

# UNCONSCIONABILITY IN THE LAW OF TRUSTS

David Horton\*

*This Article claims that trust law should recognize the unconscionability defense. It begins by noting the symmetry between trust and contract defenses and the growing consensus among courts and scholars that trusts are contracts. It sketches the leading rationales for why courts enforce promises between private actors: the theories that free exchange allows parties to maximize welfare and exercise free will. It then argues that neither concept justifies upholding a contractual term if informational defects prevent one party from observing that it sharply deviates from her ex ante desires. It asserts that the unconscionability doctrine strikes down contractual terms that suffer from precisely that defect.*

*The Article then explains how the unconscionability doctrine could serve the same purpose in trust law. It discusses why the policies underlying freedom of testation depart from those behind freedom of contract and provide less support for a laissez faire regime. It then challenges the unarticulated but intuitive notion that controls in the trust-creation process are sufficient to align an instrument's text with a settlor's intent. It reveals that corporate fiduciaries, trust mills, and a revitalized do-it-yourself movement have spawned "procedurally suspect" trusts: those created without attorney involvement and laden with complex terms. It then examines three common but controversial "substantively suspect" terms—exculpatory, no contest, and arbitration clauses—and shows how a trust-specific unconscionability doctrine would improve outcomes in cases.*

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\* Lecturer in Residence, University of California, Berkeley (Boalt Hall) School of Law; Associate Professor Designee, Loyola Law School (Los Angeles). Thanks to Pat Cain for helpful comments.

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## INTRODUCTION

Even with the recent economic downturn, Americans will bequeath hundreds of billions of dollars a year for the next half-century—the largest wealth transfer in history.<sup>1</sup> As critics continue to condemn probate as slow,<sup>2</sup> expensive,<sup>3</sup> and “quite public,”<sup>4</sup> trusts are now a staple of most estate plans. Yet after years of relative stasis, the

1 See John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Comments*, J. GIFT PLAN., Jan. 2003, at 11, 11 (estimating that even with “recessionary growth [and a] depressed stock market,” beneficiaries will inherit \$41 trillion between 1998 and 2052); John Leland, *Breaking the Silence*, N.Y. TIMES, Mar. 18, 2008, at H1 (“[T]he largest intergenerational transfer of wealth in American history [is] now under way . . .”). Ironically, by reducing philanthropy, the economic crisis may actually increase the amount of money inherited by individuals. See Deborah L. Jacobs, *As the Economy Declines, Donors Rethink Estate Plans*, N.Y. TIMES, Nov. 11, 2008, at F27.

2 For the seminal article on the decline of probate as the primary mechanism for intergenerational transfers, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). For recent criticism of the languorous probate process, see Jane Gordon, *Judges and Lawyers Debate Probate System*, N.Y. TIMES, Feb. 5, 2006, § 14, at 4 (reporting that probate judges in Connecticut were “working so little that they [were] sometimes hard to find”); David Reyes, *An Old Hassle Over This Old House*, L.A. TIMES, July 25, 2005, at B4 (describing an estate that has been mired in probate since 1925); John Waggoner, *Living Trust Can Get That Moose Head to Heirs Faster*, USA TODAY, Feb. 9, 2007, at 3B (“[A]n executor must take an inventory of the estate’s assets, settle any debts, [and] file a tax return . . .”).

3 See, e.g., Chip Jacobs, *Inherit a Home—Not a Hassle*, L.A. TIMES, Nov. 4, 2007, at K1 (noting that a \$1 million estate will cost \$44,000 to probate in California).

4 Kathy M. Kristof, *Estate Planning Can Help You Rest Easier*, L.A. TIMES, Oct. 28, 2007, at C1; see also Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 766 (2006) [hereinafter Foster, *Elusive Quest*] (arguing that reforms meant to unify probate and nonprobate transfers have in fact widened the gulf with respect to privacy); Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 575–76, 614 (2008) [hereinafter Foster, *Privacy*] (noting that “tabloid reporters, thieves, litigious family members, and spendthrifts” enjoy easy access to probate files).

law of trusts is suddenly in flux. In 2006, the United States Supreme Court opened federal courts to a broad spectrum of trust litigation.<sup>5</sup> The recently published *Restatement (Third) of Trusts* and Uniform Trust Code—ambitious projects that have reshaped doctrine more than merely summarized it<sup>6</sup>—have ushered in “a moment in time when our ideas about what a trust is, what it is for, and how to operate it are under consideration and, indeed, are changing meaningfully.”<sup>7</sup>

One defining characteristic of this reassessment has been trust law’s absorption of principles from contract law. In the last decade, scholars and courts have begun conceptualizing the trust as a “deal”: a private agreement between the settlor and the trustee to manage the corpus.<sup>8</sup> To be sure, trust law and contract law do not overlap com-

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5 For decades, federal judges puzzled over the so-called “probate exception” to federal jurisdiction. See, e.g., Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1482 (2001). Thus, in *Marshall v. Marshall*, 547 U.S. 293 (2006), the United States Supreme Court clarified that the “probate exception” only forbids federal courts from hearing issues (1) related to the probate, annulment, or administration of a will or (2) in which a state court has already assumed in rem jurisdiction. See *id.* at 311–12.

6 See John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1106 (2004) (calling the Uniform Trust Code and the third Restatement “law revision projects”).

7 Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore*, 62 ALB. L. REV. 543, 543–44 (1998); see also Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CAL. L. REV. 1877, 1881 (2000) (“In the last third of this century, and particularly in the last decade, trust law in the United States has experienced a period of rigorous, comprehensive reexamination.”).

8 See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995). Reviving the old debate about whether to classify trust as a species of contract or property doctrine, Langbein concludes that trust is a “prevalingly contractarian institution.” *Id.* at 628. Langbein contends that the shift from land to financial assets as the primary repository of inherited wealth precipitated the rise of corporate trustees as skilled portfolio administrators. See *id.* at 637–43. Accordingly, although Langbein acknowledges that a trust begins with the transfer of property, he views its essence as “the trust deal that defines the powers and responsibilities of the trustee in managing the property.” *Id.* at 627. Likewise, Robert H. Sitkoff concludes that “[t]he settlor-trustee relationship is indeed contractual, as settlors and trustees are free to dicker over the terms of the trust . . . even if in fact they do not.” Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 643–44 (2004). Even Henry Hansmann and Ugo Mattei, who assert that trust law exists to subserve creditors’ rights to beneficiaries’ rights—a “property-like aspect”—have no quarrel with the proposition that “[t]rusts are contracts.” Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 469–72 (1998) (quoting Langbein, *supra*, at 627).

Likewise, courts are increasingly referring to trusts and contracts interchangeably. See *Williams v. Interpublic Severance Pay Plan*, 523 F.3d 819, 821 (7th Cir. 2008)

pletely. For example, remedies for breach of trust differ from those for breach of contract.<sup>9</sup> Nevertheless, the analogy between trust and contract yields three important points. First, like contract law, trust law consists primarily of default rules<sup>10</sup>—rough estimates of how most parties would choose to resolve a given contingency.<sup>11</sup> Because default rules are guesses about the parties' wishes, the parties can freely modify them.<sup>12</sup> Second, as in contract law, not all trust law is

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("Trust law honors rather than overrides express contractual language specifying a trustee's powers vis-à-vis a beneficiary."); *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir. 2000) (calling an ERISA plan a "contract"); *Herdrich v. Pegram*, 170 F.3d 683, 686 (7th Cir. 1999) ("[E]ven a full-fledged trustee need not (indeed, must not) depart from the contractual provisions that the settlor established."), *rev'd*, 530 U.S. 211 (2000); *Gilbert v. Atl. Trust Co.*, No. 04-CV-327-PB, 2006 WL 1049707, at \*4 n.6 (D.N.H., Apr. 19, 2006) ("I assume for the purpose of analysis that the revocable trust agreement is in fact a contract."); *In re Vebe-liunas*, 252 B.R. 878, 887 (Bankr. S.D.N.Y. 2000) ("It follows that a trust, being a relationship, cannot have an alter ego, which would be akin to saying that someone is the 'alter ego' of a contract.").

9 For example, under the doctrine of equitable tracing, beneficiaries can assert a lien on misappropriated trust property. See Sitkoff, *supra* note 8, at 672. An aggrieved party to a contract has no such right. See *id.*

10 See, e.g., T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1604 (2007) ("Many rules of trust law are default rules . . ."); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1032 (2004) ("[T]he bulk of [inheritance doctrines] . . . comprise default rules."); Langbein, *supra* note 8, at 636 ("[V]irtually all trust law is default law . . ."); Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681, 687 (2007) (calling trust law's prudent investor rule "nominally a default rule"); Sitkoff, *supra* note 8, at 638 ("The trust's internal relationships are contractarian . . . because the law supplies default terms . . .").

11 See, e.g., Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 611 (1998) ("[D]efault rules can best approximate the parties' desires by maximizing their joint wealth or utility."). Default rules spare the parties the transaction costs of addressing every possible contingency in a contract. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 220 (5th ed. 2008) ("[Contract law] minimize[s] transaction costs of negotiating contracts by supplying efficient default terms . . ."); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 96 (7th ed. 2007) ("It may be cheaper . . . for the court to 'draft' the contractual term necessary to deal with the contingency if and when [it] materializes."). But see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89–91 (1989) (arguing that a few "penalty default rules" reflect what the parties do *not* want in order to force them to contract around the rules and thus disclose valuable information).

12 The most controversial aspect of the theory of default trust rules concerns whether fiduciary duties are waivable default rules. For instance, some scholars believe that fiduciary duties in corporate law should be modifiable because share price will indicate when a charter contains a term that invites fiduciary opportunism.

default. A select cluster of trust rules—for example, the requisites of trust formation, or the necessity that trustees owe enforceable duties—cannot be overridden. These immutable rules are too vital to the institution of trust to be displaced.<sup>13</sup> Third, trust instruments, exactly like contracts, will be economically efficient. Because a trust is a “voluntary transaction between competent adults, . . . [it] carries a presumption of Pareto optimality.”<sup>14</sup> Thus, unless fraud or coercion taints the drafting or execution of the trust, and subject to the proviso that the parties cannot displace immutable rules, courts should not regulate this aspect of private ordering.

Nevertheless, despite this shared foundation, trust and contract diverge in a notable way. Contract law recognizes the defense of unconscionability: a potent exception to the tenet that courts should permit unfettered exchange. Unconscionability, which applies most often to standard form contracts,<sup>15</sup> lets courts void clauses that are both procedurally unconscionable (nonnegotiable and buried in fine print)<sup>16</sup> and substantively unconscionable (grossly unfair).<sup>17</sup> Although the rule has a centuries-old pedigree,<sup>18</sup> it has also long been criticized. Scholars decry the amorphousness of using “fairness” as a

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*See* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 18–50 (1990). However, there is no similar market signal in trust law, and beneficiaries, unlike shareholders, cannot “exit” if they learn about trustee malfeasance. *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 82–83 (2005).

13 *See* UNIF. TRUST CODE § 105(b) (amended 2005), 7C U.L.A. 428 (Supp. 2008) (enumerating fourteen “mandatory” rules); Langbein, *supra* note 6, at 1106 (“Such terms, were they allowed, would authorize the trustee to loot the trust.”). Another ground for mandatory rules is that they forbid a settlor from making a transfer that, while ostensibly in trust, is in fact a different form of property, like a fee simple. *See id.* at 1124. In turn, strict adherence to the confines of recognized property rights saves third parties the significant cost and effort of determining “the attributes of these rights, both to avoid violating them and to acquire them from present holders.” Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000) [hereinafter Merrill & Smith, *Numerus Clausus*]; *see also* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 844 (2001) [hereinafter Merrill & Smith, *Property/Contract Interface*] (discussing trusts and information costs).

14 Sitkoff, *supra* note 8, at 644; *see also* Langbein, *supra* note 8, at 652 (contending that the trustee’s “reasonable understanding of the deal should be as relevant as the settlor’s” with respect to “aspects of the trust deal that touch the interests, duties, and responsibilities of the trustee”).

15 *See infra* Part I.B.

16 *See infra* notes 93–96 and accompanying text.

17 *See infra* notes 97–99 and accompanying text.

18 *See infra* note 41.

legal criterion<sup>19</sup> and the paternalism of overriding a party's voluntary choice to sign an agreement.<sup>20</sup> Recently, however, behavioral economics has provided a new understanding of the doctrine.<sup>21</sup> Under this view, the rule applies where informational defects in the contracting process cause terms to deviate sharply from what one party would have chosen with better information. The procedural unconscionability prong isolates terms that may suffer from informational flaws; the substantive unconscionability element employs "unfairness" as a rough proxy for detecting terms to which the party would not have agreed had she been aware of them. Clauses that depart from an informed party's ex ante preferences will neither be efficient nor foster the party's free will.<sup>22</sup> By striking down these terms, the unconscionability doctrine serves vital purposes.<sup>23</sup>

Trust law has no analogue. Although trust and contract share defenses such as fraud, duress, mistake, illegality, incapacity, impossibility, and undue influence—not to mention the same intent-seeking mode of interpretation<sup>24</sup>—unconscionability exists only in contract. In some ways, this is surprising. Trust rules evolved, in part, from probate, where judges play an active role.<sup>25</sup> One would expect to find a

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19 See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294 (1975) ("The doctrine should not, in my view, allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable."); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 559 (1967) (arguing that section 2-302 of the Uniform Commercial Code illustrates the ease with which one can "say nothing with words").

20 See Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1055 (1977) (disputing the claim that "poverty, market unresponsiveness, and incompetence" provide valid bases for findings of procedural unconscionability); Horacio Spector, *A Contractarian Approach to Unconscionability*, 81 CHI.-KENT L. REV. 95, 116 (2006) (claiming that unconscionability "encourage[s] irresponsibility . . . and greater dependency").

21 See *infra* notes 79–89 and accompanying text.

22 See *infra* Part I.C.

23 See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 78 (1993) ("For any theory of contract law based on individual autonomy and consent or Paretian concepts of welfare, the question of what constitutes voluntary consent to a transaction is of crucial importance.").

24 Compare 4 SAMUEL WILLISTON & WALTER H.E. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* § 600, at 284–85 (3d ed. 1961) (asserting that in contract law, the intent of the parties is the "polestar or lodestar of interpretation"), with *Day v. Rasmussen*, 629 S.E.2d 912, 915 (N.C. Ct. App. 2006) ("The polestar of trust interpretation is the settlors' intent." (quoting *L'Argent v. Barnett Bank*, 730 So. 2d 395, 397 (Fla. Dist. Ct. App. 1999))).

25 See, e.g., Langbein, *supra* note 2, at 1117 (noting that court supervision in probate serves the purposes of clearing title, paying off creditors, and effectuating the decedent's intent).

doctrine that empowers courts to evaluate a term's "unfairness" within the same body of law that allows courts to adjust a trustee's compensation if it "is unreasonably low or high."<sup>26</sup> Unconscionability, which restricts transferor autonomy, would also seem more at home within the narrow confines of trust than the free-for-all that is contract. Trust law, unlike contract law, limits dead hand control through the rule against perpetuities.<sup>27</sup> Trusts, unlike contracts, cannot be "capricious"; thus, a settlor cannot require the trustee to annihilate valuable property or construct a wistful statue<sup>28</sup>—objectives that the settlor could accomplish through contract law during life.<sup>29</sup> But even though trust law defers less often to transferors' wishes, it is agnostic about procedural and substantive "fairness."

On the other hand, we do not think of trusts as being susceptible to procedural or substantive defects. An attorney meets the settlor, memorializes her wishes, and revises the instrument if necessary. These circumstances—a far cry from take-it-or-leave-it standard form contracting—seem to foreclose settlor complaints about the execution process or the instrument's language. As the Illinois Supreme Court noted while rejecting an elderly widow's claim that her trust's irrevocability clause should be invalid because her attorney never discussed it with her, "[i]f such a contention had merit very few modern legal instruments could withstand attacks."<sup>30</sup> Likewise, because beneficiaries receive the windfall of an inheritance, they also seem to lack the right to object to procedural or substantive unfairness in the accompanying trust instrument. Perhaps for these reasons, no judge or scholar of whom I am aware has ever suggested that trust law embrace the unconscionability doctrine.

In this Article, however, I make exactly that claim. More and more, trusts are being created by unrepresented settlors who seldom grasp the instrument's nuances. This sea change is a product of three factors. First, institutional trustees dominate the market for medium and larger estates. These corporations sometimes condition their willingness to act as a fiduciary on the settlor acquiescing to their stan-

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26 See UNIF. TRUST CODE § 105(b)(7) (amended 2005), 7C U.L.A. 428 (Supp. 2008) (prohibiting the parties from contracting around this rule).

27 See, e.g., Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 4 (1992) (arguing that lawmakers "should consider not only for how long but *also in what ways* a testator proposes to control property after her death").

28 Langbein, *supra* note 6, at 1108. This follows from the rule that "a trust and its terms [must] be for the benefit of its beneficiaries." UNIF. TRUST CODE § 105(b)(3).

29 See *infra* notes 131–43 and accompanying text.

30 *Pernod v. Am. Nat'l Bank & Trust Co. of Chi.*, 132 N.E.2d 540, 543 (Ill. 1956).

dard trust instrument<sup>31</sup>—a practice that is indistinguishable from adhesive contracting. Second, on the other side of the spectrum, millions of blue-collar and middle-class Americans have turned to “trust mills”: companies run by nonlawyers who create low quality boilerplate instruments.<sup>32</sup> Third, next-generation do-it-yourself books and software have fueled a recent “boom in homegrown estate planning.”<sup>33</sup> Accordingly, a more diverse cross-section of society is using trusts, “including esoteric trusts,”<sup>34</sup> but “increasingly without aid of legal counsel.”<sup>35</sup>

The contents of trusts are changing, too. The cost of working with an institutional fiduciary is often a broad exculpatory clause<sup>36</sup> or authorization for the trustee to use the trust’s corpus to defend itself in litigation.<sup>37</sup> As the New York Surrogate’s Court recently put it, the result has been instruments that give corporate trustees “almost unlimited powers with a minimum of obligations.”<sup>38</sup> Similarly, mill trusts resemble standard form contracts more than testamentary instruments. To try to seem as sophisticated as lawyer-drafted documents, mill trusts can be up to one hundred pages long and include sweeping no-contest clauses and arbitration clauses.<sup>39</sup> Settlor almost certainly have no inkling that these provisions exist—let alone that they seriously erode beneficiaries’ rights. Thus, informational defects

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31 See Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713, 2715 (2006) (describing settlors who “work with an investment advisor that sets up the trust (with a document drafted by its legal department), explains the document, and then acts as trustee”). For cases involving claimed abuses by institutional trustees that also drafted the instrument, see *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust*, 855 N.E.2d 592, 595 (Ind. Ct. App. 2006); *McGinley v. Bank of America*, 109 P.3d 1146, 1156 (Kan. 2005); *Rutanen v. Ballard*, 678 N.E.2d 133, 140–41 (Mass. 1997); *Petty v. Privette*, 818 S.W.2d 743, 748 (Tenn. Ct. App. 1989).

32 See Paul Premack, *‘Trust Mill’ Representatives Not Licensed to Provide Legal Advice*, SAN ANTONIO EXPRESS-NEWS, Dec. 27, 2005, at 9C.

33 Christine Larson, *A Need for a Will? Often, There’s an Online Way*, N.Y. TIMES, Oct. 14, 2007, at BU3.

34 Dobris, *supra* note 7, at 563.

35 Halbach, *supra* note 7, at 1883.

36 See *infra* notes 241–47 and accompanying text.

37 See, e.g., Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241, 242 (2002) (describing a bank that was able to use trust funds to oppose an elderly widow’s petition to remove it as trustee).

38 *In re Estate of Stralem*, 695 N.Y.S.2d 274, 278 (Sur. Ct. 1999) (calling this tendency “a serious potential menace not only to the rights of a surviving spouse but of the children and other dependents of the testator and of all persons interested in estates”).

39 See *infra* notes 203–06 and accompanying text.



believe the proposition that all trusts are necessarily optimal and intent effectuating.

A trust-specific unconscionability doctrine could ameliorate these flaws. In the trust context, the driving force behind the procedural unconscionability element would be to isolate clauses that the settlor was unlikely to comprehend. Courts could examine whether the settlor was represented by counsel and the relative complexity of the clause at issue. As with standard form contracts, the substantive unconscionability prong would hinge on the harshness of a term. Because the purpose of a trust instrument is to benefit the beneficiaries, unfair terms are unlikely to reflect a fully informed settlor's preferences. In addition, unfair terms may create negative externalities: beneficiaries would probably be willing to pay the settlor an amount to eliminate the term that exceeds its value to the settlor.<sup>40</sup> The unconscionability doctrine would provide courts with the means to police trusts for language that exhibits these shortcomings.

Part I describes the underpinnings of the unconscionability doctrine in contract law. It begins by sketching the normative core of freedom of contract: the efficiency and autonomy theories. It shows that neither paradigm justifies enforcing a clause in an agreement if one party lacks at least a general sense of what the clause accomplishes. Part I then contends that the unconscionability doctrine invalidates terms that suffer from precisely that defect.

Part II claims that the unconscionability doctrine could serve the same purpose in trust law. It discusses why the policies behind freedom of testation depart from those behind freedom of contract and provide less support for a *laissez faire* regime. Part II then questions the unarticulated but intuitive notion that controls in the trust-creation process are sufficient to align an instrument's text with a settlor's intent. It reveals that corporate fiduciaries, trust mills, and the self-help movement have spawned what I deem the "procedurally suspect" trust: one created without attorney involvement and laden with complex terms. Part II then defines substantive unconscionability in the trust context.

Part III examines three common but controversial terms—those that enlarge the trustee's powers, condition gifts on beneficiaries not contesting the trust, and require arbitration—and shows how the unconscionability doctrine would improve outcomes in cases.

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40 See Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 70 (1999) ("Because no one can bargain with a decedent to revise a socially harmful estate plan, it would remain in effect even where the cost to others (and the sums they would be willing to pay to avoid it) exceeded its value to her . . .").

## I. UNCONSCIONABILITY IN CONTRACT LAW

Debates over the limits of freedom of contract began centuries ago,<sup>41</sup> and unconscionability remains among the most divisive issues in private law. This Part uses insights from behavioral economics to offer qualified support for the modern unconscionability defense. It first explains how the dominant rationales for freedom of contract—the efficiency and autonomy theories—cannot justify enforcing terms that do not reflect buyers’ *ex ante* preferences. It then argues that the unconscionability defense is best understood as a means of identifying and striking those terms. By elucidating that unconscionability serves important values, I hope to lay the groundwork for my normative claim that it could do the same in trust doctrine.

### A. *Rationales for Freedom of Contract*

Scholars often justify the government’s practice of enforcing promises between private actors on either utilitarian or liberal-individualistic grounds.<sup>42</sup> The most famous utilitarian theory, law and economics, contends that contract doctrine binds parties to facilitate “mutually beneficial economic exchange.”<sup>43</sup> As is well known, the

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41 For example, the Roman principle of *laesio enormis* allowed the seller of land to rescind the agreement if she received less than half of its “true value.” REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS* 259–62 (1990). See also Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 *HASTINGS L.J.* 459, 467 (1995) (noting that *laesio enormis*, with its exclusive focus on unfair price, was much more restrained than the contemporary unconscionability doctrine). Similarly, the English Chancery courts denounced “unconscientious bargains.” See Earl of Chesterfield v. Janssen, (1750) 28 Eng. Rep. 82, 100 (Ch.); see also ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 129 (1997) (“The American unconscionability standard can be traced to the Chancery court of England.”). Colonial American courts also routinely voided deals for inadequate consideration. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 164 (1977). For as long, however, these practices have been controversial. As Lord Bramwell put it, the sheer fact that two people entered into a contract “is the strongest possible proof that it is a reasonable agreement.” *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown*, [1883] App. Cas. 703, 718 (H.L.).

42 See STEPHEN A. SMITH, *CONTRACT THEORY* 46 (2004) (“Most contract theories can be placed into one of two broad categories . . . : utilitarian theories or rights-based theories.”); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 *MICH. L. REV.* 1815, 1823–24 (1991) (discussing autonomy, reciprocity, and instrumentalism as grounds on which “lawyers generally understand contracts to be enforceable”).

43 LARRY A. DiMATTEO ET AL., *VISIONS OF CONTRACT THEORY* 16 (2007); see also COOTER & ULEN, *supra* note 11, at 243 (“By enforcing promises, contract law enables people to make credible commitments to cooperate with each other. . . . [And] contract law creates incentives for efficient cooperation.”).

lynchpin of economic analysis of law is rational choice theory: the assumption that individuals seek to maximize their self-interest.<sup>44</sup> Since rational choice theory suggests that individuals will agree to deals that make them better off and refuse those that make them worse off, it establishes a compelling case for upholding contracts as written. Doing so will increase the welfare of both contracting parties and thus all of society.<sup>45</sup>

Liberal-individualistic theories revolve around the value of autonomy. They view contract law as a vehicle by which individuals acquire and transfer rights and entitlements and thus experience freedom and self-determination.<sup>46</sup> Because contract law holds people to their word, it “makes available options that would otherwise be unavailable.”<sup>47</sup> But the role of the state stops there.<sup>48</sup> Not only are the parties the best judges of what they stand to gain or lose from a transaction,

44 See COOTER & ULEN, *supra* note 11, at 16 (“[C]onsumers maximize utility (i.e., happiness or satisfaction), firms maximize profits, politicians maximize votes, bureaucracies maximize revenues, charities maximize social welfare . . . .”); POSNER, *supra* note 11, at 3 (“The task of economics . . . is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self interest.’” (footnote omitted)); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060–66 (2000) (cataloguing four subtly different definitions of rational choice theory).

45 See DiMATTEO ET AL., *supra* note 43, at 18 (“[E]conomics argues that freedom of contract should almost always be honored because private bargaining by rational people should, in light of the Coase Theorem, maximize wealth.”); SMITH, *supra* note 42, at 110 (“Arguably the most fundamental idea underlying efficiency theories of contract law is that if two persons make a voluntary exchange the exchange will make each better off, and is therefore efficient.”).

46 See CHARLES FRIED, *CONTRACT AS PROMISE* 13 (1981) (“In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself.”); Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* 206, 223 (Peter Benson ed., 2001) (“Autonomy theories of contract are based on the concept that allowing an individual to freely own and dispose of property and freely exercise his will to make choices concerning his person, labor, and property, is a value that is paramount . . . .”).

47 SMITH, *supra* note 42, at 140; see also Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 514 (1989) (“If promises were not binding, it is argued, individual freedom would be unjustifiably restricted, as individuals would be deprived of the freedom to place themselves under a moral obligation respecting their future conduct.”).

48 See Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1769 (1997) (“Society should respect the autonomy of every individual and refrain from dictating any conception of ‘the good life.’”).

but second-guessing their decisions would be inimical to free will—the very attribute that the edifice of contract exists to serve.<sup>49</sup>

Of course, both efficiency- and autonomy-based theories recognize that the government should not blindly uphold all ostensibly valid agreements. For example, if a corporation threatens to file a bogus lawsuit against a struggling homeowner unless she deeds her house for less than market price, a judge will nullify the conveyance on the grounds of duress.<sup>50</sup> By leaving the homeowner no reasonable alternative, the corporation has artificially constricted her range of rational and free choices.<sup>51</sup> Likewise, if the homeowner signs a document justifiably believing a firm's representation that it is a loan to avoid foreclosure—when in fact it is a deed to the property—fraud will vitiate the transfer.<sup>52</sup> Enforcing the contract will neither maximize the homeowner's welfare (she based her cost-benefit analysis on phantom terms) nor foster her free will (she meant to do something else).

Courts will also annul some contracts that are perfectly consistent with efficiency and autonomy principles. The homeowner could not sell her child<sup>53</sup> or take a second mortgage with an exorbitant interest rate<sup>54</sup>—no matter how informed and deliberate her reasoning. The defenses of illegality and violation of public policy forbid certain forms of commodification<sup>55</sup> or transactions that have socially deleteri-

49 See SMITH, *supra* note 42, at 113 (“[T]he basic rule that contract law should give effect to the intentions of the parties is explained on the basis of the assumption that contracting parties typically know best what is in their own interests.”).

50 See RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (1981).

51 See COOTER & ULEN, *supra* note 11, at 282–83 (noting that improper threats merely redistribute from one party to another, while bargained-for exchanges create a surplus); TREBILCOCK, *supra* note 23, at 79 (“Threats reduce the possibilities open to the recipient of the proposal, whereas offers expand them.”).

52 See *Eicher v. Mid Am. Fin. Inv. Corp.*, 702 N.W.2d 792, 800, 804 (Neb. 2005).

53 “Although only about half the states have laws specifically aimed at the black market in babies for adoption, a free market in babies would run afoul of restrictions on adoptions in every state.” Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 62 n.7 (1987) (citation omitted).

54 See, e.g., Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1111 (2008) (“Throughout the history of the American Republic, all but a small minority of states have capped interest rates on loans to consumers with usury law.”).

55 See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1925 (1987) (“If we permit babies to be sold, we commodify not only the mother’s (and father’s) baby-making capacities—which might be analogous to commodifying sexuality—but we also conceive of the baby itself in market rhetoric.”); see also TREBILCOCK, *supra* note 23, at 29–57 (analyzing the alienability of babies, sexual services, and body parts from an instrumentalist perspective).

ous effects.<sup>56</sup> These rules safeguard values that lawmakers deem to trump the gains from free exchange.

Thus, contract defenses fall into two categories.<sup>57</sup> Some, like fraud and duress, arise from defects in the contracting process.<sup>58</sup> Others, like illegality and violation of public policy, stem from problems with the agreement's substance.<sup>59</sup> This taxonomic rigidity prevents them from being useful in the context of the most common species of contract: the standard form.

### B. *Standard Form Contracts*

Virtually all modern contracts are standard forms.<sup>60</sup> These “contracts of adhesion”<sup>61</sup> pose special problems for the efficiency and autonomy theories. They have the rudiments of contract formation: consideration and a signature (or a click of the mouse) that objectively displays a buyer's intent to be bound. But in an echo of the duress example above, sellers offer standard forms on a take-it-or-leave-it basis, restricting the range of consumers' meaningful choices.

56 See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 286–87 (1995) (defending usury statutes on the ground that they counteract the fact that the safety-net function of the welfare regime encourages high-risk borrowing).

57 See Leff, *supra* note 19, at 487.

58 See *id.*

59 See *id.*

60 See, e.g., A. CORBIN, CORBIN ON CONTRACTS § 559A (Supp. 1989) (“[T]he bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts . . . .”); David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. (forthcoming 2009) (manuscript at 3), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_is=1154243](http://papers.ssrn.com/sol3/papers.cfm?abstract_is=1154243) (“Standard forms have all but subsumed the practice of contracting.”); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (“[N]early all commercial and consumer sales contracts are form driven.”); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (“[S]tandard form contracts probably account for more than ninety-nine percent of all contracts now made.”).

61 This phrase, coined by French jurist Raymond Saleilles, was appropriated by Edwin Patterson. See Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964) (describing a contract “in which a single will is exclusively predominant, acting as a unilateral will which dictates its law, no longer to an individual, but to an indeterminate collectivity” (quoting and translating RAYMOND SALEILLES, DE LA DÉCLARATION DE VOLONTÉ § 89, at 229–30 (1901))). However, it did not enter the lexicon until the 1940s, when Friedrich Kessler published *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

Likewise, just as bad information undermines efficiency and autonomy values in the fraud context, most buyers sign standard forms without reading them.<sup>62</sup> Although some courts impose a duty to the contrary,<sup>63</sup> it is not clear whether a rational buyer would spend the time and energy required to decode boilerplate language in a non-negotiable agreement.<sup>64</sup> Finally, it is widely believed that the contents of standard forms are objectionable: capitalizing on buyers' rational ignorance, sellers lace the fine print with one-sided terms.<sup>65</sup> Thus, at first blush, it is hard to square standard forms with contract law's animating policies.

To this predicament, economic analysis supplies two valuable insights. The first is that competitive markets discipline sellers to draft terms that reflect consumers' preferences.<sup>66</sup> Every clause in an agreement represents a trade-off between risk and price. To cater to the elite cadre of consumers who shop for favorable terms, a seller cannot increase the amount of risk a clause allocates to the consumer without concomitantly reducing the price of the agreement.<sup>67</sup> If a seller offers

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62 See Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 237 (2007) ("The fact that consumers do not read standard form contracts is so well accepted and documented as to be virtually enshrined as dogma . . .").

63 Compare *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 363, 367 (S.D.N.Y. 1975) (upholding a forum selection clause even though it was written in German, a language that plaintiff did not understand), with *Drelles v. Mfrs. Life Ins. Co.*, 881 A.2d 822, 836 (Pa. Super. Ct. 2005) ("[A] non-commercial insured is under no duty to read the policy as issued and sent by the insurance company.").

64 See Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1513, 1525–28 (2007) ("[I]t is irrational to read standard forms like those used in common consumer transactions . . ."); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) ("[A] rational form taker will typically decide to remain ignorant of the preprinted terms.").

65 See Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 605 (1990) ("Intuitively, any profit-maximizing business would prefer to shift a risk to the other party if it could do so at no additional cost."); Slawson, *supra* note 60, at 531 (calling "all standard forms unfair").

66 This subpart relies heavily on Korobkin, *supra* note 60, at 1208–16, and Russell Korobkin, A "Traditional" and "Behaviorial" Law-and-Economics Analysis of *Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 448–58 (2004).

67 See George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1347 (1981) (contending that because firms compete over marginal buyers, "a small group of consumers" may force firms to draft terms "responsive to the group's preferences"); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979) ("The presence of at least some consumer search in a market creates the possibility of a 'pecuniary externality': persons who search sometimes protect nonsearchers from overreaching firms.").

a self-serving term but fails to compensate by lowering prices, it will lose customers to firms that either lower prices or do not use the term.<sup>68</sup> Likewise, if a seller eliminates a favorable clause, it cannot continue to earn the same revenue unless it charges more. Because risk and price are thus inversely correlated—one rises as the other falls—terms that seem unfair to buyers may actually represent their desired mix of risk and price and thus be efficient. In fact, unless contract language is novel or idiosyncratic, its very existence is strong evidence that buyers prefer it to some other combination of attributes.<sup>69</sup> Indeed, if a superior clause existed, a competitor would adopt it and siphon off business.

For example, consider the notorious “cross-collateralization” clause in *Williams v. Walker-Thomas Furniture Co.*<sup>70</sup> that allowed Walker-Thomas to repossess all the furniture it had sold to Williams if she missed one installment payment. In its landmark decision, the D.C. Circuit opined that it would void the clause if it were “unfair.”<sup>71</sup> At first, the clause seems to meet this criterion: it imposes a major forfeiture for a mere slip. Yet if Walker-Thomas cannot hedge against default, consumers like Williams may be priced out of the rent-to-own market. The clause helps Walker-Thomas charge less both by giving it a way to recover losses and by creating a formidable incentive for consumers to pay on time.<sup>72</sup> Buyers must prefer to pay less for furniture and accept the unforgiving clause; if they did not, another store would

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68 See POSNER, *supra* note 11, at 116 (“[I]f one seller offers unattractive terms, won’t a competing seller, wanting sales for himself, offer more attractive terms . . . ?”); Korobkin, *supra* note 60, at 1209–10 (“If one seller (‘Firm’) were to provide a low-quality [term] but not reduce its price, no buyers would choose to purchase from Firm.”); Meyerson, *supra* note 65, at 590–93 (noting that a firm can poach customers from its rival by charging the same amount for a product accompanied by a contract that omits a pro-seller clause).

69 See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 439 (2002) (“Uniformity of terms within an industry, in fact, might indicate that the industry is highly competitive.”); Korobkin, *supra* note 66, at 449 (“The fact that [a firm] continues to use a . . . clause is evidence that customers prefer the combination of term (bad) and price (low) relative to other economically possible combinations of term and price.”).

70 350 F.2d 445 (D.C. Cir. 1965).

71 See *id.* at 447.

72 See, e.g., POSNER, *supra* note 11, at 117 (explaining that, without these savings, a business (like Walker-Thomas) will charge higher down payments, higher installment payments, or raise overall prices); Douglas G. Baird, *The Boilerplate Puzzle*, in *BOILER-PLATE* 131, 138 (Omri Ben-Shahar ed., 2007) (noting that Williams’ “willingness to give up the furniture in the event of default sends a powerful signal that default is unlikely”).

have dropped the term, charged more, and put Walker-Thomas out of business.<sup>73</sup>

The second economic principle that sheds light on why standard form contracts are less troubling than they first seem is that sellers will draft terms that internalize buyers' interests even in the absence of vigorous competition. A monopolist will exploit its advantage by charging supra-competitive prices. But it can attract more buyers and still profit on each component aspect of the deal by offering terms that buyers value at more than the cost of production.<sup>74</sup> For instance, if Walker-Thomas offers a warranty that costs twenty-five dollars to service but that consumers value at thirty dollars, it will sell the warranty for twenty-nine dollars. Walker-Thomas will continue to do so even if it becomes the only furniture store in existence. The warranty increases the utility both of Walker-Thomas (by four dollars) and buyers (by one dollar). Eliminating the term will only deprive Walker-Thomas of four dollars in profit and drive away marginal consumers who would have made the purchase for an extra one dollar of utility.<sup>75</sup> Thus, even a monopolist should offer efficient terms.

Together these two points have powerful policy implications. From an efficiency perspective, the fact that sellers in all circumstances will offer terms that increase buyers' welfare elucidates why standard form contracts are valid. More than that, it mandates that (in the absence of a traditional defense) courts uphold a standard form as written, no matter how "unfair" it seems. If a court invalidates a term, it makes both sellers and buyers worse off. For example, if Walker-Thomas must excise the cross-collateralization term, it will

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73 See Korobkin, *supra* note 66, at 448–49.

74 See DiMATTEO ET AL., *supra* note 43, at 28 (“[M]onopolists can maximize profits in most cases by offering efficient terms and charging monopolistic prices rather than by offering inefficient anti-buyer terms and correspondingly lower prices.”); R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 638 (1996) (“[A] rational monopolist would simply extract monopoly profits directly through price.”); Korobkin, *supra* note 60, at 1212 (“By first providing efficient terms and then raising price above its competitive-market level, sellers can maximize total profits.” (emphasis omitted)); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 843 (2003) (“Even if the seller or creditor has market power, it has the right incentive to supply the terms that parties desire.”); Priest, *supra* note 67, at 1321 (“[M]onopoly profits are maximized by selling a product identical in all respects (except price) to the product offered under competition.”); Schwartz, *supra* note 20, at 1072 (noting that a monopolist would be irrational not to provide terms for which consumers are willing to pay a premium).

75 See Korobkin, *supra* note 60, at 1211–12 (“Even when the seller is a monopolist, buyers have the option of not purchasing the goods or services in question.”).



raise prices. Marginal buyers will no longer buy furniture and enjoy greater utility. Even consumers who still make the purchase will be denied their ideal mix of risk and price and thus capture less of the contractual surplus.<sup>76</sup>

The implications for the autonomy theory are more complex. Because consent must be informed to be valid, the fact that consumers generally ignore standard form terms would seem to make them unenforceable. Yet scholars in the autonomy camp conceptualize assent to a standard form as two-tiered: an assent to “the broad type . . . of transaction” and a “blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form.”<sup>77</sup> As a result, if sellers peppered the boilerplate with exploitative terms, the autonomy theory would uphold only the contractual shell—basic aspects of the deal like the product itself and its price—but not the internal fine print. However, as mentioned, economic analysis dictates that the boilerplate will, in fact, reflect most consumers’ preferences. Because these clauses will not be “unreasonable or indecent,” they should be enforceable. To be sure, buyers cannot customize the transaction (as they would under a regime where free will flourished), and it is not entirely consistent with the precepts of autonomy to bind them to promises they did not voluntarily make. Nevertheless, if this lack of knowing assent vitiated the fine print, courts would have to fill the resulting contractual gaps with default rules: implied-in-law terms to which neither party has knowingly assented.<sup>78</sup> Thus, the conclusion that standard forms will reflect majoritarian tastes is no small thing. In sum, any attempt to set aside a form clause must explain why sellers lack incentives to draft the clause to mirror consumers’ predilections.

Recently, behavioral economics has done exactly that. The centerpiece of the tidy account of efficient form terms is the notion that consumers detect unfavorable clauses and demand price reductions by defecting to other sellers. Nested within this hypothesis are heroic assumptions about human cognition. To discipline sellers, buyers would have to use nonselective and compensatory decisionmaking

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76 See Korobkin, *supra* note 66, at 450.

77 KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 370 (1960).

78 For an attempt to rectify the notion of autonomous consent with default rules, see Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 827 (1992) (“[E]nforcement may still be justified on the grounds of consent when default rules are chosen to reflect the commonsense or conventional understanding of most parties.”). *But see* Craswell, *supra* note 47, at 515 (arguing that autonomy theories, with their focus on individual freedom, cannot dictate the content of implied legal rules).

strategies, both “compar[ing] all attributes of each available product” and “trad[ing] off the desirable attributes of one product against the desirable attributes of a competing product.”<sup>79</sup> Studies have shown this model to be unrealistic. Consumer choice is driven not by a painstaking cost-benefit evaluation, but instead by heuristics: “mental shortcuts and rules of thumb.”<sup>80</sup> For example, as Nobel Laureate Herbert Simon theorized fifteen years ago, consumers rarely even attempt to acquire and process the full panoply of information that would be required for optimal decisionmaking.<sup>81</sup> To the contrary, they engage in “satisficing” and base purchasing choices on the presence, nature, or quality of specific attributes.<sup>82</sup> Under the simplest such decision-making mechanism, known as the “lexicographic” model, consumers select the product that scores highest on the single most important product characteristic.<sup>83</sup> For instance, a consumer might choose a television entirely because of its superlative picture. Amos Tversky describes a related approach as “elimination by aspects”:

In contemplating the purchase of a new car, for example, the first aspect selected may be automatic transmission: this will eliminate all cars that do not have this feature. Given the remaining alternatives, another aspect, say a \$3000 price limit, is selected and all cars whose price exceeds this limit are excluded. The process continues until all cars but one are eliminated.<sup>84</sup>

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79 Korobkin, *supra* note 60, at 1220.

80 Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 13, 14 (Cass R. Sunstein ed., 2000).

81 See JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 162 (2d ed. 1993) (“Most human decision-making . . . is concerned with the discovery and selection of satisfactory alternatives; only in exceptional cases is it concerned with the discovery and selection of optimal alternatives.”); 3 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY* 287 (1997) (“In real-world situations, it is seldom realistic to talk about examining all alternatives or paying attention to all the potentially relevant information.”); see also DiMATTEO ET AL., *supra* note 43, at 29 (“People generally cannot and will not in any complex contract fully consider all potentially relevant contractual provisions.”); Hillman & Rachlinski, *supra* note 69, at 451 (“[P]eople rarely invest in a complete search for information, nor do they fully process the information they receive.”).

82 See 3 SIMON, *supra* note 81, at 296 (“Psychology proposes the mechanism of aspiration levels: if it turns out to be very easy to find alternatives that meet the criteria, the standards are gradually raised; if search continues for a long while without finding satisfactory alternatives, the standards are gradually lowered.”).

83 See JOHN W. PAYNE ET AL., *THE ADAPTIVE DECISION MAKER* 26 (1993) (“The lexicographic procedure determines the most important attribute and then examines the values of all alternatives on that attribute. The alternative with the best value on the most important attribute is selected.”).

84 Amos Tversky, *Elimination by Aspects: A Theory of Choice*, 79 *PSYCHOL. REV.* 281, 285 (1972).

Finally, buyers subscribe to the “conjunctive” heuristic and select the product that “exceeds a minimum acceptable level on all attributes, without regard to whether it exceeds those thresholds by a small or large amount.”<sup>85</sup>

Because consumers thus fixate on certain “salient” aspects of the deal and ignore all others, they cannot compel sellers to draft efficient boilerplate language.<sup>86</sup> Sellers have no incentive to perfect the mix of risk and price in a contract term if consumers do not factor it into their purchasing choices.<sup>87</sup> In fact, the market pushes sellers in the opposite direction. Obscure provisions such as venue and arbitration clauses are likely to be nonsalient.<sup>88</sup> Sellers can therefore make these clauses one-sided and pass less than an optimal amount of these savings to buyers.<sup>89</sup> These terms will be inefficient.

Nonsalient clauses fare no better under the autonomy theory. Recall that aside from the transaction’s core elements, consumers only offer “blanket assent” to “not unreasonable” clauses.<sup>90</sup> To lower prices by manipulating nonsalient terms, sellers must shift responsibility for substantial risks to consumers. These terms will thus likely seem unfair. Because buyers have offered neither knowing nor “blanket” assent to them, they should be unenforceable.<sup>91</sup>

Thus, we arrive where we began. Standard forms may be ubiquitous, but neither the efficiency nor the autonomy paradigms can explain why courts uphold contractual language that consumers likely

85 Korobkin, *supra* note 60, at 1224. Two related models are the “majority of confirming dimensions” heuristic (under which consumers pick the product that “wins” the most attribute comparisons) and the “frequency of good and bad features” heuristic (under which consumers evaluate products by counting the features that they deem “good” or “bad”). See PAYNE ET AL., *supra* note 83, at 27–28.

86 See Korobkin, *supra* note 60, at 1234–39.

87 See *id.*

88 See *id.* at 1243.

89 *Id.* at 1234.

90 See *supra* note 77 and accompanying text.

91 See Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 638 (2002) (arguing that form terms should be enforceable so long as they “do not exceed some bound of reasonableness”); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1271 (1993) (“[M]erchants and sellers who know that consumers do not read these terms have no objective basis for claiming that the consumers agreed to those terms.”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1251 (1983) (arguing that courts should only enforce “visible” form terms); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 23, 30–31 (1984) (urging courts to give effect to “the parties’ reasonable expectations from whatever sources they may derive”).

do not read or comprehend. At the same time, however, standard forms do not fall within the ambit of any wholly procedural or wholly substantive defense. To justify their enforcement, contract law needs a rule that strips them of dubious terms. This is where the unconscionability doctrine comes in.

### C. *The Unconscionability Doctrine*

The unconscionability doctrine can be understood as a way for courts to refuse to enforce clauses that would harm efficiency and autonomy interests. The doctrine has two elements: one procedural and the other substantive.<sup>92</sup>

Procedural unconscionability looks to the circumstances surrounding contract formation. Its definition varies among jurisdictions from the bare fact that a seller offered a standard form on a take-it-or-leave-it basis,<sup>93</sup> to unequal bargaining power plus an inability to obtain the goods or services elsewhere,<sup>94</sup> to a holistic evaluation of the par-

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92 See Leff, *supra* note 19, at 487 (noting the procedural/substantive dichotomy); see also U.C.C. § 2-302 (2007) (dealing with unconscionable contracts or terms); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (same). A similar strand of the rule had merely prohibited specific performance of unfair terms. See, e.g., *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948) (“[A] party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms.”).

93 See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (considering an employment agreement); *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 310 (Mo. Ct. App. 2005) (finding an arbitration provision procedurally unconscionable that was sent “in the mail on a take it or leave it basis”); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 96 (N.J. 2006) (“[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis . . . .” (quoting *Rudbart v. N. Jersey Dist. Water Supply Comm’n*, 605 A.2d 681, 685 (N.J. 1992))); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 925 (N.D. 2005) (reasoning that if “the only option presented to the other party is to take it or leave it, some quantum of procedural unconscionability is established”).

94 See, e.g., *VoiceStream Wireless Corp. v. U.S. Commc’ns, Inc.*, 912 So. 2d 34, 40 (Fla. Dist. Ct. App. 2005) (explaining that if “the purchaser of services was free to obtain such services elsewhere [she] . . . was not forced to sign the contract”); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (indicating that contract may not have been procedurally unconscionable because “there was no evidence that Plaintiff could not avoid doing business under the particular terms mandated by Defendant”); *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 23 (Ohio 2008) (affirming trial court’s decision that a contract to build a house was not procedurally unconscionable because “[t]here are a multitude of homebuilders in the local area” (quoting *Taylor Bldg. Corp. of Am. v. Benfield*, No. 2003 CVE 01565, 2005 WL 5468600, at \*11 (Ohio Ct. Com. Pl. Aug. 16, 2005))). A split of authority exists on whether the nature of the product or service affects the analysis. Compare *Pokrass v. DirecTV Group, Inc.*, No. EDCV 07-423-VAP, 2008 WL 2897084, at \*7 (C.D. Cal. July

ties' standing in life<sup>95</sup> and the disputed clause's font size.<sup>96</sup> Substantive unconscionability focuses on what the clause at issue accomplishes. It applies to grossly unfair clauses: those that are "so one-sided as to shock the conscience,"<sup>97</sup> or "'monstrously harsh, and exceedingly calloused,'"<sup>98</sup> or "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."<sup>99</sup> Most states insist on at least a minimum amount of evidence on both prongs.<sup>100</sup> Others employ a

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14, 2008) (holding that a contract for satellite television service was not procedurally unconscionable because "contracts for nonessential recreational activities cannot be procedurally unconscionable"), *with* *Stiener v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016, 1018, 1025 (N.D. Cal. 2008) (holding that the contract for service for an iPhone was procedurally unconscionable).

95 *See* *Darby Anesthesia Assocs., Inc. v. Anesthesia Bus. Consultants, LLC*, No. 06-1565, 2008 WL 2845587, at \*4 (E.D. Pa. July 23, 2008) ("Factors for determining procedural unconscionability include: the parties' 'business acumen and experience . . .'" (quoting *Citizens Ins. Co. of Am. v. Proctor & Schwartz, Inc.*, 802 F. Supp. 133, 143 (W.D. Mich. 1992))); *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1285 (N.D. Ga. 2008) (considering the "'age, education, intelligence, business acumen and experience of the parties'" (quoting *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 772 (Ga. 1996))); *Swayne v. Beebles Invs., Inc.*, 891 N.E.2d 1216, 1223 (Ohio Ct. App. 2008) (holding that a loan agreement was procedurally unconscionable because defendants "were in the business of brokering mortgages" and plaintiff was "a recent widow whose husband had managed the couple's finances").

96 *Compare* *E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 716-17 (Miss. 2002) (holding that an arbitration provision was procedurally unconscionable when it was "less than one-third the size of many other terms in the document [and] appear[ed] in very fine print and regular type font"), *with* *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1176 (W.D. Wash. 2002) (rejecting a claim of procedural unconscionability because the contract's "typeface, although smaller than that used in this Order, appears to be approximately the size used in most newspapers"), *and* *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001) (rejecting a claim of procedural unconscionability because the contract used "font that could be accurately characterized as small, if not 'tiny'" but "is legible, and consistent throughout the document").

97 *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1075 (9th Cir. 2007) (quoting *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1043 (9th Cir. 2001)) (emphasis omitted) (applying California law).

98 *Adler v. Fred Lind Manor*, 103 P.3d 773, 781 (Wash. 2004) (quoting *Nelson v. McGoldrick*, 896 P.2d 1258, 1262 (Wash. 1995) (en banc)).

99 *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, (1750) 28 Eng. Rep. 82, 100 (Ch.)); *see also* *Hall v. Fruehauf Corp.*, 346 S.E.2d 582, 583 (Ga. Ct. App. 1986) (categorizing as unconscionable "such an agreement as no sane man not acting under a delusion would make and that no honest man would take advantage of" (quoting *R.L. Kinsey Cotton Co. v. Ferguson*, 214 S.E.2d 360, 363 (Ga. 1975))).

100 *See, e.g.*, *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666-77 (6th Cir. 2003) (applying Ohio law); *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So. 2d 1077, 1087 (Ala. 2005); *Bland ex rel. Coker v. Health Care & Ret. Corp. of Am.*, 927 So. 2d

sliding scale and let a strong showing on the substantive prong make up for a weak showing on the procedural prong.<sup>101</sup>

The two elements thus work together to identify and strike clauses that are suboptimal and intent-thwarting because they do not reflect fully informed buyers' ex ante preferences. Procedural unconscionability acts as a gatekeeper. It weeds out language that most consumers either cannot or do not factor into their purchasing decisions. It does so by probing the legibility of the term and whether the ability to bargain or find alternative sellers makes it worth reading. As noted above, however, even if most consumers do not peruse the fine print, behavioral economic theory holds that even a handful of erudite shoppers will pressure sellers to draft majoritarian salient terms. For this reason, procedural unconscionability alone does not invalidate a clause. Courts must also inquire into substantive unconscionability, which uses "extreme unfairness" as a rough proxy for nonsalience. The logic here is that the one-sided nature of a term is strong evidence that consumers did not understand its effects.

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252, 257 (Fla. Dist. Ct. App. 2006) ("Having concluded that the trial court properly determined that the Agreement was not procedurally unconscionable, we need not address the issue of substantive unconscionability."); *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.*, 127 P.3d 138, 141–42 (Idaho 2005) (applying Michigan law); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003); *Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 799 (Neb. 2006); *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 194–95 (S.D. 2007).

101 *See, e.g.*, *Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 971 (W.D. Mo. 2005); *Vockner v. Erickson*, 712 P.2d 379, 381–82 (Alaska 1986); *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 350 (Ct. App. 2007); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 818 (Ill. App. Ct. 2005); *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 177 (Miss. 2006); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004); *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 923 (N.J. Super. Ct. Ch. Div. 2002); *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (App. Div. 1983); *Kucan v. Advance Am.*, 660 S.E.2d 98, 102 (N.C. Ct. App. 2008) ("[W]hile the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa . . . ." (quoting *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008))); *Woodhaven Apartments v. Washington*, 942 P.2d 918, 925 (Utah 1997); *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209, 246–47 (Wyo. 2000).

A few courts have opined that substantive unconscionability alone can be sufficient. *See Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995) ("[A] claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies."); *Am. Home Improvement, Inc. v. MacIver*, 201 A.2d 886, 889 (N.H. 1964); *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985) ("Gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability."); *Adler*, 103 P.3d at 782.

Thus formulated, the rule is an exercise in accommodation: it balances behavioral economic and autonomy values with concern for judicial economy. Under a behavioralist regime, courts would need to hear expert testimony and make a complex, fact-sensitive determination about salience.<sup>102</sup> By letting courts adjudicate “gross unfairness” as a matter of law, the unconscionability doctrine approximates the same results with less expenditure of government resources. In addition, because empirical data indicates that only about five attributes will be salient to buyers,<sup>103</sup> making nonsalience the hallmark of unconscionability would effectively abolish modern contracting. The rule wisely does not do so. However, it is more permissive than it would be if autonomy reigned supreme. Terms that buyers neither read nor understand can only constitute the exercise of free will if they exactly replicate what informed buyers would have selected. Any term not concordant with buyers’ reasonable expectations should be void. Thus, an autonomy-driven unconscionability defense would require little more than proof that a term is unreasonable. In contrast, the real defense hinges not just on unfairness, but “manifest unfairness.” This is a nod to the economic tenet that judicial intervention, which imposes its own costs, will be inefficient unless it targets a pronounced market failure.<sup>104</sup> Finally, setting the bar so high discourages some litigants who might otherwise be tempted to ask courts to second-guess the equanimity of a clause.<sup>105</sup>

In sum, neither utilitarian nor deontological theories justify enforcing terms that deviate from what informed consumers would

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102 See Korobkin, *supra* note 60, at 1280–83 (“[B]uyers might present studies that demonstrate what percentage of customers in a particular market reported considering the term in question when making their purchase decision, selected one seller over another because of the content of that term, or were even aware of the content of that term in their particular contract.”).

103 See *id.* at 1227.

104 There are three reasons why court involvement is not ideal. First, courts are publicly subsidized and thus drain the social fisc. See Ayres & Gertner, *supra* note 11, at 93. Second, courts make mistakes—especially when asked to place themselves in the contracting parties’ shoes. See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005) (discussing the costs of judicial error). Third, courts can only rectify market failures through piecemeal litigation and thus cannot “encourage markets to move toward competitive equilibria.” Schwartz & Wilde, *supra* note 67, at 679.

105 Indeed, a recent study of 187 published federal court opinions over the last four decades confirmed that courts only apply the unconscionability doctrine in about a third of the cases where it is raised. See Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1100 (2006) (“Results of our analysis revealed that unconscionability claims are difficult to win.”).

have selected *ex ante*. The unconscionability doctrine is a pluralist attempt to eliminate these clauses. Like most grand compromises, it fully satisfies almost nobody. Yet, despite the fact that calls to recalibrate the rule are frequent,<sup>106</sup> calls to abolish it are rare.<sup>107</sup> This speaks volumes about the values it seeks to protect.

These values exist in equal measure in trust law. Indeed, like contracts, trust instruments outline rights and duties flowing from a transfer of property. Courts honor a settlor's intent as expressed in the instrument because doing so increases the welfare of the parties involved and fulfills the settlor's free will. By the same token, adhering to terms that do not match what a fully informed settlor would have chosen *ex ante* will be suboptimal and autonomy-thwarting. But although contract law includes the unconscionability defense, no trust rule seeks to pinpoint and eliminate these clauses. I consider this issue in depth in the next Part.

## II. UNCONSCIONABILITY IN TRUST LAW

This Part makes the case for a trust-specific unconscionability doctrine. It begins by explaining that freedom of testation, like freedom of contract, can be justified on economic and deontological grounds. However, trust law also involves powerful countervailing policy considerations and therefore defers to an instrument's text less often than does contract law. The unconscionability doctrine, which voids express contractual terms to safeguard important values, would be right at home in trust law.

Trust law does not recognize the rule largely because of the perception that it is unnecessary: unlike consumers assenting to a standard form contract, settlors enjoy the benefits of attorney representation and the ability to revise or amend the instrument. In the last decade, however, corporate fiduciaries, trust mills, and the self-help phenomenon have generated millions of trusts that do not fit this mold. Complex clauses in these instruments may not reflect a

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106 See Korobkin, *supra* note 60, at 1279–90 (proposing that courts modify the doctrine in a way that better reflects concerns about term salience); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 110–15 (2006) (arguing that courts should not strictly adhere to the two-pronged test); Schwartz, *supra* note 20, at 1054–55 (urging courts to stop using seller's market power and consumers' economic status or sophistication as yardsticks for procedural unconscionability).

107 One such exception is Epstein, *supra* note 19, at 295 (arguing that because terms that seem unfair allow sellers to lower prices and thus may be in both parties' interests, "the doctrine [of substantive unconscionability] tends on balance to work more harm than good, and should therefore be abandoned").



fully informed settlor's ex ante desires. In addition, as with standard form contracts, settlors are boundedly rational and underestimate the odds that fine-print trust clauses will substantially affect beneficiaries' rights. Accordingly, courts should subject these procedurally suspect instruments to heightened scrutiny.

Trust-specific substantive unconscionability, like its contractual cousin, would use gross unfairness as the yardstick for detecting inefficient and intent-defeating terms. Because trusts exist to benefit the beneficiaries, harsh clauses probably do not reflect an informed settlor's desires. Unfair terms may also be suboptimal: they may be worth less to a settlor than a beneficiary would pay to get rid of them.

### A. *Rationales for Freedom of Testation*

To some degree, rationales for freedom of testation dovetail with those for freedom of contract. First, as noted, trusts arguably are Pareto-superior.<sup>108</sup> Settlers derive utility from the act of executing a trust: some enjoy the prospect of controlling from the grave, others take comfort in providing for loved ones.

The trust "deal" also makes trustees better off. Indeed, because "[n]o one can be made to accept a trusteeship,"<sup>109</sup> the trustee's choice to do so confirms that, for her, the benefits outweigh the costs. Finally, trusts enhance the welfare of beneficiaries, who gain new property and assets. Thus, because trusts augment the well-being of all relevant parties, courts need only regulate their content in the event of market failure.

Second, the trust instrument permits the settlor to exercise her free will. The settlor's posthumous dominion over her property is a natural extension of her power over it during life. Through the trust instrument, she expresses her individualism by selecting recipients for her estate and conditioning the gifts.<sup>110</sup> Indeed, courts often make

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108 See *supra* note 14 and accompanying text.

109 Langbein, *supra* note 8, at 650; see also RESTATEMENT (SECOND) OF TRUSTS § 169 cmt. a (1959) ("[T]he trustee is not under a duty to administer the trust unless he accepts.").

110 See, e.g., Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1191 (1985) ("Along with liberty of contract, free alienation is one of the keystones of the twin policies of promoting individual autonomy and free exchange in competitive markets."); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life."); Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973,

grand statements about the settlor's autonomous prerogative to dispose of her property as she sees fit.<sup>111</sup>

Moreover, permitting free testation may have both *ex ante* and *ex post* benefits. *Ex ante*, the power to designate who will receive one's assets at death adds an important stick to the bundle of property rights. This makes property rights more desirable, which, in turn, spurs hard work, creativity, and saving.<sup>112</sup> Similarly, the threat that a settlor will opt out of the default inheritance regime creates incentives for children to care for aging parents.<sup>113</sup> This binds families together and lowers the cost of publicly subsidized assistance for the elderly.<sup>114</sup>

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973 (1988) (commenting on "the widespread belief that private property is an aspect of personality subject to individual control").

111 See, e.g., *In re Estate of Fritschi*, 384 P.2d 656, 659 (Cal. 1963) (en banc) ("[T]he right to testamentary disposition of one's property is a fundamental one which reaches back to the early common law."); *In re Reynolds' Estate*, 27 A.2d 226, 236 (N.J. Prerog. Ct. 1942) ("The courts cannot reject a will because it does not comport with their ideas of propriety and justice, or even because it appears to be unreasonable, unjust, injudicious, or cruel." (quoting *Smith v. Smith*, 25 A. 11, 19 (N.J. Prerog. Ct. 1891)) (emphasis omitted)). For a fascinating account of the historical forces that shaped this purported respect for testamentary idiosyncrasy, see Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 1017 (2006) (explaining that after the Civil War, "courts increasingly cast testamentary freedom in terms of the autonomy of the will, rather than its conformity to notions of rationality and morality").

112 See, e.g., COOTER & ULEN, *supra* note 11, at 164 ("[R]ules that restrict transfer undermine the owner's incentive to maximize the value of the property."); Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 297 (1988) ("[R]egulating how a settlor can dispose of his wealth may lead to inefficiencies because such interference would decrease the incentive to accumulate wealth, since influencing events and individuals after one's death may provide a primary motivation for accumulating wealth during one's life."). Nevertheless, inherited wealth may also reduce beneficiaries' incentives to work hard and save. See Hirsch & Wang, *supra* note 27, at 9. Moreover, over time, free testation also leads to "great disparities of wealth," which "undermine the very utility that a private property regime is supposed to foster." Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1291.

113 See, e.g., 1 PAGE ON THE LAW OF WILLS § 1.7, at 35 (rev. ed. 2003) ("To bind a person to an intestate scheme might destroy parental control, and deprive a person of the ability to reward kindness and punish cruelty."); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 636 (1989) ("[T]estamentary freedom heightens social control, by creating incentives for obedience and loyalty to one's family."); Hirsch & Wang, *supra* note 27, at 10 ("The testator's power to bequeath encourages her beneficiaries to provide her with care and comfort—services that add to the total economic 'pie.'").

114 See, e.g., Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 171 (2008) ("[C]hanges over the past few decades have considerably strengthened the argument that society should tolerate freedom of testation

Ex post, free testation arguably “permits more intelligent estate planning”<sup>115</sup> by letting a settlor distribute property according to her loved ones’ needs.

Despite the virtues of testamentary freedom, courts recognize that not all trust instruments are consonant with these values. For example, a trust may contain language that does not faithfully articulate the settlor’s genuine wishes. Accordingly, the doctrine of undue influence invalidates terms that stem from a beneficiary’s overreaching rather than the settlor’s volition.<sup>116</sup> The incapacity doctrine performs the same function when the settlor lacks the mental acuity necessary to make complex decisions.<sup>117</sup> Under the doctrine of mistake, courts will reform an instrument upon clear and convincing evidence that the drafting attorney failed to memorialize the settlor’s wishes correctly.<sup>118</sup> These doctrines acknowledge that a term is unlikely to be optimal or freedom-enhancing if it does not reflect the

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because it allows parents to reward children for lifetime services.”). Today, however, many children are delegating these duties to nurses and in-home caregivers. See Barbara Correa, *Home Sweet Home: Elderly Parents, Children Need Early Talk About Care*, DAILY NEWS (L.A.), Apr. 3, 2008, at B1 (noting a spike in the “demand for home care services, such as bathing and dressing, meal preparation and driving clients on errands”). Despite the “caregiving” basis for testamentary freedom, lawmakers tend to be suspicious about testamentary gifts to nonrelative caregivers. See CAL. PROB. CODE § 21350(a)(6) (West 2007) (creating a presumption of invalidity for gifts from “dependent adults” to “care custodians”); David Horton, *The Uneasy Case for California’s “Care Custodian” Statute*, 12 CHAP. L. REV. 47, 49 (2009) (criticizing the statute).

115 Hirsch & Wang, *supra* note 27, at 12 (calling this the “father knows best” hypothesis (internal quotation marks omitted)).

116 See, e.g., Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 575 (1997) (“[U]ndue influence involves the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, resulting in an instrument that would otherwise not have been made.”).

117 See, e.g., Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 31 (2006) (noting that courts will apply the incapacity defense when a settlor cannot understand the nature of the testamentary act, the nature and extent of her property, and the natural objects of her bounty).

118 *Van Riper v. Van Riper*, 834 N.E.2d 239, 240 (Mass. 2005) (requiring “full, clear, and decisive” evidence (quoting *Putnam v. Putnam*, 682 N.E.2d 1351, 1353 (Mass. 1997))); UNIF. TRUST CODE § 415 (amended 2005), 7C U.L.A. 514–15 (2006) (requiring clear and convincing evidence). Courts insist on a high level of proof because a deceased settlor “cannot corroborate or deny evidence that the words of the will are contrary to [her] intent.” Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 815 (2001). Courts also distinguish between trusts (to which they will apply the mistake defense) and wills (to which they will not). The primary rationale for this difference is that language in a will must comply with the Statute of Wills; thus, when a court is asked to reform a will, “the objection arises that the language to be supplied was not written, signed, and attested as required.” John H. Langbein & Lawrence W.

settlor's "authentic, autonomous choice."<sup>119</sup> In this regard, trust and contract law are virtually identical.<sup>120</sup>

However, the two bodies of law take different approaches to regulating an instrument's substantive effect. The root of this asymmetry is the fact that, on closer inspection, rationales for free testation are less persuasive than those for freedom of contract. For one, because contracts rarely last into the distant future, it makes sense to assume that the parties are capable of foreseeing what rights and duties will maximize their self-interest.<sup>121</sup> Testamentary instruments, on the other hand, often span generations.<sup>122</sup> There is less reason to defer to a settlor's desires about a contingency that will not occur for decades.<sup>123</sup> In fact, the certainty that the world will change raises thorny questions about second-order preferences: whether settlors want (or expect) courts to follow the terms rigidly or modify them when necessary to effectuate their essential purposes.<sup>124</sup> Trust law resolves this dilemma by letting beneficiaries do something contract

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Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 528 (1982).

119 Marsha Garrison, *The Empire of Illness: Competence and Coercion in Health-Care Decision Making*, 49 WM. & MARY L. REV. 781, 794 (2007).

120 One difference, however, is that although a mistake by the settlor can be grounds to reform a trust, a party's unilateral mistake is generally not sufficient to reform a contract. See, e.g., 27 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 70:27 (Richard A. Lord ed., 4th ed. 2003).

121 Even "relational" contracting consists of a series of freestanding agreements, rather than one long-term commitment. See, e.g., Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 900 (1978) (describing contracts that are "more complex and of greater duration than discrete transactions").

122 This is especially true of trusts. For example, William Randolph Hearst's testamentary trust became effective on his death in 1951. It has spawned litigation in five of the six decades since. See *Hearst v. Hearst*, 123 F. Supp. 756 (N.D. Cal. 1954); *Hearst v. United States*, 167 Ct. Cl. 513 (1964); *In re Estate of Hearst*, 136 Cal. Rptr. 821 (Ct. App. 1977); *Hearst v. Ganzi*, 52 Cal. Rptr. 3d 473, 475 n.4 (Ct. App. 2006) (mentioning a 1999 case that did not result in a published opinion).

123 See Sherman, *supra* note 112, at 1283 ("Questions about the proper distribution and use of resources are best answered with reference to current facts and circumstances, a judgment that the dead cannot make.").

124 Compare POSNER, *supra* note 11, at 546 ("[A] rational donor knows that his intentions might eventually be thwarted by unpredictable circumstances and may therefore be presumed to accept implicitly a rule permitting modification of the terms of the bequest in the event that an unforeseen change frustrates his original intention."), with Macey, *supra* note 112, at 307 ("People forming trusts clearly will take the possibility of unforeseen contingencies into account when creating the trust.").

law would never let a nonsignatory do: ask a court to reform or terminate the instrument due to unanticipated circumstances.<sup>125</sup>

Another key difference between freedom of contract and testamentary freedom is that while the parties to a deal usually suffer its repercussions, trusts have the potential to cause negative externalities. For example, a settlor's right to dictate how property will be used long after her death can exact a social cost.

Even the savviest investor cannot predict how to allocate assets efficiently in the distant future.<sup>126</sup> Settlor-imposed restrictions on property use also give rise to "a basic paradox at the core of liberal property law"<sup>127</sup>: the settlor's exercise of her freedom to dispose of her property reduces the beneficiary's freedom to do the same. Trust doctrine responds to these concerns with the rule against perpetuities, which forbids the dead from tying up resources forever.<sup>128</sup> Similarly, trusts can create externalities by excluding certain individuals. In some circumstances, by omitting her dependants, a settlor will deprive them of an irreplaceable income stream and thus pass the cost of providing for them to the government. To prevent this from happening, forty-nine states and the District of Columbia have either enacted community property regimes or elective share statutes to protect a surviving spouse from complete disinheritance.<sup>129</sup>

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125 See UNIF. TRUST CODE § 412(a) (amended 2005), 7C U.L.A. 507 (2006) ("The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."); RESTATEMENT (THIRD) OF TRUSTS § 66 (2003) (reversing the longstanding rule that permitted deviation from administrative but not dispositive terms). Compare *Clafin v. Clafin*, 20 N.E. 454, 456 (Mass. 1889) (denying a request to deviate from the dispositive provisions of a trust), with *Carlick v. Keiler*, 375 S.W.2d 397, 398 (Ky. 1964) (disagreeing with *Clafin* with respect to the administrative provisions of a trust).

126 See POSNER, *supra* note 11, at 549 ("[A]rrangements for the distant future [are] likely to result in an inefficient use of resources . . ."); Sherman, *supra* note 112, at 1283 ("To regulate events in 1980 the judgment of a mediocre mind on the spot is incomparably preferable to the guess in 1960 of the greatest man who ever lived." (quoting W. BARTON LEACH & JAMES K. LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* 241–42 (1961))).

127 Alexander, *supra* note 110, at 1189.

128 The rule against perpetuities provides that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (Roland Gray ed., 4th ed. 1942). However, its viability is shrouded in doubt. See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359–60 (2005) (noting that as many as twenty states have abolished the rule).

129 See, e.g., POSNER, *supra* note 11, at 550 (arguing that elective share statutes minimize the transaction costs of couples negotiating detailed property-sharing

Finally, since the settlor may be dead when a trust becomes effective,<sup>130</sup> a testamentary instrument, unlike a contract, raises the specter of moral hazard. Because executing a trust is an exercise of power without responsibility,<sup>131</sup> settlors “can sometimes be so awed by the infinite wisdom of their own plans for the future as to feel justified controlling other people’s lives.”<sup>132</sup> Often this tendency manifests itself in the relatively benign form of instructing the trustee to invest exclusively in a specific corporation that the settlor regards highly.<sup>133</sup> Yet it can also include clauses that disinherit a beneficiary if she remarries<sup>134</sup> or joins a particular faith.<sup>135</sup> A final fringe category includes settlors who mandate the destruction of their house<sup>136</sup> or

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arrangements); Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 739 (2006) (noting that elective share statutes vary widely but typically entitle the surviving spouse to between one-third and one-half of the decedent’s property). *But see* Sherman, *supra* note 112, at 1302 n.132 (“Among American jurisdictions, only Louisiana and Puerto Rico protect children against deliberate disinheritance.”).

130 Of course, this will not be true for irrevocable living trusts.

131 *Cf.* Hirsch & Wang, *supra* note 27, at 13 (“[T]estators making private provision for the distribution of assets at their deaths are free to behave as responsibly or irresponsibly as they choose, without bearing the interpersonal costs that living persons pay for eccentric behavior.”).

132 Sherman, *supra* note 112, at 1284 (quoting M. Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173).

133 *See, e.g.*, *Ams. for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust*, 855 N.E.2d 592, 595 (Ind. Ct. App. 2006) (involving a trust funded entirely with Eli Lilly stock); RESTATEMENT (THIRD) OF TRUSTS § 228(b) cmt. e (2003) (providing that when the settlor requires the trustee to invest entirely in a specific company, the trustee must comply unless “compliance would be impossible . . . or illegal”). For the view that such an instruction should be invalid, see Langbein, *supra* note 6, at 1115 (“[T]he advantages of diversification [are] so overwhelming that the settlor’s interference with effective diversification will be treated as inconsistent with the requirement that the trust terms must be for the benefit of the beneficiaries.”). *But see* Jeffrey A. Cooper, *Empty Promises: Settlor’s Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1175–1201 (2008) (arguing that Langbein’s approach would have several unwelcome effects).

134 *See In re* 1942 Gerald H. Lewis Trust, 652 P.2d 1106, 1108 (Colo. App. 1982); *In re* Lambert’s Estate, 46 N.Y.S.2d 905, 908 (Sur. Ct. 1944).

135 *See* U.S. Nat’l Bank of Portland v. Snodgrass, 275 P.2d 860, 862 (Or. 1954) (en banc) (considering a bequest that required the beneficiary to not have “embraced, nor become a member of, the Catholic faith”). More common are testamentary gifts that require the beneficiary to remain within the fold. *See* Maddox v. Maddox’s Adm’r, 52 Va. (11 Gratt.) 804 (1854), available at 1854 WL 3137, at \*4 (considering a legacy that was conditioned on the beneficiary remaining Quaker).

136 For example, in *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 211–13 (Mo. Ct. App. 1975), the testator directed her executor “to cause our home at 4 Kingsbury

money,<sup>137</sup> or the creation of a statue garden replete with bronze replicas of their family.<sup>138</sup> Of course, individuals can freely accomplish these objectives during life: they can keep undiversified portfolios, ostracize children for lifestyle choices, raze their property, and build memorials. Unlike the dead, however, the living must suffer the financial and interpersonal consequences of these decisions.<sup>139</sup> They can change their minds and abandon foolish plans.<sup>140</sup> To combat the tendency of settlors to succumb to wasteful or controlling impulses, trust law contains a robust prohibition against terms that contravene public policy.<sup>141</sup> Unlike contract law, where “courts always proceed with caution” when asked to invalidate a clause on this basis,<sup>142</sup> “a large and miscellaneous group of trusts . . . [are held] invalid, on the ground that their enforcement would violate public policy.”<sup>143</sup>

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Place . . . to be razed”—an act that would have reduced the value of the legacy from \$40,000 to \$650. Similarly, in *Brown v. Burdett*, (1882) 21 Ch.D. 667, 668 (Eng.), the testator tasked her executor with boarding, bricking, and shuttering up her house for twenty years before transferring it to the beneficiaries.

137 See *In re Scott's Will*, 93 N.W. 109, 109 (Minn. 1903) (involving a term that required the executor to “destroy all the rest and residue of the money or cash or other evidence of credit that to me or to my estate may belong”).

138 In *McCaig's Trustees v. Kirk-Session of the United Free Church*, 1915 Sess. Cas. 426, 434 (Scot. 2d Div.), the settlor required the trustee to construct an amphitheater not accessible to the public that contained bronze statues of her parents and their nine children.

139 See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 28 (7th ed. 2005) (“[A] person can, if she wishes, destroy her property during life (unless it is subject to historic preservation or similar laws). For if she does, she bears most of the economic consequences of her decision, plus or minus.”). For example, in *McCaig's Trustees*, the court struck down the requirement that the trustee build the amphitheater on the grounds that the settlor's family had long “contemplated the erection of similar statues, but . . . could not bring themselves to part with the money during their own lifetimes.” See 1915 Sess.Cas. at 438. But see Lior Jacob Strabilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781, 840–41 (2005) (contending that settlors who require the trustee to destroy property make “a real, immediate economic sacrifice” because they effectively lose the ability to sell their interest for profit during their life).

140 See Langbein, *supra* note 6, at 1111 (“The living donor can always change his or her mind, as he or she observes the consequences of an unwise course of conduct . . .”).

141 See RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).

142 *Fid. & Deposit Co. of Md. v. Moore*, 3 F.2d 652, 653 (D. Or. 1925); see also RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

143 2 AUSTIN WAKEMAN SCOTT ET AL., *SCOTT AND ASCHER ON TRUSTS* § 9.3 (5th ed. 2006). Similarly, the *Restatement (Third) of Trusts* and the Uniform Trust Code require a “trust, its terms, and its administration [to] be for the benefit of its beneficiaries.”

Thus, trusts, like contracts, serve economic and individualistic interests. Yet, more than contract law, trust law allows courts to override an instrument's express terms when necessary to reduce social costs or protect third parties.<sup>144</sup> This recognition that the parties' articulated intent is not sacrosanct—that it sometimes cedes to competing values—is also the foundational insight of the unconscionability doctrine. Nevertheless, trust law does not recognize the rule. Instead, it only permits courts to void clauses for wholly procedural or wholly substantive flaws. One cluster of defenses—incapacity, undue influence, and mistake—responds to defects in the trust-creation process. Another category, exemplified by the public policy doctrine, weighs the substantive effect of a clause. The unconscionability rule, with its two-prong procedural and substantive test, straddles both categories. As I now explain, it is able to detect inefficient and intent-defeating clauses that the other defenses do not.

### B. *Unconscionability in Trust Law*

As with freedom of contract, the justifications for freedom of testamentation assume that terms in an instrument will reflect the settlor's *ex ante* preferences. For example, suppose a settlor executes a trust with a broad exculpatory clause. If a competent attorney represents the settlor, courts should enforce the clause. For one, the clause will be efficient. The settlor's informed decision to include it indicates that she has decided that its benefits outweigh its drawbacks, just as the trustee's choice to serve signifies that the clause will make her better off.<sup>145</sup> To be sure, the beneficiaries would probably prefer that the settlor not give the trustee so much leeway. However, they may unwittingly profit from the clause. If the settlor fears that the beneficiaries are litigious or unduly risk averse, she may not be willing to leave them as large a gift—or provide for them at all—if she cannot insulate the trustee from their demands. The beneficiaries would rather accept a gift with the exculpatory clause than receive no gift whatso-

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RESTATEMENT (THIRD) OF TRUSTS § 27; *see also* UNIF. TRUST CODE § 404 (amended 2005), 7C U.L.A. 484 (2006) (“A trust and its terms must be for the benefit of its beneficiaries.”). Although there is an open question about how egregious a clause must be to violate this rule, it nevertheless “places an outside limit upon the normal rule of deference to the settlor’s intent.” Langbein, *supra* note 6, at 1109.

144 *See, e.g.*, Merrill & Smith, Numerus Clausus, *supra* note 13, at 3 (noting that contract law lets parties “be as whimsical or fanciful as they like in describing the promise to be performed . . . and the duration of the agreement”); *see also* Sherman, *supra* note 112, at 1284–85 (contending that there should only be a “minimalist” right to testamentation).

145 *See supra* notes 108–09 and accompanying text.



ever. Similarly, allowing the beneficiaries' wishes about the clause to take precedence over the settlor's wishes would dilute the value of the right to devise property. This would concomitantly diminish the value of property rights in general and thus the motivation to be productive and frugal. Thus, upholding the clause will serve the utilitarian goal of wealth maximization.

Likewise, honoring the settlor's informed decision to shield the trustee from lawsuits will be consistent with autonomy principles. Because the settlor knowingly and voluntarily agreed to the exculpatory clause, respect for her free will requires a court to uphold it.<sup>146</sup> Moreover, doing so acknowledges that the settlor is best situated to reward (or punish) beneficiaries for their conduct and carry out "intelligent estate planning."<sup>147</sup> As noted above, the settlor may have compelling reasons based on the beneficiaries' personalities or situations in life to immunize the trustee from damages.

These rationales dissolve if imperfect information prevents the settlor from understanding the clause's possible ramifications. Take the example of a cautious settlor who is dimly aware that the term exists but does not know that it could exonerate the trustee from liability for making speculative investments. Enforcing the clause will be inefficient. Admittedly, this issue is less clear than in contract law, because the settlor will be dead and thus incapable of realizing that, in contrast to her wishes, the trustee need not invest conservatively. Indeed, a decedent cannot suffer diminished utility.<sup>148</sup> Nevertheless, settlors as a class will experience less satisfaction from the testamen-

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146 See *supra* notes 110–11 and accompanying text.

147 See *supra* note 115 and accompanying text.

148 Cf. Hirsch, *supra* note 113, at 637 ("The social benefits of freedom of testation flow from the *opportunity* to exercise testamentary intent during the testator's lifetime. Following the testator's death, no further behavioral utilities derive from reconstructing the testator's unexpressed intent."). Of course, a settlor who executes an irrevocable trust during her lifetime can become aware of the fact that a term deviates from her wishes. She will be powerless to change the term because by making the instrument irrevocable she has forfeited her right to amend it. In these circumstances, the settlor will suffer welfare loss analogous to that of a contracting party who discovers *ex post* that a term deviates from her *ex ante* preferences. One context in which this problem may often arise is the traditional estate plan for a husband and wife with enough property to be subject to the estate tax. Under that scheme, when the first spouse dies, the trustee divides the estate into three trusts: a survivor's trust (which consists of the surviving spouse's separate property); an irrevocable bypass trust (which consists of the maximum amount that can pass tax-free at death); and a marital trust (which consists of the balance of the estate). See, e.g., JEROME A. MANNING ET AL., MANNING ON ESTATE PLANNING § 2:2.1 (6th ed. 2008) (discussing the formation of such a bypass trust). The surviving spouse's utility will decrease if she finds deviations from her wishes in the bypass trust, which she cannot amend.

tary act if they cannot be sure that the law will carry out their intent. In turn, this will lower the value of property rights and the incentives to produce and acquire property rights.<sup>149</sup> Also, unlike beneficiary-initiated modification or termination, the rule against perpetuities, forced share statutes, and the public policy defense—other obstacles to testamentary freedom—upholding a clause that deviates from the settlor's *ex ante* preferences serves no purpose. It neither reduces social costs nor protects third parties.

Moreover, the exculpatory clause will make the beneficiaries worse off. Unlike the example above, the settlor did not bolster the trustee's protection in order to give more generously to the beneficiaries. In fact, the settlor was only vaguely cognizant of the clause. Because the settlor has no stake in the term, it is worth less to her than the amount that beneficiaries would pay to be rid of it. But bargaining is impossible, leaving the settlor and beneficiaries with a clause that neither desires. Admittedly, the term is advantageous for the trustee, who will enjoy less risk exposure. But the trustee has far less hanging in the balance. She may manage the property, but its profits and costs run to the beneficiaries. Because settlors as a class will be worse off, and the beneficiaries' welfare loss will dwarf the trustee's meager gain, the term will be inefficient even under the Kaldor-Hicks test.<sup>150</sup>

The settlor's lack of informed assent to the term is also troubling from an autonomy perspective. Because the settlor did not know she was absolving the trustee for improvident decisions, upholding the term will not promote her free will. To the contrary, it will reduce her personal sovereignty over how her assets pass at death. Similarly, if the term deviates from the settlor's desires, it will foil her efforts to create a meritocracy based on the beneficiaries' conduct or disperse assets in the manner that they will be most valued.<sup>151</sup> For instance, a settlor with loving, mature children may undeservedly hinder their enjoyment of her estate by inadvertently liberating the trustee from a duty of due care.

Therefore, no basis for freedom of testation supports enforcing a term that deviates from what the settlor would have chosen with better information. Upholding such a clause will not further trust law's ani-

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149 See *supra* note 112.

150 Unlike Pareto efficiency, which requires a transaction to make all parties better off and no one worse off, Kaldor-Hicks efficiency merely requires that "the gainers gain more than the losers lose." COOTER & ULEN, *supra* note 11, at 47; see also POSNER, *supra* note 11, at 13 ("The winners *could* compensate the losers, whether or not they actually do.").

151 See *supra* note 113.

mating values; in fact, it will harm them. However, these inefficient and autonomy-thwarting terms do not necessarily fall within the ambit of any procedural or substantive defense. Because the settlor's failure to grasp "the legal import of language used[] will not normally support a claim for reformation,"<sup>152</sup> our risk-averse settlor cannot invoke the mistake doctrine to narrow the broad exculpatory clause.<sup>153</sup> Nor will the breadth of the exculpatory term, by itself, violate public policy.<sup>154</sup> Thus, there is a hole in trust law in the shape of the unconscio-

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152 *Carlson v. Sweeney*, 868 N.E.2d 4, 19 (Ind. Ct. App. 2007) (quoting *Peterson v. First State Bank*, 737 N.E.2d 1226, 1229 (Ind. Ct. App. 2000)). In some jurisdictions, this rule applies to all trusts. *See, e.g., Seufert v. Mulzer*, No. IP 99-1237-C T/G, 2000 WL 1358527, at \*3 (S.D. Ind. Sept. 19, 2000) ("[U]nder Indiana law a unilateral mistake as to the legal effect of the terms of a trust gives no right for reformation of the trust."); *duPont v. S. Nat'l Bank of Houston*, 575 F. Supp. 849, 859 (S.D. Tex. 1983) ("[N]o Texas court has rescinded or revoked a trust on the ground that the settlor was induced to create the trust by a subjective or objective mistake of law at the time of its creation."), *aff'd in relevant part*, 771 F.2d 874, 884 n.9 (5th Cir. 1985). A recent trend, however, limits this rule to "[w]here no consideration is involved in the creation of a trust." RESTATEMENT (THIRD) OF TRUSTS § 62 cmt. a (2003). This exempts the declaration of trust, where the settlor simply names herself as trustee and transfers title to herself in that capacity. It probably does not exempt trusts that name a corporation as the initial trustee.

153 Another reason that the mistake defense is inadequate to regulate terms that deviate from an informed settlor's ex ante preferences is the requirement of clear and convincing proof. *See supra* note 118 and accompanying text. If the settlor is still alive, she will almost certainly not seek reformation unless a dispute has arisen. If that is the case, however, a court may question the credibility of her testimony. *See, e.g., Walton v. Bank of Cal., Nat'l Ass'n*, 32 Cal. Rptr. 856, 867 (Ct. App. 1963) (denying a settlor's petition to reform a trust because her strenuous denials that she understood the gift tax consequences of the instrument "merely created a conflict in the evidence"). On the other hand, if the settlor has died, the beneficiaries will have extreme difficulty proving that she formulated a specific belief about the meaning of an esoteric clause. *See, e.g., In re Trust Created by Isvik*, 741 N.W.2d 638, 647-48 (Neb. 2007) (denying the beneficiaries' request to reform a trust even though numerous witnesses testified that the settlor mistakenly sought to revoke it).

154 *See, e.g., Ams. for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust*, 855 N.E.2d 592, 595 (Ind. Ct. App. 2006) (upholding an exculpatory clause that allowed a trustee not to diversify trust assets); *Hanson v. Minette*, 461 N.W.2d 592, 597 (Iowa 1990) (enforcing a clause that liberated a trustee "for any loss sustained through any error of judgment"); *In re Trusteeship of Williams*, 591 N.W.2d 743, 747 (Minn. Ct. App. 1999) (rejecting a public policy-based argument that corporate trustees cannot invoke exculpatory clauses); *Am. Cancer Soc'y v. Hammerstein*, 631 S.W.2d 858, 864 n.6 (Mo. Ct. App. 1981) ("An exculpatory clause is valid and not contrary to public policy and is enforceable absent a showing that the settlor was improperly induced to insert it."); *Bauer v. Bauernschmidt*, 589 N.Y.S.2d 582, 583 (App. Div. 1992) ("[E]xculpatory provisions like those in the present case are valid in inter vivos trusts so long as there is some accountability, at least, to the settlor."); *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250-51 (Tex. 2002) (holding that

nability doctrine. In the section below, I develop my claim that trust law's exclusion of the rule flows from outmoded perceptions of how trusts come to be and what kinds of terms they contain.

## 1. Procedural Unconscionability

The purpose of the trust-specific procedural unconscionability element should be to identify terms that are not what an informed settlor would have chosen. Thus, as I will discuss, it should be calibrated to detect informational defects in the trust-creation process. Of course, as mentioned, the conventional wisdom is that attorney draftsmanship and the settlor's ability to revise and amend the instrument protect against such flaws. In the next section, I will show that informational defects in trust instruments are surprisingly common.

### a. The Rise of the Procedurally Suspect Trust

In the last decade, the number of traditional, lawyer-drafted trusts has declined. Increasingly, settlors are turning to pre-printed instruments prepared by corporate trustees and trust mills, or creating their own dispositive schemes with the help of advanced estate planning products. The result has been trusts that are replete with esoteric terms—especially those that enlarge the trustee's powers, impose forfeitures on contesting beneficiaries, and require arbitration—but lack attorney oversight.

#### i. Corporate Trustees

Corporate trusteeship is one the most profitable niches in the financial services industry. As of 2005, banks and trust companies held more than \$3.3 trillion of assets in trust—a figure projected to swell to \$7 trillion by 2010.<sup>155</sup> Brokerages such as Charles Schwab and

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“public policy, as expressed by the Legislature in the Trust Code, does not preclude a settlor from relieving a corporate trustee from liability for self-dealing”); *see also* RESTATEMENT (SECOND) OF TRUSTS § 222 (1959) (“[T]he trustee, by provisions in the terms of the trust, can be relieved of liability for breach of trust.”).

155 Press Release, Charles Schwab Corp., Schwab Institutional Readies Two New Trust Services to Help Advisors Win and Retain Assets (Oct. 29, 2007), *available at* <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/10-29-2007/0004692112>; *cf.* Schanzenbach & Sitkoff, *supra* note 10, at 682 (placing the figure at about \$1 trillion). The industry has grown steadily throughout the twentieth century. *See* Note, *Institutionalized Trusteeship: Avenues of Compensation Reform*, 58 YALE L.J. 924, 924 n.5 (1949) (noting that there were 569 trust companies holding about \$1 billion in 1895 and nearly 3000 trust companies holding over \$36 billion by 1947); *see also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 970 (2005) (“Across the twentieth century the trust devel-

Merrill Lynch have recently scrambled to open and bolster their own trust departments.<sup>156</sup> While institutional trustees were once the province of the wealthy, competition has reduced the size of the average corporate-handled estate to a comparatively modest \$250,000.<sup>157</sup> As a result, “[t]oday, the vast majority of trusts are administered by large financial institutions.”<sup>158</sup>

These companies offer many advantages, from investment expertise to deep pockets to greater longevity than individual trustees.<sup>159</sup> Yet there is some evidence that they occasionally will refuse to serve unless the settlor agrees to their standard trust instrument.<sup>160</sup> A settlor in that situation often will not seek out the advice of an independent attorney and is thus indistinguishable from a consumer faced with a purchasing decision tied to a standard form contract. In addition, even if the institution refers the settlor to an outside attorney, she nevertheless may not receive the benefit of zealous advocacy. Commentators have long expressed concern about the “symbiotic relationship” between some financial service companies and law firms.<sup>161</sup> Because corporate fiduciaries can select not only the draft-

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oped its characteristic modern form as a management regime for a portfolio of financial assets, often professionally administered by a bank trust department or other institutional trustee.” (footnote omitted)).

156 See Indraneel Sur, *Banks, Brokerages See Growing Opportunity in Managing Estates*, L.A. TIMES, May 28, 2000, at C1 (noting that Schwab acquired U.S. Trust and its \$86 billion portfolio of trust assets and Merrill Lynch acquired \$12 billion of trust assets in the span of a decade); see also Brooke Southall, *U.S. Bust? Schwab Trust Offering Due*, INVESTMENT NEWS, Sept. 11, 2006, at 1 (“People with a lot of money are going to die, and that’s the key.” (quoting Charles Godlman, Chief Operating Officer of Schwab Institutional)).

157 See Mike McNamee, *Keeping Trusts Out of Harm’s Way*, BUS. WK., Apr. 10, 2000, at 228.

158 Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 775 (2000).

159 See Langbein, *supra* note 8, at 639 (explaining that a trust company’s wealth effectively insures the corpus and its ability to “outlive [the] trust” saves the settlor from providing for multiple alternate successor trustees); Judy B. Rosener, *Matters at Hand*, ORANGE COUNTY REG., July 16, 2007, 2007 WLNR 15733005 (noting that a trustee can act as a buffer between feuding family members). But see Fran Hawthorne, *Breaking Up Is Hard to Do*, N.Y. TIMES, Mar. 18, 2008, at H2 (reporting that “[d]issatisfaction with trustees—particularly corporate trustees rather than individuals—has been growing over the last five years”); Merri Rudd, *Four Readers Writing About Wills, Trusts, and Deeds*, ALBUQUERQUE J., Mar. 15, 2007, at 7 (describing frustration at turnover rates within trust companies).

160 See *supra* note 31 and accompanying text.

161 Marvin B. Sussman et al., *Will Making: An Examination of Client and Lawyer Attitudes*, 23 U. FLA. L. REV. 25, 45–46 (1970) (noting the perception among trusts and estates counsel that “a conspiracy exist[s] between the banks and large law firms”).

ing attorney, but also the attorney who administers the estate, they provide a lucrative wellspring of business.<sup>162</sup> This gives lawyers the “disincentive to argue too vociferously [if] institutions . . . wish to modify fiduciary obligations.”<sup>163</sup> Thus, in some circumstances, even represented settlors may go without the benefits of truly independent legal advice.

Moreover, although settlors, like all consumers, are free to shop among rival banks, brokerages, or trust companies, they likely cannot exert the market pressure necessary to discipline these firms to offer favorable boilerplate. First, settlors may evaluate competing trust services (not to mention competing trust boilerplate) less often than typical consumers weigh various alternatives. Many middle- and upper-class individuals decide to execute estate plans after years of entrusting a specific institution with overseeing their finances. In fact, settlors often create trusts at the urging of their investment advisor.<sup>164</sup> Because the act takes place in the context of a preexisting relationship, settlors may never look elsewhere for drafting or fiduciary services.

In addition, even settlors who do shop will invariably fixate on salient issues such as brand name<sup>165</sup> and the trustee’s fee schedule.<sup>166</sup> Because settlors, like standard form buyers, engage in selective and noncompensatory decisionmaking, they will ignore nonsalient boilerplate language, such as clauses that exculpate the trustee or authorize it to use trust funds to defend itself in litigation. In fact, these types of

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For example, Northern Trust, the nation’s largest trust company, offers on its website to “suggest for your consideration a number of qualified attorneys.” Northern Trust Corp., Living Trusts—Northern Trust, [http://www.ntcs.com/pws/jsp/display2.jsp?XML=\]pages/nt/0402/44668330\\_3556.xml&TYPE=interior](http://www.ntcs.com/pws/jsp/display2.jsp?XML=]pages/nt/0402/44668330_3556.xml&TYPE=interior) (last visited Apr. 2, 2009). See also Lisa Shidler, *Advisers Pressing to Handle Greater Amount of Trust Biz*, INVESTMENTNEWS, May 22, 2006, at 1, 1–2 (noting that financial advisers frustrated with lawyers “suggest[ing] that large trust companies administer a trust” are “clamoring to grab and administer more trusts”).

162 See Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 119 (1984) (noting that financial institutions usually tap the drafting attorney to handle estate administration, which makes their referrals all the more valuable).

163 Leslie, *supra* note 31, at 2716.

164 See *id.* at 2715.

165 For a discussion of how reputation, advertising, and word of mouth can shape consumer perception in the insurance context, see Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1414–15 (2007).

166 See, e.g., Ashlea Ebeling, *Do You Trust a Trust?*, FORBES, Dec. 8, 2003, at 214 (advising consumers to “[s]hop around—fees vary widely, particularly for small trusts”).

dispute-resolution terms are at the crossroads of three well-documented sources of bounded rationality. First, since individuals deny their own mortality, they experience discomfort when confronted with it directly.<sup>167</sup> They spend less than an ideal amount of time planning for posthumous events. For example, studies reveal that a substantial percentage of people inexplicably fail to create estate plans,<sup>168</sup> purchase adequate life insurance,<sup>169</sup> or reduce taxes through annual exclusion gifts.<sup>170</sup> Since people “prefer to minimize even [their] cognitive encounters with death,”<sup>171</sup> it would be surprising if they meticulously compared various trust providers’ fine print terms.

Second, research indicates that “emotion laden” product attributes—those that require the decisionmaker to confront unpleasant contingencies—tend to be nonsalient.<sup>172</sup> For instance, a prospective car buyer will experience a visceral negative emotional response if asked to choose whether to pay more for extra safety features.<sup>173</sup> As a result, buyers will employ “non-compensatory decisionmaking strategies that allow them to avoid making such tradeoffs.”<sup>174</sup> This occurs most frequently for choices that are transparent to the public and thus subject to ex post scrutiny.<sup>175</sup> Arguably, clauses that govern litigation

167 The best known work in this vein is ERNEST BECKER, *THE DENIAL OF DEATH* 15 (1973) (presenting “a network of arguments based on the universality of the fear of death”).

168 See, e.g., Am. Ass’n Retired Persons, *Where There Is a Will . . . 7* (Apr. 2000), available at <http://assets.aarp.org/rgcenter/econ/will.pdf> (reporting that more than a third of persons over fifty years of age had neither a will, trust, nor a durable power of attorney); Nathan Roth, *The Psychiatry of Writing a Will*, 41 AM. J. PSYCHOTHERAPY 245, 246 (1987) (“If the prevalent opinion is that a majority of us deny our own certainty of death, then it can come as no surprise that so many people die intestate.”).

169 See, e.g., Joel Slemrod, *Thanatology and Economics: The Behavioral Economics of Death*, 93 AM. ECON. REV. 371, 372 (2003) (noting that studies show “significant declines in living standards and increases in poverty rates among women whose husbands had passed away”).

170 As many as two-thirds of individuals subject to the estate tax “do not take advantage of the tax savings available through inter vivos giving.” Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 574 (2003).

171 Wojciech Kopczuk & Joel Slemrod, *Denial of Death and Economic Behavior*, 5 ADVANCES THEORETICAL ECON. 1, 1 (2005) (quoting ROBERT KASTENBAUM, *THE PSYCHOLOGY OF DEATH* 98 (3d ed. 2000)).

172 See, e.g., Korobkin, *supra* note 60, at 1231–32; Mary Frances Luce, *Choosing to Avoid: Coping with Negatively Emotion-Laden Consumer Decisions*, 24 J. CONSUMER RES. 409, 427 (1998) (“[C]hoice may also be influenced by a concern with minimizing negative emotion.”).

173 See, e.g., Aimee Drolet & Mary Frances Luce, *The Rationalizing Effects of Cognitive Load on Emotion-Based Trade-off Avoidance*, 31 J. CONSUMER RES. 63, 63 (2004).

174 Korobkin, *supra* note 60, at 1231.

175 See Luce, *supra* note 172, at 411.

over the settlor's estate fit this bill. For one, a settlor will likely find the prospect of her family and loved ones squabbling over her fortune inimical to the peace of mind a trust is supposed to bring and thus quite distressing. To avoid thinking about this outcome, she may ignore the existence of dispute-resolution clauses. She may also wish to suppress the recognition that certain terms empower the trustee at the beneficiaries' expense. Thus, even if she shops among corporate fiduciaries, she may not factor these clauses into her decision.

Third, even if dispute-resolution terms are salient to a particular settlor, she may underestimate their value and not demand an appropriate concession from the trustee in return. Indeed, "[o]ne of the most robust findings of social science research on judgment and decisionmaking is that individuals are quite bad at taking into account probability estimates."<sup>176</sup> For example, experiments reveal that the "optimistic bias" causes individuals to misjudge the odds that an adverse event will happen to them.<sup>177</sup> Similarly, the "availability heuristic" creates the belief that a specific harm is unlikely to materialize if it is unfamiliar or difficult to conceptualize.<sup>178</sup> Settlers who have had no previous experience with lawsuits may thus assume that their estate too will be immune. As a result, they may not consider terms that excuse the trustee from a duty of due care or let the trustee defend litigation with trust funds to be significant. Accordingly, informational asymmetries are possible even when a settlor shops along this specific margin.

In sum, when a corporate trustee provides the terms of an instrument, or refers the settlor to an attorney with whom it enjoys a cozy relationship, the settlor is analogous to a standard form consumer. Corporate fiduciary drafters or attorneys who are beholden to them have no incentive to create nonsalient terms that mirror settlers' desires. Instead, they will exploit settlor myopia and draft clauses that deviate from settlers' preferences and thus are inefficient and autonomy-thwarting.

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176 Korobkin, *supra* note 60, at 1232.

177 Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 656 (1999) (noting that individuals "underestimate their own chance of suffering some adverse outcome even when they accurately state or even overstate everyone else's chance of suffering that same outcome"); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 809-12 (1980).

178 "A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations come to mind." Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY 163, 164 (Daniel Kahneman et al. eds., 1982).



## b. Trust Mills

Another source of informational defects in instruments is the trust mill. Trust mills are corporations run by nonlawyers that “churn out a high volume of cookie-cutter living trusts.”<sup>179</sup> Even though trust mills only emerged in the mid-1990s,<sup>180</sup> by the end of that decade they had generated an estimated four million so-called “mill trusts.”<sup>181</sup>

Many trust mills are really schemes to sell deferred annuities and other unsuitable investments to elders.<sup>182</sup> Casting themselves as “estate planners” or “senior experts,”<sup>183</sup> these nonlawyer salesmen target elders through ads, direct mailing, telemarketing, and seminars in

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179 Premack, *supra* note 32.

180 In 1996, California brought a high-profile lawsuit against the Alliance for Mature Americans: a now-defunct trust mill that purportedly chose its name in the hope that seniors would conflate it with the American Association of Retired Persons. See Catherine Bridge, *Taking Aim at Annuities*, RECORDER, May 22, 2000, at 1; Sheryl Harris, *A Living Trust? Beware of Scams*, CLEVELAND PLAIN DEALER, Jan. 12, 2002, at E1 (noting that trust mills “frequently use ‘sound-alike’ names so people confuse them with legitimate nonprofits or falsely indicate a connection with well-known groups”).

181 See, e.g., Kathy M. Kristof, *Seniors Warned Against Fast-Talking Living Trust Sellers*, L.A. TIMES, June 15, 2000, at C4 (reporting on a living trust scam that may have reached up to four million low-income senior citizens); Darla Mercado, *Settlement Reached in ‘Living Trust Mill’ Suit*, INVESTMENTNEWS.COM, July 21, 2008, [www.investmentnews.com/apps/pbcs.dll/article?AID=/20080721/reg/383987327/1077/toc](http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20080721/reg/383987327/1077/toc) (reporting that 24,000 Kentucky seniors purchased trusts from a particular mill); Nancy Weaver Teichert, *Suit Targets ‘Trust Mills’*, SACRAMENTO BEE, Feb. 11, 2005, at A3 (discussing a lawsuit brought by the California attorney general on behalf of “tens of thousands of seniors” against a mill that “has between 250 and 300 agents operating in 11 cities along with 80 telemarketers operating out of a call center”); Press Release, Minn. Att’y Gen., Swanson Files Suit Against American Family Legal Plan and Heritage Marketing and Insurance Services (Mar. 7, 2007), [available at http://www.ag.state.mn.us/Consumer/PressRelease/AmericanFamilyLegalPlan.asp](http://www.ag.state.mn.us/Consumer/PressRelease/AmericanFamilyLegalPlan.asp) (noting that a mill sold thirty trusts a week to Minnesota seniors).

182 See, e.g., *Death Planning Made Difficult: The Danger of Living Trust Scams: Hearing Before the S. Spec. Comm. on Aging*, 106th Cong. 2 (2000) (testimony of Paul F. Hancock, Deputy Att’y Gen. for South Florida), [available at http://aging.senate.gov/events/hr53ph.pdf](http://aging.senate.gov/events/hr53ph.pdf) (“[P]ersons seeking to ‘sell’ revocable living trusts with a ‘one-size-fits-all’ trust are not advancing the best interest of the ‘buyer’ . . . .”); Kathy M. Kristof, *Con Artists’ Old Tricks*, L.A. TIMES, Aug. 19, 2007, at C1, C4 (“Although living trusts can help avoid probate, state securities authorities maintain that con artists establish ‘trust mills’ to simply get a good look at a senior’s assets.”).

183 Rick Jurgens, *Many Seniors Easy Targets for Financial Abuse*, CONTRA COSTA TIMES, Nov. 11, 2004, at A1; Press Release, Office of the Cal. Att’y Gen., Living Trust Mills, [http://ag.ca.gov/consumers/general/living\\_trust\\_mills.php](http://ag.ca.gov/consumers/general/living_trust_mills.php) (last visited Feb. 1, 2009) (“[T]hese sales agents often pose as expert financial or estate planners. They pass themselves off as a ‘trust advisor,’ ‘senior estate planner’ or ‘paralegal[]’ . . . .”).

motel rooms or community centers.<sup>184</sup> Many go door-to-door in gray-ing neighborhoods.<sup>185</sup> Their sales presentations greatly exaggerate the cost of probate and the advantages of creating a trust.<sup>186</sup> Some offer trusts for \$399—an amount, not coincidentally, one dollar less than the minimum in many states for a felonious transaction.<sup>187</sup>

Once a senior buys the product, the mill agent schedules two meetings. The first, which focuses on the senior's testamentary wishes, allows the agent to learn about the senior's assets and income.<sup>188</sup> The agent then inserts specific dispositive provisions into a pre-printed instrument.<sup>189</sup> Occasionally the senior "receives one short telephone call" from an attorney affiliated with the mill.<sup>190</sup> The lawyer neither meets the elder nor "ask[s] . . . estate-related questions."<sup>191</sup> With other mills, the attorney has no contact with the senior, and merely gives the finished trust a perfunctory glance.<sup>192</sup> The agent visits the senior again, ostensibly to supervise the execution

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184 See Josh Friedman, *State Says Company Tricked Seniors*, L.A. TIMES, Feb. 11, 2005, at C1; Matt Smith, *Son of Super Swindler*, S.F. WKLY., Sept. 10–16, 2003, at 18, 21 ("These firms routinely take out half-and full-page advertisements—touting two-a-day seminars week after week, year after year—in major newspapers."); Nancy Weaver Teichert, *Living-Trust Mills' Under Attack*, SACRAMENTO BEE, Feb. 10, 2005, at A1 (reporting on an entity "touting low-cost trusts that held nearly 30 seminars in the Sacramento area in one recent week").

185 See Harris, *supra* note 180; Rick Jurgens, *JFK Clinic Strives to Halt Abuse of Elders*, CONTRA COSTA TIMES, Mar. 26, 2006, at F4.

186 See Rick Jurgens, *Seniors' Assets an Easy Target*, CONTRA COSTA TIMES, Dec. 19, 2004, at A1, A10 (quoting trust mill agents as telling audiences in hotels and fraternal organization conference rooms that "you can control your entire estate from the other side," "[t]here are no disadvantages of any kind by having a trust," "[i]f you've got love in your heart, you need a trust," and "I'm just trying to scare you to get a trust today").

187 See Ryan Huff & Randy Myers, *When More than Memories Are Stolen*, CONTRA COSTA TIMES, Mar. 4, 2007, at A1, A10; see also Cal. Penal Code § 594 (West Supp. 2009) (setting forth a \$400 threshold for felony treatment of vandalism).

188 See, e.g., Jan Warner & Jan Collins, *Trusting 'Trust' Mills Creates Problems*, PITTSBURGH POST-GAZETTE, Aug. 14, 2007, at C2 (describing the abusive tactics used by con artists in the area).

189 See, e.g., Huff & Myers, *supra* note 187 (describing such a process).

190 Press Release, Minn. Att'y Gen., *supra* note 181.

191 *Id.*

192 See Estate of Swetmann, 102 Cal. Rptr. 2d 457, 460 n.3 (Ct. App. 2000) ("In the past several years, mounting criticism has been leveled at the marketing of living trusts by nonlawyers with only cursory oversight by attorneys."); Premack, *supra* note 32 ("[A] company in another city (often another state) prepares boilerplate trust forms and an attorney somewhere in Texas (whom you have never met and who is acting in violation of ethical rules) signs off on the documents.").

of the trust, but actually to persuade the senior to invest in deferred annuities or so-called “promissory notes.”<sup>193</sup>

The debate over trust mills so far has centered on facts that hamstring states’ ability to regulate them: the cost of prosecution,<sup>194</sup> the nebulousness of the rules that define unlicensed practice of law,<sup>195</sup> and the shame that prevents many elderly victims from coming forward.<sup>196</sup> However, the actual mill trusts, which have just begun to trickle into courts, will also pose serious problems. Trust mills “generally do a dreadful job of drafting”<sup>197</sup> and “rarely accomplish the settlor’s objectives.”<sup>198</sup> Recently, in *In re Estate of Oswald*,<sup>199</sup> a California appellate court considered a mill trust that purported to leave the settlor’s estate to his beloved brother, but contained no property whatsoever.<sup>200</sup> Despite abundant evidence that the settlor wanted his brother to inherit the estate, the court felt constrained to rule that the assets passed by intestacy.<sup>201</sup> Thus, mill trusts can fail to capture a settlor’s intent on quotidian issues such as trust funding.

193 Press Release, Office of the Cal. Att’y Gen., *supra* note 183. Deferred annuities are inappropriate investments for elders because they remain illiquid for years. *See, e.g.,* Negrete v. Fid. & Guar. Life Ins. Co., 444 F. Supp. 2d 998, 1000 (C.D. Cal. 2006) (denying motion to dismiss complaint against trust mill that allegedly sold lead plaintiff an annuity that would not mature until he was ninety-eight years old).

194 *See* Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 109; Jurgens, *supra* note 183 (“In an ongoing ‘whack-a-mole’ game, regulators and consumer advocates take legal action against individuals and companies that bend or break the rules to prey upon vulnerable seniors, only to see the same or similar predators pop up again elsewhere.”).

195 *See* Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595, 600 (2000) (“A clear definition of what constitutes the practice of law does not exist . . .”).

196 *See* Buhai, *supra* note 194, at 109; Huff & Myers, *supra* note 187 (“Only one in 100 cases of elder financial abuse gets reported, according to the California Welfare Directors Association.”); Kristof, *supra* note 182 (“Because [seniors are] embarrassed or infirm . . . they’re far less likely to report and pursue prosecution of the criminal.”).

197 Dobris, *supra* note 7, at 565; *see also* Francine Brevetti, *Trusts Crucial to Estate Planning*, SAN MATEO COUNTY TIMES, June 9, 2006, at Business 8 (“[Trust mills] give you a form that they say will work for everybody, but it doesn’t work for anybody.” (quoting attorney Kathleen Durrans)).

198 Vallario, *supra* note 195, at 596 (footnote omitted).

199 No. A117034, 2008 WL 727656 (Cal. Ct. App. Mar. 19, 2008).

200 *Id.* at \*1–2.

201 The settlor executed a pour-over will, but failed to have it witnessed. In the trial court, the brother, Miles, offered “uncontradicted evidence of his close relationship with [the settlor], and of [the settlor’s] frequent statements . . . that he was leaving all of his assets to Miles and Miles’s sons.” *Id.* at \*2. The settlor’s other siblings “put on no evidence.” *Id.*; *see also* Foster, *Privacy*, *supra* note 4, at 591 (describ-

Because trust mills are generally not involved in estate administration, they have no impetus to draft terms that favor a particular party. In this regard, mill trusts differ from instruments created by corporate fiduciaries. Indeed, trust mills gain nothing by drafting nonsalient terms that advantage the trustee. Nevertheless, two novel features of mill trusts likely breed inefficient and nonmajoritarian terms. First, settlors cannot shop for favorable mill trust clauses. Indeed, like a “rolling” contract, a mill trust arrives after the sale.<sup>202</sup> As a result, trust mills have little incentive to tailor terms to settlors’ preferences. Doing so will not attract more business. Unlike corporate trustee drafters, then, trust mills are immune from market pressure to internalize settlors’ wishes.

Second, mill trusts are notoriously overinclusive. An attorney-drafted trust rarely exceeds thirty pages. Yet to foster the illusion of legal authenticity, mill trusts can be up to one hundred pages long.<sup>203</sup> Trust mills fill this massive canvas with a veritable encyclopedia of terms, including the most controversial provisions in trust law. Often the mere existence of a term can be suboptimal. For example, a mill trust with a no-contest clause—a term the settlor is unlikely to understand—can seriously affect beneficiaries’ rights. Thus, even if trust mills do not draft self-serving clauses, the sheer amount of boilerplate language in their products raises doubts about whether they embody settlors’ wishes.

### c. The Second-Generation Do-it-Yourself Movement

A less sinister (but equally striking) trend is the resurgence of self-help. Since the 1965 publication of Norman Dacey’s pointedly titled bestseller *How to Avoid Probate*,<sup>204</sup> many Americans have fashioned their own estate plans. In recent years, however, “the use of do-

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ing “Florida children [who] learned only after their mother’s death that she had purchased from an out-of-state trust mill a revocable trust that was invalid under Florida law”).

202 Rolling contracts are valid because they “typically give the buyer a right to return a purchased item or cancel a purchased service to avoid the transaction.” Stephen E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1, 4 (2006); see, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (discussing the rolling contract concept in the computer software context); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (citing examples of rolling contracts).

203 See Warner & Collins, *supra* note 188 (reporting a hundred-page mill trust).

204 See NORMAN F. DACEY, *HOW TO AVOID PROBATE* (1965). Dacey was tried and acquitted for the unauthorized practice of law. See *N.Y. County Lawyers’ Ass’n v. Dacey*, 234 N.E.2d 459, 459 (N.Y. 1967). See also Foster, *Privacy*, *supra* note 4, at 558 n.20 (noting that “‘do-it-yourself’ trust books and software have been ‘heavily marketed’” since the publication of Dacey’s book); Langbein, *supra* note 2, at 1116 (not-

it-yourself estate planning documents and software has exploded.”<sup>205</sup> This “boom in homegrown estate planning”<sup>206</sup> stems from a number of sources: rising legal fees, interactive software, and growing comfort with online financial management.<sup>207</sup>

Statistics from the last few years alone are telling. In 2006, downloads of Quicken WillMaker—a full-service program that allows consumers to create wills, trusts, and powers of attorney—increased by a third.<sup>208</sup> In 2007, website LegalZoom.com saw a seventy-three percent rise in sales of its estate planning products.<sup>209</sup> In 2008, tax colossus H&R Block joined the fray with an Internet service that allows “everyday people [to] write their own wills, trusts and estate plans at home.”<sup>210</sup> Finally, in less than a decade, We the People, a franchise that prepares legal documents, has expanded from twenty-five stores to 110 locations<sup>211</sup> in thirty-two states.<sup>212</sup>

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ing the “depth of public dissatisfaction with probate” since the publication of Dacey’s book).

205 Dan Heilman, *No Room for Shortcuts*, MINN. LAW., Dec. 31, 2007.

206 See *supra* note 33 and accompanying text.

207 See *id.* (ascribing the movement to “the increasing sophistication of software and services for estate planning, combined with growing consumer comfort with online financial management”); Claudia Buck, *Write a Will or Risk Having Strangers Decide Your Affairs*, ORLANDO SENTINEL, Feb. 3, 2008, at G1 (describing how “online documents have evolved according to customers’ requests”); Holly Hubbard Preston, *It’s the Ultimate in Planning, If You Will*, INT’L HERALD TRIB., Jan. 13, 2007, at 17 (noting that law firms charge between \$2000 and \$10,000 for an estate plan, but online products cost as little as \$45).

208 See Claudia Buck, *Matters of Life, Death*, KAN. CITY STAR, Mar. 23, 2008, at D3. Executing an instrument using WillMaker takes about half an hour. See Phuong Cat Le, *A Will Is a Must for Parents with Minor Children*, SEATTLE POST-INTELLIGENCER, Mar. 25, 2008, at C1.

209 See Larson, *supra* note 33. LegalZoom offers a “Peace of Mind Review” by a “legal specialist.” Gail Rosenblum, *Where There’s a Will, There’s a Headache*, MINNEAPOLIS STAR TRIB., July 7, 2008, at E1. In actuality, these “reviewers are not lawyers” but rather “law students or other college graduates.” Larson, *supra* note 33. Other similar Internet providers include LegacyWriter.com, BuildaWill.com, see Emily Brandon, *How to Write a Will Online*, USNEWS.COM, Nov. 12, 2007, <http://www.usnews.com/articles/business/retirement/2007/11/12/how-to-write-a-will-online.html>, ItsMyLife.com, and SuzeOrman.com, see Jim Miller, *Creating a Will Doesn’t Require a Lawyer*, CHARLESTON GAZETTE & DAILY MAIL, Jan. 14, 2008, at 2D.

210 Gene Meyer, *Without Lawyer’s Help: Companies See Potential Sales in Do-It-Yourself Legal Kits*, ORLANDO SENTINEL, Jan. 20, 2008, at G3.

211 See Larson, *supra* note 33.

212 Francine Brevetti, *Chain Helps People File Legal Papers*, OAKLAND TRIB., May 15, 2006, 2006 WLNR 8344718. Some lawyers have gone to great lengths to compete. See Michael Pollick, *Attorney’s New Web Site Offers Wills for \$45*, SARASOTA HERALD-TRIB., Aug. 14, 2006, at 9 (describing a Florida law firm that promised to charge “online customers” \$45 for a will).

Of course, homemade estate plans are not inherently suspect. Indeed, twenty-seven states admit holographic wills—those that are handwritten and not witnessed—to probate.<sup>213</sup> Courts have even honored dispositions located in a chili recipe<sup>214</sup> and scratched into a tractor fender.<sup>215</sup>

Holographs, though, tend to be extraordinarily simple. For example, a study of 145 such wills admitted to probate in Allegheny County, Pennsylvania found that “[t]he overwhelming majority of testators . . . record[ed] the entire sweep of their final wishes with less than a page of writing, and a significant minority needed fewer than half-a-dozen sentences.”<sup>216</sup> Trusts can rarely be so straightforward. While wills generally make outright gifts, trusts are “projected on the plane of time and so subjected to a management regime.”<sup>217</sup> This need for trusts to spell out a detailed administrative scheme makes trusts more complex. It also raises the risk of informational defects.

And indeed, a signature trait of next-generation books and software is their level of sophistication. Leading do-it-yourself manuals advise settlors on how to create spendthrift trusts, no contest clauses, and arbitration clauses.<sup>218</sup> Similarly, self-help pioneer Nolo Press recently unveiled plans to offer “deep and detailed content . . .

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213 See Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 93 n.2 (2006). As Brown’s article illustrates, holographs remain controversial. See *id.* at 123 (arguing that homemade wills give rise to validity and interpretation disputes); see also Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 632 (1981) (arguing that statutory fill-in will forms constitute “consumer fraud”). But see Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 70–71 (2008) (examining all holographic wills probated in a five-year period and concluding that they are no more likely to spark litigation than other testamentary instruments).

214 The handwritten document purportedly read:

“4 quarts of ripe tomatoes, 4 small onions, 4 green peppers, 2 teacups of sugar, 2 quarts of cider vinegar, 2 ounces ground allspice, 2 ounces cloves, 2 ounces cinnamon, 12 teaspoonfuls salt. Chop tomatoes, onions and peppers fine, add the rest mixed together and bottle cold. Measure tomatoes when peeled. In case I die before my husband I leave everything to him.”

—(signed) MAGGIE NOTHE.

John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 301 (1934).

215 See Clowney, *supra* note 213, at 30 (describing the case of Cecil George Harris, a Canadian farmer who inscribed on a fender, “In case I die in this mess, I leave all to my wife” with a knife after being trapped under his tractor).

216 *Id.* at 55–56.

217 Bernard Rudden, Book Review, 44 MOD. L. REV. 610, 610 (1981).

218 See, e.g., THE AMERICAN BAR ASSOCIATION GUIDE TO WILLS & ESTATES 105–06, 288, 305–06 (2d ed. 2004) (discussing spendthrift trusts and arbitration clauses); HENRY W. ABTS, III, THE LIVING TRUST 116–17, 152 (2003) (calling a no-contest clause

on a subscription [web]site.”<sup>219</sup> As documents created with these products and services become more complicated, the likelihood that they will accurately express a settlor’s preferences decreases.

In *In re Estate of Pozarny*,<sup>220</sup> for example, a New York state court struggled to interpret a forty-page pre-printed form trust that failed to name a fiduciary and suffered from “a staggering number of additional ambiguities, inconsistencies, apparent irrelevancies, and outright errors.”<sup>221</sup> The judge provided a blistering condemnation of commercialized trust forms:

The estate planning package containing the living trust and pour-over Will is an example of a product being heavily promoted throughout New York State . . . . One of the dangers of such a system, which the instant case points up, is that it leads [individuals], who may have little if any experience in sophisticated estate and tax planning, to consider themselves competent to “draft” complex instruments and purvey them on a large scale. In the matter before us, . . . such “drafting” appears no more than piecing together various sections from the forms, often in a seemingly feckless, haphazard manner.

Indeed, this Will and trust agreement collectively represent the most egregious example of maladroitness “drafting” this court has encountered.<sup>222</sup>

Although *Pozarny* may be an extreme case, it illustrates the perils of what Joel Dobris calls “the massification of trusts, or, the pedestrianization of trusts.”<sup>223</sup> As more lay people try their hands at a service historically provided by licensed professionals, informational defects will only become more common. Indeed, if a commercial trust can neglect to name a fiduciary, then other, less obvious deviations from the settlor’s wishes are not just possible, but likely.

#### d. Articulating the Rule

The trust-specific procedural unconscionability prong should seek out clauses that are probably not what an informed settlor would have wanted. As with contract law, the test should be flexible. An important threshold issue should be whether a lawyer represented the

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a “necessary provision[] for a good living trust” and an arbitration clause “an added protection”).

<sup>219</sup> Kathy M. Kristof, *Legal Champion for the Middle Class*, L.A. TIMES, Nov. 18, 2007, at C3.

<sup>220</sup> 677 N.Y.S.2d 714 (Sur. Ct. 1998).

<sup>221</sup> *Id.* at 716.

<sup>222</sup> *Id.* at 717.

<sup>223</sup> Dobris, *supra* note 7, at 563.

settlor during the drafting process. Of course, there are lawyers of all stripes, including those of lesser competence, and attorney representation is no panacea. Yet the law must draw a bright line somewhere to avoid unnecessarily subjecting every trust to heightened scrutiny. In addition, the doctrine of professional malpractice already provides remedies for informational defects in lawyer-drafted trusts.<sup>224</sup> As contract law generally refuses to let powerful enterprises invoke procedural unconscionability,<sup>225</sup> trust law could do the same for settlors who received legal advice. If an institutional fiduciary referred the settlor to the attorney, however, courts should look past the bare fact of representation and examine the lawyer's ties to the trustee and actions on behalf of the settlor. If the former are too strong and the latter deficient, courts should be able to determine that the settlor did not receive the benefit of independent counsel.

Another key inquiry should be the nature of the disputed terms. Some aspects of a trust might be categorically immune from a finding of procedural unconscionability. For instance, there is little risk that a dispositive provision—which simply allocates property among beneficiaries—will be nonsalient. Other terms, however, are less straightforward and will be less likely to attract settlors' attention. As noted, clauses that govern the resolution of disputes are prime candidates for nonsalience. Overall, courts should be willing to find procedural unconscionability for clauses that are dense, legalistic, or otherwise difficult for an unrepresented settlor to grasp. Courts might also consider the physical appearance of the language<sup>226</sup> and the settlor's business acumen. The precise formulation of these factors matters less

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224 Many states allow beneficiaries to sue the drafting attorney for scrivener's error if they can prove that the settlor "specifically intended for his attorneys' services to benefit [them]." *Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.*, 958 S.W.2d 42, 49 (Mo. Ct. App. 1997); see also *Bucquet v. Livingston*, 129 Cal. Rptr. 514, 517–21 (Ct. App. 1976) (noting that because the settlor is often dead when the error is detected, "[u]nless the beneficiaries can recover against the attorney, no one could do so and the social policy of preventing future harm would be frustrated").

225 See, e.g., *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 904 n.8 (3d Cir. 1997) (noting the existence of an exception in the insurance context for "a large commercial enterprise that has substantial economic strength, desirability as a customer, and an understanding of insurance matters, or readily available assistance in understanding and procuring insurance"); *Avid Eng'g, Inc. v. Orlando Marketplace, Ltd.*, 809 So. 2d 1, 5 (Fla. Dist. Ct. App. 2001) (refusing to find an arbitration clause procedurally unconscionable when it "was negotiated at arms length by relatively sophisticated parties with relatively equal bargaining power").

226 For example, in *Pozarny*, the court expressed concern over the fact that the trust consisted of loose leaf pages in a three-ring binder, which might easily become confused. See *Pozarny*, 677 N.Y.S.2d at 717. More often, however, this issue will turn on whether a term is in small font or otherwise difficult to read.



than the driving force behind them: exposing informational defects in the trust-creation process.

## 2. Substantive Unconscionability

If a court has determined that a term is procedurally unconscionable, it should void the term if it is also substantively unconscionable—that is, grossly unfair. The principle here is that a clause that significantly limits rights or remedies is probably a clause that the settlor did not truly understand. Since trusts exist to benefit the beneficiaries,<sup>227</sup> the fact that language works an unjustified hardship suggests that the settlor did not grasp its ramifications. Also, if a settlor is not fully aware of the effect of a clause, its value to her, if any, must be exceedingly small. Yet terms that erode beneficiaries' rights and remedies greatly diminish their utility. Arguably, if the settlor were aware of this discrepancy, she would voluntarily remove the provision. But because the settlor presumably is dead and cannot do so, substantive unconscionability fills the role.

In its purest form, substantive unconscionability would apply to a term drafted by the trustee that enhances its power at the expense of the settlor or the beneficiaries. In such a case, the trust-specific unconscionability doctrine would be functionally identical to its contract law counterpart. By invalidating the clause, it aligns the instrument with what the settlor's intent would have been if not for informational defects. Moreover, it penalizes the drafter for taking advantage of the settlor. In these circumstances, trust law could import the teachings of contract law wholesale. Judges in the trust milieu could even examine contract precedent to define the boundaries of gross unfairness. For instance, as in contract law, a clause might be grossly unfair if it requires the settlor or beneficiary to submit claims against the trustee to arbitration, but permits the trustee to sue in court.<sup>228</sup> Likewise, a term might be grossly unfair if it purports

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227 See *supra* note 28.

228 See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000) (holding an arbitration clause that required the employee but not the employer to submit claims to arbitration to be substantively unconscionable); *Mot-singer v. Lithia Rose-FT, Inc.*, 156 P.3d 156, 163 (Or. Ct. App. 2007) (“[S]ome courts have concluded that, despite the existence of adequate consideration, a nonmutual arbitration clause is *presumptively* unconscionable when the parties lack equal bargaining power.”); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 173 (Wis. 2006) (“Many courts have reached a similar conclusion of unconscionability when one-sided arbitration provisions require the weaker party to arbitrate.”). *But see Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) (rejecting this argument on the

to waive specific remedies on behalf of the settlor or beneficiaries, but leaves the trustee's arsenal fully stocked.<sup>229</sup>

The harder question is whether substantive unconscionability should apply when the drafter is not also the trustee, or when the term at issue favors one beneficiary over another. In either instance, the drafter has not exploited the settlor's imperfect information for personal gain. For example, suppose a mill trust limits the settlor's ability to replace the trustee. Because the trust mill will never serve as trustee, it has no stake in the enforceability of the language. Similarly, if an institutional trustee inserts a far-ranging no-contest clause in an instrument, the party who profits is not the trustee, but any beneficiary whose gift is vulnerable to judicial challenge. Unlike substantive unconscionability in contract law, voiding a term in these situations does not seem to punish drafter overreaching. Without this element of advantage taking, it might seem strange to use the morally loaded idiom "unconscionable" to describe the clause.

Nevertheless, a trust-specific unconscionability defense could still serve a limited punitive and deterrent function. The defense would authorize courts to declare that a trust mill or do-it-yourself purveyor failed to memorialize the settlor's desires properly. Over time, this publicly available data could affect these entities' reputations. Therefore, albeit in an attenuated way, the doctrine could castigate drafters for creating flawed terms.

More importantly, a broad definition of substantive unconscionability that applies even in the absence of drafter wrongdoing would benefit trust law. As noted, trust law gives courts greater freedom to ignore an instrument's text than contract law does. Beneficiary-provoked modification or termination, the rule against perpetuities, elective share statutes, and the muscular public policy defense override the settlor's intent when necessary to minimize social costs or protect third parties. In fact, unlike these rules, which are controversial, in part, because they are interventionist, the unconscionability defense is intent-serving. It harmonizes a trust's terms with what an informed

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grounds that promises need not be reciprocal so long as they are supported by consideration).

229 See *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 767 (Wash. 2004) (en banc) (ruling that a clause that relinquished the employee's—but not the employer's—right to punitive damages was substantively unconscionable because it “allow[ed] the employer alone access to a significant legal recourse”); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 50 (2003) (“Courts have not been taken in: they have uniformly refused to enforce such remedy-stripping clauses to deprive the non-drafting party of substantive rights and remedies.”).

settlor would have chosen. It thus addresses perhaps the most fundamental question in trust law: what is the settlor's true intent. This important and independent basis for the doctrine has nothing to do with deterring drafter malfeasance.

Finally, terms that deviate from a party's informed *ex ante* preferences arguably work more harm in trust law than they do in contract law. For one, trusts tend to be higher value transactions than consumer form contracts. As a result, harsh terms that slip in unnoticed can impose greater welfare loss. In addition, trusts, unlike contracts, serve an important expressive function.<sup>230</sup> In the exculpatory clause example above, where the settlor inadvertently freed the trustee from a duty of reasonable care, the harm that flows to the beneficiaries is not strictly financial.<sup>231</sup> Indeed, the exculpatory clause could seem to send a powerful signal—one infused with all the solemnity of the testamentary act—that the settlor preferred the trustee to the beneficiaries or viewed the beneficiaries as contentious. Likewise, a no-contest clause that favors one beneficiary over another can be construed as a powerful statement about love and trust. The trust-specific unconscionability doctrine would eliminate these messages when the settlor did not truly intend to convey them.

### C. Counterarguments

To be sure, the concept of an unconscionable testamentary instrument would be a departure, and faces powerful counterarguments. First, the idea of a procedurally unconscionable trust might seem incompatible with the concept that individuals who sign documents have a duty to read them.<sup>232</sup> Although the duty to read has roots in contract law,<sup>233</sup> one state supreme court recently extended it to a trust instrument.<sup>234</sup> One could even argue that a duty to read

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230 See, e.g., Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 648–49 (1992) (“To the extent that a will is an expression of autonomy and self-determination, what it can be expected to communicate is the testator’s unique and personal ideas . . . .” (footnote omitted)).

231 See *supra* Part II.B.

232 See, e.g., *Biesecker v. Biesecker*, 302 S.E.2d 826, 828–29 (N.C. Ct. App. 1983) (explaining that a “‘person signing a written instrument is under a duty to read it’” (quoting 6 STRONG’S N.C. INDEX 3D, *Statute of Frauds* § 5 (1977))).

233 See generally John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341 (1974) (describing how the duty to read, once a firmly entrenched principle of contract law, has given way to a “reasonableness” test that often leads to inconsistent results).

234 See *In re Estate of Smid*, 756 N.W.2d 1, 7 (S.D. 2008) (upholding a spouse’s waiver of her elective share rights in the decedent’s trust because “‘one who accepts

makes more sense when applied to trusts than standard form contracts. It may be rational for a person to ignore, say, a software license, but the same cannot be said of an instrument that allocates their property after death.

But this contention proves too much. The duty to read ensures that parties cannot escape their responsibilities by remaining willfully ignorant of them: if parties were bound only to terms they actually read, they would ignore their obligations and inundate courts with ex post claims of unawareness.<sup>235</sup> But if settlors are naturally inclined to try to understand trusts, then the duty to read is superfluous. It is an artificial construct encouraging conduct that needs no encouragement. Because the duty to read adds virtually nothing in the trust context, elevating it above the core values the unconscionability doctrine could serve would be misguided.

More importantly, even if trust law does embrace the duty to read, it is not inconsistent with the unconscionability defense. Indeed, the two coexist in contract law. This illustrates a crucial point about the unconscionability rule—it targets an evil that would exist even if consumers read instruments thoroughly. Recall that consumers can only exert market pressure on sellers to internalize their preferences for *salient* terms: those that consumers actually factor into their purchasing choices. As Russell Korobkin explains, the mere fact that a buyer reads a term does not necessarily make it salient:

A form term calling for arbitration of disputes in an inconvenient state, for example, is likely to be non-salient to the vast majority of buyers unless the type of contract in question commonly results in disputes. This fact is not necessarily changed if the seller takes steps to inform the buyer about this term—for example, by orally informing the buyer or requiring him to write his initials next to the term on the contract to signal his actual knowledge and assent. “Notice” is a prerequisite of salience, but notice is not a sufficient condition of salience.<sup>236</sup>

Thus, even terms that many settlors read can deviate from what their informed preferences would have been.

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a contract is conclusively presumed to know its contents and to assent to them’” (quoting *Holzer v. Dakota Speedway, Inc.*, 610 N.W.2d 787, 795 (S.D. 2000)).

235 See, e.g., *Alliance Trust Co. v. Armstrong*, 186 So. 633, 635 (Miss. 1939) (“‘To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.’” (quoting 12 AM. JUR. *Contracts* § 137 (1938))).

236 Korobkin, *supra* note 60, at 1234.

A second rejoinder to a procedural unconscionability doctrine in trust law is that settlors, unlike contracting parties, often retain the power to amend their instruments. Unless part or all of the trust has become irrevocable,<sup>237</sup> settlors can change terms with which they become dissatisfied. This additional line of defense arguably tempers the need for a rule that targets informational flaws during the drafting process.

Nevertheless, I find this argument unpersuasive. First, the notion that settlors will discover that terms deviate from their *ex ante* wishes is implausible. Many terms, especially those that govern dispute resolution or the relationship between the trustee and the beneficiaries, lie dormant until the settlor dies. It is hard to imagine what might cause a settlor to reconsider them during her life. Indeed, even if the settlor rereads the trust, if a term was not salient when she executed the instrument, then it will most likely remain nonsalient. Moreover, because suspect terms often regulate administrative minutiae or events that are unlikely to occur, few will seem bothersome enough to warrant the trouble of revising the instrument. Finally, in the unlikely event that a settlor unearths disconcerting language, transaction costs may discourage her from amending it. Settlor may be unwilling to try to revise the instrument themselves, especially if the error stemmed from eschewing legal counsel in the first place. Thus, a settlor's ability to amend the trust is unlikely to eliminate informational defects in the drafting process.

### III. APPLYING THE DOCTRINE

Finally, to make the discussion as concrete and helpful as possible, this Part considers three specific terms that have long vexed courts and academics: those that expand the trustee's powers, those that condition bequests on a beneficiary not contesting the trust, and those that require arbitration. It showcases how a trust-specific unconscionability doctrine could improve outcomes in cases.

#### A. *Exculpatory Clauses and Other Pro-trustee Provisions*

Although the unconscionability doctrine would be a novel addition to trust law, courts have effectively adopted the defense in one important context. Indeed, the rules that govern the validity of an exculpatory provision inserted by the trustee have slowly gravitated

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<sup>237</sup> Settlor may make trusts irrevocable at their inception for tax reasons. In addition, the traditional joint husband-wife estate plan typically makes the "bypass" trust irrevocable when the first spouse dies. See DENIS CLIFFORD, *PLAN YOUR ESTATE* 292, 297–99 (9th ed. 2008).

toward an unconscionability-like standard. At the same time, however, trust law inexplicably does not subject other terms that aggrandize the trustee's power to heightened scrutiny.

Exculpatory clauses became common in the early twentieth century, as trust companies emerged and the nature of the trust shifted from a mechanism for the conveyance of land to one for holding and investing financial assets.<sup>238</sup> Corporate trustees began to draft instruments or refer the settlor to a law firm that would do so, and trusts began to feature terms that exonerated the trustee from liability for poor decisions. At first, courts were unsure how to treat an exculpatory term in instruments that the trustee or its associates had drafted.<sup>239</sup> The *Restatement of Trusts* set forth six factors for courts to gauge the validity of such a provision:

- (1) whether the trustee prior to the creation of the trust had been in a fiduciary relationship to the settlor, as where the trustee had been guardian of the settlor; (2) whether the trust instrument was drawn by the trustee or by a person acting wholly or partially on his behalf; (3) whether the settlor has taken independent advice as to the provisions of the trust instrument; (4) whether the settlor is a person of experience and judgment or is a person who is unfamiliar with business affairs or is not a person of much judgment or understanding; (5) whether the insertion of the provision was due to undue influence or other improper conduct on the part of the trustee; (6) the extent and reasonableness of the provision.<sup>240</sup>

This rubric, just like the unconscionability doctrine, bifurcates into procedural and substantive elements. Indeed, the third and fourth factors, which consider whether the settlor received counsel or is sophisticated, also inform the test for whether a contract is proce-

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238 See, e.g., Langbein, *supra* note 8, at 638 (“The modern trust typically holds a portfolio of these complex financial assets, which are contract rights against the issuers. This portfolio requires active and specialized management, in contrast to the conveyancing trust that merely held ancestral land.”).

239 In *Fleener v. Omaha National Co.*, 267 N.W. 462 (Neb. 1936), for example, the Nebraska Supreme Court considered an exculpatory clause in a deed of trust. The plaintiffs argued that the clause should be invalid because the trustee, a bank, had drafted the instrument. The court disagreed, reasoning the issue would be relevant only if the trust were ambiguous. See *id.* at 464. Conversely, in *Jothann v. Irving Trust Co.*, 270 N.Y.S. 721 (Gen. Term 1934), a New York appellate court cast a skeptical eye on such clauses. The plaintiff, “an unmarried woman and a stranger in New York City, with little business experience,” was referred to a lawyer by a trust company. *Id.* at 722. The resulting instrument contained an exculpatory clause. Noting that the plaintiff did not enjoy independent representation and that the trust company’s explanation of the provision “was superficial and entirely inadequate,” the court declined to enforce it. *Id.* at 724–26.

240 RESTATEMENT (SECOND) OF TRUSTS § 222 cmt. d (1959).

durally unconscionable. The sixth factor, which weighs the term's "reasonableness," is a watered-down version of substantive unconscionability's benchmark of "gross unfairness."

Over time, these unconscionability-type factors became the fulcrum of the Restatement test. Courts focused largely on whether informational defects may have prevented the settlor from appreciating the exculpatory term's effect. For example, in *Rutanen v. Ballard*,<sup>241</sup> the Massachusetts Supreme Judicial Court voided such a clause, reasoning that "the settlor received no independent advice, . . . was seventy years old, had had a stroke and was 'in questionable health.'"<sup>242</sup> Conversely, in *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust*,<sup>243</sup> an Indiana appellate court rejected the claim that an exculpatory clause was invalid because the trustee had "buried" it in the instrument:

No party was naïve, unrepresented, or taken advantage of in this situation. Moreover, paragraph 10(b) is neither buried nor misleadingly labeled. Indeed, it takes up one-half of one page in a ten-page document. The language is signaled with a double-spaced lead-in indicating that the provisions to follow encompass all of the powers and rights of the trustee in administering the document.<sup>244</sup>

This emphasis on the identity of the parties and the physical appearance of the language is the functional equivalent of determining whether the instrument is procedurally unconscionable.

The Uniform Trust Code cements the similarity between the rules that govern trustee-drafted exculpatory clauses and the unconscionability doctrine. Section 1008(b) whittles down the relevant factors for assessing the validity of such terms to (1) the procedural issue of whether the "existence and contents" of the exculpatory provision "were adequately communicated to the settlor" and (2) the substantive issue of whether "the exculpatory term is fair under the circumstances."<sup>245</sup> Moreover, as John Langbein has noted, section 1008(b)'s purpose is to "prevent[] enforcement of a clause that the settlor probably did not intend or understand."<sup>246</sup> That is precisely the aim of the unconscionability doctrine.<sup>247</sup>

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241 678 N.E.2d 133 (Mass. 1997).

242 *Id.* at 141.

243 855 N.E.2d 592 (Ind. Ct. App. 2006).

244 *Id.* at 598.

245 UNIF. TRUST CODE § 1008(b) (amended 2005), 7C U.L.A. 654 (2006).

246 Langbein, *supra* note 6, at 1125.

247 Section 1008(b) reflects the modern trend of placing the burden on the fiduciary to prove disclosure and reasonableness. *Compare* *New England Trust Co. v. Paine*, 59 N.E.2d 263, 270 (Mass. 1945) (upholding a clause due to the absence of evidence

Despite the existence of section 1008(b), the unconscionability defense can still pay dividends in the realm of exculpatory clauses. First, it can explain a significant ambiguity in section 1008(b) and a longstanding puzzle in trust doctrine. Section 1008(b) carves out a categorical exception for settlors who were represented by “independent counsel”:

The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor’s attorney is considered the drafter of the instrument even if the attorney used the trustee’s form. Because the settlor’s attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor’s attorney is disclosure to the settlor.<sup>248</sup>

Of course, the modifier “independent” could set the minimal requirement that the lawyer not also be on the trustee’s payroll. Yet it could also mandate some degree of separation between the lawyer and the trustee—proof that the trustee neither recommended the lawyer nor provided a regular stream of rainmaking. By punting on whether to scrutinize an exculpatory clause when the settlor’s lawyer has ties to a corporate fiduciary, section 1008(b) continues the legacy of the first *Restatement of Trusts*, which expressly demurred on the issue<sup>249</sup> and the *Restatement (Second) of Trusts*, which ignored it.<sup>250</sup> However, if the rule’s purpose, as Langbein declares, is to rectify informational asymmetries,<sup>251</sup> then it is simply a codification of the

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that the trustee improperly inserted it), *and* *Marsman v. Nasca*, 573 N.E.2d 1025, 1033 (Mass. App. Ct. 1991) (upholding a clause because “there was no evidence that the insertion of the clause was an abuse of [the trustee’s] fiduciary relationship”), *with* *Rutanen v. Ballard*, 678 N.E.2d 133, 141 (Mass. 1997) (“The practice of ‘casually dismiss[ing] as mere boilerplate an exculpatory provision . . . is unacceptable.’” (quoting AUGUSTUS PEABODY LORING, *A TRUSTEE’S HANDBOOK* § 7.2.6 (7th ed. 1994))), *In re* *Estate of Kramer*, No. 92-2347, 2003 WL 22889500, at \*5 (Pa. Ct. Com. Pl., May 15, 2003) (“[T]he scrivener/fiduciary has the burden of establishing that the client realized the implications of such a clause.”), *and* *Petty v. Privette*, 818 S.W.2d 743, 748 (Tenn. Ct. App. 1989) (placing the burden on the trustee). In this way, section 1008(b) is more protective of settlor intent than the unconscionability defense, which places the burden on the party seeking invalidation of the clause.

248 UNIF. TRUST CODE § 1008(b) cmt. (amended 2005).

249 See RESTATEMENT OF TRUSTS § 222 cmt. d (1935) (“*Caveat*: The authorities do not justify any statement on the question to what extent a provision relieving the trustee of liability is ineffective in the case of a corporate trustee where the trust instrument is drawn by an attorney regularly retained by the trustee or an attorney recommended by the trustee.”).

250 See RESTATEMENT (SECOND) OF TRUSTS § 222 cmt. d (1959) (eliminating any language about attorneys with connections to trustees).

251 Langbein, *supra* note 6, at 1125–26.



unconscionability principle. Construed against that backdrop, section 1008(b) should probe the link between a settlor's lawyer and a corporate trustee for "independence." As I have argued above, a settlor will probably fail to grasp the import of an exculpatory clause unless her lawyer calls her attention to it and its possible effects. A lawyer who is beholden to an institutional trustee for a steady revenue stream will not necessarily do so. Thus, the values behind the unconscionability doctrine militate against making settlor representation dispositive in all cases.

However, the unconscionability doctrine could be most useful outside of the narrow contours of section 1008(b). Even when exculpatory provisions are not inserted by a corporate trustee, they present, in the words of one court, a "menace not only to the rights of a surviving spouse but of the children and other dependents of the [settlor] and of all persons interested in estates."<sup>252</sup> Yet trust law relies on the orthodox defenses of mistake and public policy to combat informational defects in these terms. These rules lack the flexibility of the unconscionability doctrine's hybrid procedural/substantive approach and are relics of a time when informational flaws were uncommon in instruments. Because the unconscionability doctrine allows courts to void exculpatory terms that depart from an informed settlor's *ex ante* intent, it stands for the common sense proposition that drastic provisions should be unenforceable if there is reason to believe that the settlor did not understand their drastic effects.

Similarly, unconscionability could fill a gaping void outside the context of exculpatory clauses. There are many other ways for a trustee to aggrandize its power at the expense of the settlor or the beneficiaries. In particular, terms that allow the trustee to use trust funds to defend itself in litigation or entrench itself against being replaced can have serious ramifications. Notably, though, section 1008(b) does not apply to these clauses—even when they are drafted by the trustee. It is unclear why trust law subjects trustee-inserted exculpatory terms to heightened scrutiny but not other trustee-inserted, pro-trustee terms. Indeed, applying the unconscionability doctrine to these clauses will have the double-barreled benefit of contract law unconscionability—not only will it align the trust with the settlor's true intent, but it will penalize drafter overreaching. Thus, the unconscionability defense could better equip this area of trust law to deal with the realities of contemporary trust practice.

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252 *In re Estate of Stralem*, 695 N.Y.S.2d 274, 278 (Sur. Ct. 1999).

### B. *No-Contest Clauses*

The unconscionability rule could also prove helpful in the misty arena of the no-contest clause. No-contest clauses, also known as *in terrorem* clauses, impose forfeitures on beneficiaries who seek specific forms of legal redress.<sup>253</sup> Most often, no-contest clauses require beneficiaries not to dispute the validity of an instrument. Nevertheless, even the law governing this most basic species of no-contest clause is a patchwork of inconsistent approaches and decisions. Jurisdictions alternatively enforce no-contest clauses in most circumstances,<sup>254</sup> refuse to enforce them at all,<sup>255</sup> or enforce them only when a beneficiary lacks “probable cause” for the lawsuit.<sup>256</sup> The primary difficulty with formulating an appropriate rule is that no-contest clauses pit critical values against each other. On the one hand, settlors have the right to condition gifts and enjoy peace of mind that their final wishes will be carried out. On the other hand, individuals should be able to

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253 See, e.g., Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries With In Terrorem Clauses*, 51 SMU L. REV. 225, 227 (1998) (“Under a typical *in terrorem* provision, the beneficiary is presented with a choice of either (1) accepting the gift under the will or trust, or (2) contesting the instrument with the hope of upsetting the testator’s or settlor’s intended disposition . . .”). No-contest clauses date back to the seventeenth century. See, e.g., Anonymous, 86 Eng. Rep. 910 (1674) (enforcing clause that provided, “[i]f A. molest B. by suit or otherwise, he shall lose what is devised to him, and it shall go to B”). Yet they have long sparked “a confusion of judicial thought altogether out of proportion to the apparent simplicity of the issues involved.” Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 629 (1994) (quoting Olin L. Browder, Jr., *Testamentary Conditions Against Contest Re-Examined*, 49 COLUM. L. REV. 320, 320 (1949)).

254 See *Tunstall v. Wells*, 50 Cal. Rptr. 3d 468, 479 (Ct. App. 2006) (“California traditionally has been among the states that hold no contest clauses valid regardless of whether there is probable cause or good faith to challenge them.”); *Ackerman v. Genevieve Ackerman Family Trust*, 908 A.2d 1200, 1202 (D.C. 2006) (“[T]here is no exception to enforcement of a ‘no contest’ clause even when litigation is brought in good faith and with probable cause.”).

255 See FLA. STAT. ANN. § 732.517 (West 2008) (“A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable.”); IND. CODE ANN. § 29-1-6-2 (West 2008) (“[S]uch provision or provisions shall be void and of no force or effect.”).

256 See ARIZ. REV. STAT. ANN. § 14-2517 (2005); *In re Estate of Pepler*, 971 P.2d 694, 697 (Colo. App. 1998); *Hannam v. Brown*, 956 P.2d 794, 798 (Nev. 1998) (“[P]ublic policy favors recognition of the implied exception to no-contest clauses for good faith challenges based on probable cause.”); UNIF. PROB. CODE § 3-905 (1983); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 9.1 (1983); cf. CAL. PROB. CODE § 21306 (West 2008) (recognizing a limited probable cause exception for claims of forgery, revocation, or transfer to a disqualified person).

access courts freely, and society has a stake in exposing and preventing illegal conduct.

An additional complexity is that the scope of prohibited conduct under a no-contest clause is often unclear. For example, a common no-contest clause forbids not just frontal challenges to the trust's validity under the doctrines of incapacity and undue influence, but also attempts to "'otherwise . . . set aside this [t]rust or any of its provisions'."<sup>257</sup> Because the broad phrase "'set aside . . . provisions'" sweeps within its ambit any action that thwarts the settlor's intent, courts have applied the clause to a surviving spouse's effort to enforce her community property rights under ERISA,<sup>258</sup> a petition to remove a fiduciary,<sup>259</sup> a breach of contract claim,<sup>260</sup> and a frivolous objection to an accounting.<sup>261</sup>

Because no-contest clauses can thus chill a range of potential litigation, courts must differentiate between permissible terms and those that go too far. To draw this boundary, courts employ the violation of public policy defense.<sup>262</sup> But because forceful arguments lurk on both sides of the policy ledger, it cannot provide a clear blueprint for borderline cases. Consider two sentences from a recent California Supreme Court opinion:

No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator. Because a no contest clause results in a forfeiture, however, a court is required to strictly construe it and may not extend it beyond what was plainly the testator's intent.<sup>263</sup>

For courts, settlors, and estate planners, being instructed that no-contest terms are both "favored by . . . public polic[y]" and yet must be "strictly construe[d]" is not helpful. Indeed, it results in ad hoc balancing that makes enforceability issues difficult to predict.

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257 *Burch v. George*, 866 P.2d 92, 100 (Cal. 1994) (en banc) (emphasis removed) (quoting a trust provision).

258 *See id.*

259 *See In re Estate of Kubick*, 513 P.2d 76, 79–80 (Wash. Ct. App. 1973).

260 *See Zwirn v. Schweizer*, 36 Cal. Rptr. 3d 527, 531–32 (Ct. App. 2005).

261 *See Estate of Ferber*, 77 Cal. Rptr. 2d 774, 779–81 (Ct. App. 1998) (dictum).

262 *See, e.g., Estate of Wojtalewicz v. Woitel*, 418 N.E.2d 418, 420–21 (Ill. App. Ct. 1981) (striking down a clause that attempted to prevent beneficiaries from objecting to accounting); *In re Andrus' Will*, 281 N.Y.S. 831, 851–52 (Sur. Ct. 1935) (invalidating a clause that sought blanket approval of a fiduciary's conduct).

263 *Burch v. George*, 866 P.2d 92, 96 (Cal. 1994) (citations omitted).

A second drawback is that the public policy rule is entirely substantive. For instance, in *Estate of Ferber*,<sup>264</sup> the testator had been embroiled in two decades of bitter litigation over his father's estate. When the time came for him to make his own will, he instructed his lawyer to include "the strongest possible no contest clause."<sup>265</sup> The resulting provision stripped gifts from beneficiaries who unsuccessfully tried to remove a fiduciary. A California appellate court balanced the "chilling effect on beneficiaries" with the powerful "public policy in favor of the validity of no contest clauses," and determined that the provision was only valid if applied to frivolous claims.<sup>266</sup> Tellingly, however, the testator's understandable aversion to litigation played no role in the analysis.

Making the unconscionability doctrine the primary means of regulating no-contest clauses would interject procedural considerations into the analysis. To be sure, the public policy defense could still effect a bright-line proscription against no-contest terms that purport to apply to certain causes of action. For example, the rule could nullify no-contest clauses that apply to breach of trust allegations and thus require unwavering allegiance to the trustee's decisions.<sup>267</sup> For marginal issues, though, expanding the terrain of judicial inquiry to include a procedural component would sharpen the contours of what is permissible. Courts might be more willing to uphold no-contest clauses such as the one in *Ferber* in light of the evidence that it reflected the testator's strongly felt desires. Unlike the current law, which turns decisions about a term's enforceability into sweeping pronouncements, the unconscionability defense is case-specific. The clause in *Ferber* might be enforceable on that case's unique facts, but invalid if contained in a boilerplate mill trust.

In addition, as in other contexts, the unconscionability doctrine could identify and void no-contest terms that are inefficient and autonomy-thwarting. Current doctrine is poorly calibrated to serve these ends. For example, a no-contest clause in a mill trust would likely pass muster under the public policy doctrine, but likely would not reflect the settlor's informed ex ante preferences. In fact, because the settlor would likely be unaware of the clause, it would discourage meritorious litigation but add none of the values associated with permitting the exercise of testamentary freedom in return. The unconscionability doctrine would give courts a means to police these terms.

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264 77 Cal. Rptr. 2d 774, 775 (Ct. App. 1998) (en banc).

265 *Id.* at 775.

266 *Id.* at 779–81.

267 *See supra* note 262.

### C. Arbitration Clauses

Finally, the unconscionability defense could be useful as courts struggle with how to treat arbitration clauses in trusts. In contract law, issues relating to the enforceability of arbitration clauses—especially those imposed by firms on consumers—are controversial.<sup>268</sup> The difficulty stems from the U.S. Supreme Court’s expansive view of the Federal Arbitration Act (FAA).<sup>269</sup> The FAA requires courts to enforce agreements to arbitrate, subject only to common law contract defenses:

[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>270</sup>

The Court has noted that the FAA expresses a “‘liberal federal policy favoring arbitration agreements’”<sup>271</sup> and preempts contrary state law.<sup>272</sup> This deference toward arbitration clauses has given parties license to customize the rules that will govern their dispute in arbitration.<sup>273</sup> For example, parties have drafted—and courts have upheld—arbitration provisions that waive the right to bring a class action,<sup>274</sup>

268 See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005) (describing the debate).

269 9 U.S.C. §§ 1–16 (2006).

270 *Id.* § 2.

271 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

272 See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (“We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.”).

273 See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 332–33 (“[T]he Court appears to be transforming a dispute-resolving process traditionally regarded in this country as nonlegal into a process more nearly resembling that of a court of law.”).

274 See *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (upholding an arbitration agreement provision barring class arbitration); *Strand v. U.S. Bank Nat’l Ass’n*, 693 N.W.2d 918, 926 (N.D. 2005) (same); *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 714 (Tenn. Ct. App. 2006) (same). The class action waiver has generated a firestorm of criticism. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 429 (2005) (“The question on the table here—whether to enforce collective action waivers—totally and inevitably collapses into the question of whether class actions are a good thing or a bad thing.”); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) (arguing that the controversy will soon become moot as parties will realize that class actions are best handled through litigation).

reduce the length of the statute of limitations,<sup>275</sup> and proscribe the recovery of attorney's fees.<sup>276</sup>

Yet at the same time, arbitration is superior to litigation in many ways. It is faster,<sup>277</sup> cheaper,<sup>278</sup> and confidential.<sup>279</sup> These virtues may be particularly appealing to settlors, who have strong interests in streamlining estate-depleting litigation and preventing the dissemination of private information.<sup>280</sup>

However, the only cases to address the issue have held that arbitration clauses in trusts are unenforceable. In *Schoneberger v. Oelze*,<sup>281</sup> the Arizona court of appeals concluded that a trust did not fall within a state statute requiring the enforcement of an arbitration provision in a "written contract."<sup>282</sup> The court reasoned that while "[a]rbitration rests on an exchange of promises[,] . . . [a] trust merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument, relevant statutes and common

275 See *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282–83 (4th Cir. 2007) (upholding one-year statute of limitations in antitrust claims).

276 See *Faber v. Menard, Inc.*, 367 F.3d 1048, 1055 (8th Cir. 2004) (enforcing a waiver of the right to recover attorney's fees under the Age Discrimination in Employment Act).

277 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (heralding "the simplicity, informality, and expedition of arbitration").

278 See *PaineWebber Inc. v. Farnam*, 843 F.2d 1050, 1052 (7th Cir. 1988) (calling arbitration an "inexpensive alternative to litigation").

279 See *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.").

280 See Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351, 352 (2007) ("[T]he grantor can shelter beneficiaries from the stress of litigation while protecting private and potentially embarrassing information from public disclosure; trustees can protect trust assets from depletion by litigation costs while limiting personal liability; and beneficiaries, particularly those with limited funds available for litigation, can ensure quick and lower cost resolutions."); Ronald R. Volkmer, *Arbitration Clauses in Trust Agreements*, EST. PLAN., Jan. 2005, at 55, 55. ("Given the perils (and costs) of litigation, some drafters of trusts may be inclined to include in the trust instrument a provision requiring arbitration of any future disputes."); see also E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 314 (1999) (arguing that arbitration may provide a refuge for cultural minorities, whose testamentary wishes are thwarted by courts and juries imposing hegemonic norms).

281 96 P.3d 1078 (Ariz. Ct. App. 2004).

282 *Id.* at 1080 (quoting ARIZ. REV. STAT. § 12-1501 (2003)).

law, holds that interest for the beneficiary.”<sup>283</sup> Similarly, in *In re Calomiris*,<sup>284</sup> an appellate court in the District of Columbia relied heavily on *Schoneberger* and reached the same result under its local arbitration statute.<sup>285</sup>

These cases make sense as matters of statutory interpretation: neither legislature likely meant the word “contract” to include trusts. Yet one problem with *Schoneberger* and *Calomiris* is that neither considered whether settlors have the inherent ability to compel arbitration even without express statutory authority. After all, through no-contest clauses, settlors can force beneficiaries to choose between bringing a claim and accepting a bequest. As a result, settlors would also seem to enjoy the lesser power to force beneficiaries to choose between submitting claims to arbitration and accepting a bequest.<sup>286</sup> In any event, some jurisdictions are considering legislation that would place arbitration clauses in trusts on equal footing with arbitration clauses in contracts.<sup>287</sup>

If courts do indeed begin to enforce arbitration clauses in trusts, they will need a means to protect against overreaching and remedy stripping. As noted, the FAA and allied state statutes make arbitration clauses enforceable unless a common law contract defense applies.<sup>288</sup> Thus, in contract law, the unconscionability defense has become the main check against remedy-stripping arbitration clauses.<sup>289</sup> But since trust law does not acknowledge the rule, allowing settlors to mandate arbitration would give them a power against which there is no effec-

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283 *Id.* at 1083.

284 894 A.2d 408 (D.C. 2006).

285 *See id.* at 409–10.

286 Such a clause might expressly put beneficiaries to an election between arbitrating disputes or taking nothing. Apparently, the clauses in *Schoneberger* and *Calomiris* did not do so and instead merely purported to require arbitration. *See Schoneberger*, 96 P.3d at 1080; *Calomiris*, 894 A.2d at 408–09.

287 *See Bruyere & Marino*, *supra* note 280, at 364.

288 *See supra* note 270 and accompanying text.

289 For a sampling of state supreme courts recently holding arbitration clauses unconscionable, see *Discover Bank v. Superior Court*, 113 P.3d 1100, 1116–17 (Cal. 2005); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 264–66 (Ill. 2006); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 99 (N.J. 2006); and *Scott v. Cingular Wireless*, 161 P.3d 1000, 1003 (Wash. 2007) (en banc). For articles analyzing this trend, see Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469; Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004).

tive safeguard.<sup>290</sup> Through arbitration clauses, they could significantly rewrite the rules of trust litigation.

A trust law unconscionability doctrine would thus have two benefits. First, its very existence could make courts more sanguine about the concept of arbitration clauses in trusts. Exactly as in contract law, the unconscionability rule could strike down overbearing arbitration clauses. With this protection in place, courts might be more willing to allow settlors to reap the many rewards of mandating arbitration. Second, as always, the unconscionability doctrine would provide courts with a means to make sure the clause accurately reflects the settlor's informed preferences.

#### CONCLUSION

The time has come for trust law to adopt the unconscionability doctrine. In contract law, the unconscionability doctrine ensures that a clause does not sharply differ from a party's desires because of informational defects. Because enforcing such a term will be inefficient and frustrate the party's autonomy, this purpose is vital to the health and coherence of the body of law.

The unconscionability doctrine could serve the same purpose in trust law. Although attorney representation and settlors' ability to amend their instruments once made the rule unnecessary, fundamental changes in the process by which trusts are created and the nature of their terms have made informational defects more common. By identifying and striking clauses to which an informed settlor would not have agreed, the unconscionability doctrine would protect trust law's animating values.

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<sup>290</sup> Although courts could apply the public policy defense, it would suffer from many of the same shortcomings as it does in the no contest clause context. *See supra* notes 262–63 and accompanying text.