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The Exaggerated Rumors of the Death of Unconscionability

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Babette Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, __ Md. L. Rev. __ (forthcoming, 2021), available at [SSRN](#).

Professor Babette Boliek makes two important contributions in *Upgrading Unconscionability: A Common Law Ally for a Digital World* before even reaching the article's normative argument.

First, the article challenges what has become a surprisingly prevalent bit of supposed wisdom among commentators on contract law: that the doctrine of unconscionability barely exists and that nobody should take it seriously—or, as Professor Boliek puts it, that “the application of unconscionability is so rare that it is the last refuge of fools.” The pessimistic view of unconscionability's role may confuse a paucity of *rules* about unconscionability with a paucity of *cases* (or more generally with a lack of importance of the doctrine). It is true that unconscionability is a vague doctrine. Even its statutory formulations in US law tend not to supply clear definitions; for example, the Uniform Commercial Code provides general rules that let courts respond to “unconscionable” contracts (see [U.C.C. § 2-302](#)), but never defines the term. But while that may make it hard to apply unconscionability on a Contracts exam, it doesn't mean the doctrine of unconscionability isn't important. Indeed, if the purpose of the rule is simply to give courts flexibility to prevent the worst abuses of contract-related processes or the most oppressive contracting outcomes, the doctrine needn't be specific, and pinning it down too tightly may limit the doctrine's ability to respond flexibly to abuses.

Professor Boliek challenges the supposed withering of unconscionability doctrine by investigating real cases; as she points out, whether the doctrine of unconscionability is really “the last refuge of fools” is, “of course, an empirical question.” Professor Boliek's investigation (which I reviewed only in draft form, so I do not comment here on the particulars of the empirics) finds that litigants do often raise arguments about unconscionability—and they succeed in roughly a fifth or a quarter of cases, depending on the type of argument. The precise numbers are not as important as the general observation that lawyers do routinely raise arguments about unconscionability and that those arguments are not destined to fail.

Second, Professor Boliek's investigation and analysis divide cases based on whether the unconscionability argument is directed at an arbitration clause or not. Most or all analysis of form contracts should draw the same division. In discussions of form contracts generally, it's become too easy to mistake a pattern of decisions that apply the Federal Arbitration Act as if it suggests that form terms generally are enforceable. Arbitration clauses are distinct both because they're protected by federal statute and also, more generally, because they're a known type of clause—standard and often predictable in their own way, aided by at least the formal concept that they vary only procedure rather than substantive rights, and plausibly an appropriate part of what Karl Llewellyn [called](#) “essentially private self-government in the lesser transactions of life...— if only [businesses] and all their lawyers would be reasonable.” Enforcing an arbitration clause is very different from enforcing, say, a [clause](#) that charges consumers money when they post negative online reviews of products or services. It's not clear that idiosyncratic clauses in forms should even get off the ground as “contractual” in the first place and thus even require an analysis of unconscionability before striking them down: they're not agreed to or constrained by any normal process of bargaining, they're certainly not commonly read, and many probably wouldn't be accepted if consumers were aware of them (see [Restatement \(Second\) of Contracts § 211](#)). But in that analysis, and in applying the doctrine of unconscionability as a final guardrail to prevent their enforcement, distinguishing clauses based on their content—and starting with the distinction between purely procedural clauses (involving arbitration and forum selection) and others—is a wise step.

Professor Boliek’s normative discussion favors statutory responses to particular types of concerns about form contracts—that is, outright prohibition of certain problematic types of terms—as is commonplace in other jurisdictions. That approach seems to have worked well in the jurisdictions that have used it. Online commerce hasn’t ground to a halt in Europe, for example; familiar commercial flexibility isn’t destroyed because sellers can’t unilaterally impose terms on consumers under the banner of private ordering. In an ideal world we probably wouldn’t need a statutory response, but identifying particular abuses and trying to prevent them with legislative or administrative processes is probably, in the real world, a step in the right direction.

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