

HOUSTON LAW REVIEW

ADDRESS

BAMBI MEETS GODZILLA: REFLECTIONS ON CONTRACTS SCHOLARSHIP AND TEACHING VS. STATE UNFAIR AND DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION STATUTES

*Stewart Macaulay**

Contracts teachers have paid little attention to unfair and deceptive trade practices acts and consumer protection statutes. Wolfgang Friedmann saw traditional contract law as the home of free market values.¹ He pointed out, however, that statutes and

* Malcolm Pitman Sharp Professor University of Wisconsin Law School. This paper is based on a talk given at the Association of American Law Schools meeting in Miami, Florida, January 9, 1988. Professor Peter Linzer of the University of Houston Law Center encouraged me to translate the notes from my speech into a manuscript; without his encouragement this would not have been done. Dr. Jacqueline Macaulay took time from her law practice to edit it. My colleagues John Kidwell and Bill Whitford offered valuable suggestions. They all greatly improved the document. I did not take all their good advice, however, and, as always, all errors remain mine alone.

1. Ian Macneil reminded me of Friedmann's comment. See Macneil, Book Review, 14 J. L. & Soc'y 373, 373 (1987). Friedmann's ideas appear in *LAW IN A CHANGING SOCIETY* 119 (2d ed. 1972).

administrative regulations were shifting contract values to those of the welfare state.² Lawrence Friedman argued that classic contract law was the law of left-overs—areas too new or too unimportant to warrant their own statute.³ These insights, however, seldom affect contracts teaching or research. Academic contracts celebrates free market capitalism; the few exceptions serve to make this institution seem wonderful or at least tolerable. In this picture, capitalist contract doctrine plays Godzilla, the monster that overwhelms the Bambi of statutes, which, at best, creates minor and trivial exceptions to the general law of contract.⁴ The roles are no longer so clear, however, when we walk outside the doors of the academy and see contract in society.

First, I will look at some of our academic practice. Then I will review state unfair and deceptive trade practices statutes which may invade much of contracts' turf. Finally, I will offer some explanations for academic inattention to these statutes and draw a few conclusions.

I. PERIPHERIES NIBBLE AWAY AT CORES

Duncan Kennedy describes academic contract study as core and periphery.⁵ Our tradition offers a core of doctrine which seems

2. W. FRIEDMAN, *supra* note 1, at 129-57.

3. L. FRIEDMAN, *CONTRACT LAW IN AMERICA* viii, 23-29 (1965). Friedman further argues: [T]he most dramatic changes touching the significance of contract law in modern life also came about, not through internal developments in contract law, but through developments in public policy which systematically robbed [the] contract of its subject matter . . . Carried into modern times by treatise writers and the Restatements, the common-law approach to law in the schools and in legal literature at its worst could be compared to a zoology course which confined its study to dodos and unicorns, to beasts rare or long dead and beasts that never lived.

Id. at 24-25.

4. See Macneil, *Contractland Invaded Again: A Comment on Doctrinal Writing and Shell's Ethical Standards*, 82 NW. U.L. REV. 1195, 1196 (analogizing statutes to lessor and greater fierce tiger cats).

5. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737 (1976). Professor Kennedy comments on the indeterminacy we find in modern law:

One way of conceiving of the transition from Classical to modern legal thought is through the imagery of core and periphery. Classical individualism dealt with the issues of community vs. autonomy, regulation vs. facilitation and paternalism vs. self-determination by affirming the existence of a core of legal freedom which was equated with firm adherence to autonomy, facilitation and self-determination. The existence of countertendencies was acknowledged, but in a backhanded way. By its "very nature," freedom must have limits; these could be

hard and rational. However, there is also a periphery of soft exceptions which make minor corrections so we may achieve justice in unusual situations. Kennedy argues that, in practice, the periphery swallows the core.⁶ As exceptions expand, the rule becomes little more than "it depends."⁷ For example, the apparently soft exceptions of promissory estoppel, waiver, and numerous sections of the Uniform Commercial Code⁸ (U.C.C.) have undercut much of the hard core of Professor Williston's consideration doctrine.⁹ Matters can become even more incoherent when traditionalist judges counterattack what they see as peripheral, if not eccentric, positions. Professor Llewellyn, in the U.C.C., told judges to search for substantive justice using the grand style of reasoning.¹⁰ However, judges who resist Llewellyn's innovative approach to requirements contracts and the parol evidence rule can circumvent these U.C.C. provisions by a strict reading or misreading of the Code's Statute of Frauds.¹¹

Academic contract is not an empirical study. We have no systematic way of discovering which doctrines are being used, abused,

derived as implications from that nature; and they would then constitute a periphery of exceptions to the core doctrines.

What distinguishes the modern situation is the breakdown of the conceptual boundary between the core and the periphery, so that all the conflicting positions are at least potentially relevant to all issues. The Classical concepts oriented us to one ethos or the other—to core or periphery—and then permitted consistent argument within that point of view, with a few hard cases occurring at the borderline. Now, each of the conflicting visions claims universal relevance, but is unable to establish hegemony anywhere.

Id.

6. *Id.*

7. *Id.* at 1751-62. Kennedy argues that we typically face an established rule and an ever-expanding cluster of exceptions. Thus, judges must decide whether to apply the rule or an exception or to fashion still a further exception. There is little in the rule system to govern this choice. Moreover, lawyers must predict judicial action, but they must look outside the rule system to predict with any accuracy.

8. See, e.g., U.C.C. § 2-209(1)-(4) (1987) (concerning modifications and waivers); *id.* § 2-306 (concerning output requirements and exclusive dealings).

9. For Williston's classic view of consideration, see 1 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 103 (3d ed. 1957).

10. See Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 488, 492-503 (1987). Llewellyn's advocacy of grand-style judging appears throughout his book, *THE COMMON LAW TRADITION—DECIDING APPEALS* 213-87, 401-03 (1960).

11. See *W. H. Barber Co. v. McNamara-Vivant Contracting Co.*, 293 N.W.2d 351, 353-58 (Minn. 1979); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash. 2d 291, 635 P.2d 103, 105-07 (1981); Bruckel, *The Weed and the Web: Section 2-201's Corruption of the U.C.C.'s Substantive Provisions—The Quantity Problem*, 1983 U. ILL. L. REV. 811, 811.

or forgotten. We miss new doctrines that displace old ones. We may not see that a peripheral rule has almost destroyed one of our core concepts. Or, worse yet, our theory may undervalue a peripheral exception and confine it to a small place.¹² Frequently, we overlook statutes that eat away the foundations of our conventional wisdom.

A. Core

Long ago in law school, I learned that courts said that they were not interested in the fairness of contract negotiations. A deal was a deal, and there was nothing wrong with driving a hard bargain. Of course, parties could assert fraud and duress, but few people could prove they met the requirements of these defenses. Fraud had to be proved by clear and convincing evidence. People had a duty to take care of themselves. They could not rely on mere seller's talk or opinions. I thought as a student that the policy of the common law was to encourage fraud and paranoia—students of my generation did not have the advantage of the revelations of law and economics.

B. Periphery

1. *Unconscionability*. Then came the reformist 1960s. *Williams v. Walker-Thomas Furniture Co.*¹³ became the contract teachers' morality play. Evil Walker-Thomas preyed on Mrs. Williams, a poor welfare mother. Walker-Thomas had rigged matters so that if she missed a payment on one item, they could clean out her apartment and take away everything she had ever bought from them.¹⁴ The trial court wanted to help Mrs. Williams, but the judge thought his hands were tied.¹⁵ The Walker-Thomas transaction took place before the U.C.C. went into effect in the District of Columbia.¹⁶ As a result, the court could not find the cross-collateral clause unconscionable under Section 2-302.¹⁷ A legal services

12. Macneil, *supra* note 4, at 1196.

13. 350 F.2d 445 (D.C. Cir. 1965).

14. See *id.* at 447; see also Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1480 (1967).

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

16. *Id.*

17. See *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964).

office appealed the case.¹⁸ Judge Skelly Wright rode to the rescue.¹⁹ Much to our amazement, he told us that unconscionability always had been part of the common law in the District.²⁰ Before this decision, most of us thought that unconscionability was only a limitation on specific performance.²¹ The *denouement*? As usual, the case was remanded for findings of fact and then settled.²²

The *Williams* decision quickly became a favorite of law review and casebook authors. It still is.²³ For example, my survey of fourteen casebooks published since 1980 shows that nearly everyone includes it. Originally, the *Williams* case showed how a progressive judge could use the U.C.C. to fashion weapons for legal services programs in the War on Poverty. Students eager to battle for the poor might be reassured that contracts law could be part of the solution rather than part of the problem.

Today, if we explore appellate cases dealing with Section 2-302 via a LEXIS search, we find that individuals such as Mrs. Williams have almost disappeared from judicial opinions.²⁴ Yet *Wil-*

18. Skilton & Helstad, *supra* note 14, at 1480.

19. *Williams*, 350 F.2d at 447.

20. *Id.* at 448-49.

21. See *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

22. The Chief Staff Attorney of the District of Columbia Legal Assistance Office said that Walker-Thomas dropped all claims against Mrs. Williams and paid her the reasonable value of the used items it had taken from her. See Dostert, *Appellate Restatement of Unconscionability: Civil Legal Aid at Work*, 54 A.B.A. J. 1183, 1186 (1968).

23. Refer to note 25 *infra* for examples.

24. Business people repeatedly assert unconscionability. Cf. Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U.L. REV. 1198, 1208-09, 1228-30 (1988). Most lose. Perhaps the farmer faced with what David Stockman called disinvestment is the Mrs. Williams of the 1980s. For successful claims of unconscionability brought by farmers see, e.g., *Langemeier v. National Oats Co.*, 775 F.2d 975, 977-78 (8th Cir. 1985) (holding that a contract provision allowing a buyer to reject popcorn damaged by a freeze was unconscionable because the buyer, also the supplier of the seed, failed to provide the grower with adequate growing and harvesting information); *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1571 (D. Kan. 1986) ("This court is surprised that a reputable company such as Deere would stoop to this."); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 485-93, 186 Cal. Rptr. 114, 129 (1982) ("No experienced farmer would spend \$32,000 for equipment which could not process his tomatoes before they rot and no fair and honest merchant would sell such equipment with representations negated in its own sales contract.") (Stanforth, J., concurring); *Latimer v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 386 N.W.2d 618, 625 (1986) (holding that, where farmer owed \$1486.66 for defective seed and incurred \$29,160 in damages, clause limiting seller's liability to purchase price was unconscionable). National companies which use limitation of liability clauses in their contracts with farmers may expose themselves to a successful unconscionability claim. For example, in *Martin v. Joseph Harris Co.*, 767 F.2d 296, 299-302 (6th Cir. 1985), Judge Merritt stated:

[H]ere, where the technical, legalistic disclaimer failed to inform the farmers

liams v. Walker-Thomas Furniture Co. remains in the casebooks²⁵ and law reviews.²⁶ Why? Casebook notes and questions, and a few articles suggest that *Williams* now plays a very different role in the drama of this era.²⁷ Writers see the case as an expression of knee-jerk liberalism.²⁸ Students innocently follow the grand tradition of hissing the villain and cheering the hero. Contracts professors, then, use the case to trap them. We hope that our privileged students have some empathy for Mrs. Williams, but once the class accepts Judge Wright's decision, the professor moves in. On one hand, we may be hurting poor welfare mothers in the name of helping them. Welfare mothers are poor credit risks, and if they cannot make contracts that bind, they will not be able to make contracts at all.²⁹ Walker-Thomas demanded cross-collateral clauses to minimize its losses from defaulting debtors. These clauses must be necessary. Otherwise, competitors, seeking to make sales, would offer goods to welfare mothers on a different basis. Mrs. Williams was able to share in the consumer society that

as to the risk they were bearing, and where the seed company for the first time failed to take precautions against the risk by hot water treating the seeds, the key element of accurate and roughly equal knowledge regarding the meaning of the contract was absent.

Id. at 304. (J. Merritt, concurring).

25. See, e.g., KNAPP & CRYSTAL, PROBLEMS IN CONTRACT LAW 546-50 (1987) (case included in section on unconscionability); DAWSON & HARVEY, CASES AND COMMENT ON CONTRACTS 678-82 (5th ed. 1987) (case included in section entitled "Inequality in the Exchange"); HAMILTON, RAU & WEINTRAUB, CONTRACTS 689-90 (1984) (*Williams* cited as a note case in chapter entitled "Policing the Bargaining Process"); FARNSWORTH & YOUNG, CONTRACTS 504-10 (1980) (case included in section entitled "Unconscionability and Problems of Adhesion Contracts").

26. See, e.g., Levin & McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 MCGILL L.J. 24, 74-78 (1983) (arguing that contract law cannot be expected to provide a panacea for social and economic inequalities, but it can provide some measure of equity between the parties if obligers are required to understand their commitments); Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 536 (1988) (citing *Williams* as an example of judicial paternalism).

27. My favorite attack on unconscionability is Leff, *Thomist Unconscionability*, 4 CAN. BUS. L.J. 424 (1979) (suggesting that legal scholars and reformers are fascinated and tormented by unconscionability because they want simultaneously to protect market efficiency and to achieve nonexploitative results but they find that they cannot have both at the same time).

28. See, e.g., Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 536 (1988) ("[T]he opinion reveals a paternalist readiness to invalidate a credit arrangement that a consumer was willing to enter in order to get the goods she wanted . . .").

29. *But cf.* Judge Posner's opinion in *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) ("If contractual protections are illusory, people will be reluctant to make contracts.").

she saw on her television set only because Walker-Thomas found a way to profit by supplying these goods to her. If we regulate too much, we risk taking away her chance to improve her situation, if only a little. Efficiency and the rule of law yield a just society, and Yuppie students can relax and seek big salaries because this is the best of all possible worlds.³⁰

Once many students begin to nod in agreement, the professor can bound to the opposite side of the ideological street and declare that *Williams* is wrong because it is little more than a gesture when so much more is needed. Judge Wright can be seen as a mad field marshal leading a column of cardboard tanks against an enemy with real weapons. In spite of her great victory, nothing really changed for Mrs. Williams. She was not likely to find buying appliances at reasonable prices on reasonable terms much easier. Judge Wright could not order VISA or Sears to issue a credit card to her. After the decision, Mrs. Williams was still a welfare mother living in the inner city.³¹ The case did little to open opportunities for her or her children. The opinion is largely liberal symbolism, blinding us to the structural changes needed to attack poverty. Liberal students usually become uneasy when they recognize that marginal reform is not enough.

Indeed, if the government wanted to provide appliances to the poor, it could do it far more directly than by funding a legal services program to assert U.C.C. § 2-302. Those in the military or in diplomatic service overseas can buy goods at a post exchange (PX). Why not establish PXs for those on welfare, selling goods at fair prices on fair terms? The government could use its buying power to shop for higher quality at lower prices and share this gain with Mrs. Williams and others in her position. (By this time the liberal students are squirming and the conservatives are anguished. The professor, of course, continues to pour gasoline on the fire.)

30. *But cf.* Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, in NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 379 (L. Nader ed. 1980). A full understanding of the *Williams* case requires reading Greenberg's account of the business practices of Walker-Thomas. Greenberg details how Walker-Thomas' business practices violated the assumptions created by a long-term continuing relationship, labeled by one author as a fictive friendship. *Id.* at 379-80, 381-86. See Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & Soc'y. Rev. 719, 727-29 (1973).

31. My colleague Professor Daniel Bernstine and law students at Howard University attempted to locate Mrs. Williams. Unfortunately, they could not trace her.

What about the problems of paternalism?³² If Mrs. Williams can learn to cope with Walker-Thomas, she can cope better with the rest of her circumstances. She may be empowered to better her situation. Indeed, the government PX scheme or anything similar is likely to offer what experts or bureaucrats decide she should want rather than what she does want. Paternalism involves treating Mrs. Williams as less than a competent person.³³ All we know is that she is poor and uneducated; that does not mean that she does not know her own self-interest better than liberal reformers or social workers hampered by bureaucratic constraints.

This whole discussion produces lively classes and allows students to learn something of the War on Poverty—a subject they now see as ancient history. However, we cannot stop with Mrs. Williams' story, or this exercise will come at the price of straying far from where the action seems to be in the 1980s. There is still another periphery attacking the core of contract doctrine, but it has been largely unnoticed.

2. *Unfair and Deceptive Trade Practices Acts.* Over the past twenty or thirty years, many states have passed unfair and deceptive trade practices (UDTP) acts. Some of these statutes

32. For discussions on the problems of paternalism in contract law, see generally Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). Some students have suggested that the term should be maternalism, and not paternalism. They argue that mothers take care of a majority of the children's problems, acting in their best interests, while fathers seldom do this. Fathers just decide important questions, refusing to allow their children any voice. I hope such stereotypes are unwarranted. An additional choice, preferred by others, is parentalism. I continue to use paternalism, but I could be persuaded to change.

33. Professor Patricia Williams writes of her experiences at the Harvard Law School:

I learned to undo images of power with images of powerlessness; to clothe the victims of excessive power in utter, bereft naivete; to cast them as defenseless supplicants raising—pleading—defenses of duress, undue influence and fraud. I learned that the best way to give voice to those whose voice had been suppressed was to argue that they had no voice.

Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 419-20 (1987). She then continues in a footnote:

A quick review of almost any contracts text will show that most successful defenses feature women, particularly if they are old and widowed; illiterates; blacks and other minorities; the abjectly poor; and the old and infirm. A white male student of mine once remarked that he couldn't imagine "reconfiguring his manhood" to live up to the "publicly craven defenselessness" of defenses like duress and undue influence.

Id. at 420 n.54.

have overturned much of contracts' conventional wisdom, and there are other statutes lurking in the shadows that have the potential to do this. Contracts scholars must watch these developments carefully if they want their articles and courses to have real contact with the worlds in which their students will practice.

Many of these statutes arm only state attorneys general for the battle against unfair trade practices.³⁴ Some statutes also create private causes of action, often with a chance to recover double, treble or unlimited punitive damages as well as attorneys' fees.³⁵ Legal services programs have brought many of the reported cases. The substantive standards vary, but almost always these statutes, far more than the common law or U.C.C. § 2.302, favor plaintiffs.

State UDTP laws can be roughly divided into three categories: [1] Little FTC Acts, [2] Consumer Fraud Acts, and [3] Deceptive Trade Practices Acts.³⁶ Little FTC Acts prohibit "unfair methods of competition and unfair or deceptive acts or practices."³⁷ Consumer Fraud Acts, though phrased in varying terms, normally contain broad general prohibitions against deceptive acts or practices,

34. For a critical evaluation of statutory use in consumer protection, see generally Silbey & Bittner, *The Availability of Law*, 4 L. & POL. Q. 399 (1982) (consumer protection agents in the attorney general office employ a variety of incidental laws in the name of consumer protection); Bernstein, *Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices*, 20 HOW. L.J. 247 (1977) (examining how remedies are elected in the consumer protection division of state attorney general's offices, and recommending changes in the election process). Some attorneys general, however, have taken action under this legislation. See, e.g., *States March into the Breach*, N.Y. Times, Dec. 18, 1988, § 3, at 1, col. 1 (describing the aggressive regulatory activities of several states in the areas of consumer protection, insurance, antitrust, securities and environmental issues). For instance, the California attorney general settled an action against the Trane Corporation, involving the sale of air conditioners. See Weinstein, *Firm to Settle Consumer Suit for \$1 Million*, L.A. Times, Dec. 18, 1980 §1, at 1, col. 2. As part of the settlement Trane agreed not to engage in illegal practices, not to initiate foreclosures against low-income customers, and to pay about \$1,000,000 in civil penalties to settle the matter without admitted wrongdoing. *Id.*

35. See, e.g., TEX. BUS. & COM. CODE ANN. § 17.50(b)(1), (d) (Vernon 1987) (Texas Deceptive Trade Practices Act).

36. Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 521-22 n.2 (1980); Shell, *supra* note 24, at 1212-13 n.81. The statutes are analyzed in great detail in Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984). Deceptive practices statutes in the following states specifically prohibit unconscionability: Alaska; California; the District of Columbia; Kansas; Kentucky; Michigan; Nebraska; New Jersey; New Mexico; New York; Ohio; Texas; Utah; and West Virginia. *Id.* at 467-70.

37. Leaffer & Lipson, *supra* note 36, at 521-22 n.2.

any deception or fraud, or unconscionable commercial practices.³⁸ Deceptive Trade Practices Acts contain express prohibitions against many specified deceptive practices and also include catch-all provisions.³⁹ For example, the Michigan Consumer Protection Act lists twenty-nine "[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce"⁴⁰ Some of the more interesting ones include:

(x) Taking advantage of the consumer's inability reasonably to protect his interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer's inability.

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

(z) Charging the consumer a price which is grossly in excess of the price at which similar property or services are sold.

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(cc) Failing to reveal facts which are material to the transaction in light of representations of fact made in a positive manner.⁴¹

Statutes such as Michigan's suggest major changes in the common law, but much will turn on what courts do with them. Decisions in five states indicate that the judiciary has a great deal of discretion when faced by such qualitative standards.⁴²

38. *Id.*

39. *Id.*

40. MICH. COMP. LAWS ANN. § 445.903 (West 1989).

41. *Id.*

42. This discussion is based on a selection of appellate cases, or what Karl Llewellyn called taking test borings. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 495 n.132 (1987). I looked at the cases cited by law review writers and appellate opinions from Georgia, Kansas, Michigan, Texas and Washington. Washington has a "little FTC act." Georgia has a consumer protection statute. Kansas, Michigan and Texas have more elaborate deceptive trade practices and consumer protection acts. Furthermore, one writer says "[r]oughly half of all reported state court decisions involving private consumer actions have arisen in Texas, under its Deceptive Trade Practice and Consumer Protection Act of 1973." Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 449 (1984).

The cases decided under these statutes have been far from consistent. Some decisions remind us of Mrs. Williams' problems. For example, in *McRaid v. Shepard Lincoln Mercury*,⁴³ Legal Assistance of St. Clair County brought an action against an auto dealer under the Michigan Consumer Protection Act.⁴⁴ The plaintiff recovered \$11,551.31 as damages, costs and attorneys' fees.⁴⁵ The plaintiff, a widow, traded her \$43,000 house and her 1978 Buick for \$11,000 and a 1980 Lincoln Mark VI automobile worth \$17,000.⁴⁶ Moreover, she remained obligated on the mortgage on the house.⁴⁷ She wished to sell her house because she no longer wanted to maintain it, and she planned to travel.⁴⁸ The trial court found that the Michigan Act had been violated because the defendants' actions confused the plaintiff, the consideration that the plaintiff exchanged for the car was grossly excessive, and the defendants took advantage of plaintiff.⁴⁹ The appellate court affirmed, saying no more than "[w]e are not left with a definite and firm conviction that the trial court made a mistake."⁵⁰

In *Murphy v. McNamara*,⁵¹ Ms. Murphy agreed to pay \$16 a week for a television set. If she made payments for seventy-eight weeks, she would own it.⁵² She entered the deal because she could get a television set without establishing credit. She was a welfare mother with four minor children.⁵³ She was not told that the total she would pay under the contract was \$1268 or that the retail sales price for the set was \$499.⁵⁴ She made payments totaling \$436.⁵⁵ She stopped paying when she read a newspaper article criticizing

Of course, we all must be aware that appellate cases may present a highly distorted view of what is going on in lawyers' offices, settlement negotiations and trial courts. Moreover, consumer disputing is an area where we find resolution mechanisms that do not involve lawyers. See Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & Soc'y REV. 115, 120-24 (1979).

43. 141 Mich. App. 406, 367 N.W.2d 404 (1985).

44. *Id.* at 405.

45. *Id.*

46. *Id.*

47. *Id.* at 406.

48. *Id.* at 405.

49. *Id.* at 406.

50. *Id.*

51. 36 Conn. Supp. 183, 416 A.2d 170 (Conn. Super. Ct. 1979).

52. 416 A.2d at 173.

53. *Id.*

54. *Id.*

55. *Id.*

the plan.⁵⁶ The defendant threatened her with arrest if she did not pay. The threat caused her emotional distress.⁵⁷

New Haven Legal Services sought to prevent the seller from using self-help or initiating a criminal complaint in repossession of the set.⁵⁸ Ms. Murphy was granted a temporary injunction, pending trial of the case.⁵⁹ The Connecticut statute provides "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."⁶⁰

The Superior Court noted:

the unconscionable bargain extracted by the defendant in requiring her to pay over two and one-half times the regular retail sales price of the television set for the extension of credit, the failure to advise her of the true purchase price she would pay over the eighteen-month period, and the unscrupulous collection practice of threatening her with arrest. This court has no doubt that these practices offend the CUTPA and come within its proscriptions.⁶¹

It further noted that "the act must be applied to protect the unthinking, the unsuspecting and the credulous as well as the sophisticated."⁶² The court continued the injunction against the harsh collection practices pending final resolution of the suit.⁶³

Appellate cases suggest, however, that middle class and rich consumers are the usual beneficiaries of these statutes. The poor consumer seems protected only marginally.⁶⁴ Many of the cases involve new automobiles. Indeed, my students think the Texas statute was designed to protect J.R. Ewing from bad deals. The following headnotes written for two Texas cases remind us that we are moving far from Mrs. Williams' situation:

Finding that manufacturer [Mercedes-Benz] knowingly engaged in unconscionable course of action by failing to provide

56. *Id.* at 173.

57. *Id.*

58. *Id.*

59. *Id.*

60. CONN. GEN. STAT. ANN. § 42-110b(a) (West 1987).

61. 416 A.2d at 175.

62. *Id.*

63. *Id.* at 180.

64. We can hope that these statutes aid legal services programs and other lawyers who seek to help the poor. Perhaps the threat of invoking these statutes promotes settlements benefiting the poor. As always, legal scholars know little about what lawyers do, and we are only beginning to bring our picture of practice into sharper focus by empirical study.

proper replacement parts for car was sufficiently supported by evidence of manufacturer's repeated, unsuccessful attempt to provide replacement parts for car, which resulted in gross disparity between value buyer gave for car and value he received.⁶⁵

And

Automobile purchaser's payment of \$55,175 for car which was not in deliverable condition and was in effect repossessed from him, for which he was not reimbursed, supported finding of unconscionability for purposes of Deceptive Trade Practices Act⁶⁶

In addition, the scope of some unfair and deceptive trade practices acts extends far beyond the protection of individual consumers who buy items for personal use.⁶⁷ Eight states allow businesses to sue, while the statutory language of six other states appears to allow businesses to do so.⁶⁸ Texas allows businesses to sue if the business has "assets of less than \$25 million."⁶⁹ For example, in *Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns*,⁷⁰ a vendor of copying machines approached a lawyer and, using a printed lease form,⁷¹ arranged the lease of a machine. The machine constantly malfunctioned, and when the lawyer refused to pay installments, the machine was repossessed and sold. The equipment lessor sued for a default judgment.⁷²

The case turned on disclaimers in the form contract.⁷³ The disclaimers said that the equipment was leased "as is."⁷⁴ The trial court found this provision unconscionable because there was a gross disparity between the value received and the consideration paid.⁷⁵ The appellate court pointed out that the lawyer was unfa-

65. *Mercedes-Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844, 845 (Tex. App.—Fort Worth 1986, no writ).

66. *Jim Stephenson Motor Co. v. Amundson*, 711 S.W.2d 665, 665 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

67. See Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1634-40 (1983); Gilleran & Stadfeld, *Little FTC Acts Emerge in Business Litigation*, 72 A.B.A. J. 58, 58-60 (May 1986); Shell, *supra* note 24, at 1214-34.

68. Gilleran & Stadfeld, *supra* note 67, at 58, 60-61.

69. TEX. BUS. COM. CODE ANN. § 17.45 (Vernon 1987).

70. 710 S.W.2d 604 (Tex. App.—Houston [1st Dist.] 1985, no writ).

71. *Id.* at 605.

72. *Id.*

73. *Id.* at 606.

74. *Id.*

75. *Id.* at 607.

miliar with copiers; until he tried the machine in his office, he could not determine whether it was in good condition.⁷⁶ "The trial court could reasonably have decided that [the salesman], being in a superior position of knowledge, took advantage of [the lawyer] to a 'grossly unfair degree' by representing that the machine would perform its intended function."⁷⁷ As a result, "the trial court's finding of unconscionability precludes conclusive effect being given to the stipulation that the parties' entire agreement is set forth in the lease, subject to modification only by a writing signed by [the lessor's] executive officer."⁷⁸

In *Honeywell, Inc. v. Imperial Condominium Association*,⁷⁹ a condominium association purchased a contract to service its heating and air conditioning system.⁸⁰ During the negotiations a salesman distributed Honeywell's promotional literature.⁸¹ The litera-

76. *Id.* at 607.

77. *Id.*

78. *Id.* On motion for rehearing, however, the court noted "[o]ur holding in this case does not constitute a general condemnation of the contract clauses in question" *Id.* at 610.

Weitzel v. Barnes, 691 S.W.2d 598 (Tex. 1985) may go further than *Tri-Continental*, but we must first reconstruct the facts from both the majority and dissenting opinions. Apparently, a lawyer drafted a contract as the buyer to purchase a used house. *Id.* at 601. The contract gave the lawyer the right to inspect the plumbing and air conditioning systems and demand repairs. *Id.* at 599. The contract further provided that it was "the entire agreement of the parties and cannot be changed except by the written consent of all parties hereto." *Id.* at 602. The lawyer discovered a condemned notice on the house. *Id.* The lawyer moved in without having the house inspected. *Id.* The city's representative refused to discuss the matter with the lawyer, stating that the city could deal only with the seller. *Id.* The lawyer called the seller and was told that the house met the Fort Worth, Texas code standards. *Id.* A few weeks later, the lawyer sued the seller for misrepresenting that the house complied with the city's code standards. *Id.* The trial judge found for the lawyer and awarded treble damages and attorney's fees. *Id.* at 599.

The Supreme Court of Texas affirmed, finding that because there was no effort to show a breach of contract, the parol evidence rule was not applicable. *Id.* at 600. "The oral misrepresentations, which were made both before and after the execution of the agreement, constitute the basis of this cause of action, so traditional contractual notions do not apply." *Id.*

The dissenting Justice asserted:

This case demonstrates how far we have strayed from the Legislature's intent of protecting the uneducated, the unsophisticated and the poor against the false, misleading and deceptive practices. I cannot believe that the Legislature ever intended for the Deceptive Trade Practices Act to be used to bail out an attorney who does not inspect the *used* house he purchases even though he had actual notice, prior to closing, that the city had condemned the property.

Id. (Gonzalez, J., dissenting).

79. 716 S.W.2d 75 (Tex. App.—Dallas 1986, no writ).

80. *Id.* at 76.

81. *Id.*

ture made representations greater than the obligation assumed by Honeywell in a written form contract.⁸² "Honeywell's representations concerning the quality and benefits of its services did not accurately depict those actually received."⁸³ Thus, the promotional literature could be introduced to show that Honeywell had violated the Texas statute.⁸⁴ The court noted that, in a DTPA suit based on precontractual misrepresentations, the parol evidence rule does not apply.⁸⁵

II. SO WHAT? SUBSTANTIVE CONCERNS FOR CONTRACTS SCHOLARSHIP

Why should contracts scholars take note of these unfair trade practices statutes? Many of the statutes resolve important questions in contract law. Other statutes may provide solutions as courts interpret them. If we fail to tell our students that this legislation exists, they may overlook it when they enter practice. The risk of overlooking such statutes appears even greater when we recognize that the relatively low amounts at issue seldom justify exhaustive research. If we fail to consider these statutes when we write about contracts problems, our discussion may be incomplete and misleading.

A. Diverse Statutes; Divergent Views

Some statutes provide a more precise standard than others. Connecticut's legislation tells us no more than "[n]o person shall engage in . . . unfair or deceptive acts or practices in the conduct of any trade or commerce."⁸⁶ Others, such as the Kansas Consumer Protection Act, prohibit unconscionable practices and then offer many examples of these practices.⁸⁷ My colleague, Professor Whitford, suggests that statutes such as the Connecticut act say little more than U.C.C. § 2-302 and are unlikely to affect merchant behavior.⁸⁸ Why, then, should we expect judges to be willing to attack

82. *Id.* at 78.

83. *Id.*

84. *Id.*

85. *Id.*

86. CONN. GEN. STAT. ANN. § 42-110b(a) (West 1987).

87. KAN. STAT. ANN. § 50-627 (1983).

88. See Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1020-21, 1042-43.

unfair or deceptive acts or practices when they have not been ready to do much to overturn unconscionable ones? Professor Whitford argues that more detailed provisions could offer hesitant judges guidance and might have some substantial impact.⁸⁹ While his argument seems plausible, my research for this paper cannot settle the matter. For example, there have been several pro-consumer cases under the very general Connecticut statute.⁹⁰ At the same time, a great burst of proconsumer cases was provoked by the very detailed Texas statute.⁹¹ Those who favor economic explanations will have little difficulty distinguishing the Code from the UDTP statutes. Unlike U.C.C. § 2-302, many of the general unfair and deceptive trade practices statutes provide for attorney's fees and punitive or multiple damages.⁹² This should prompt more litigation that, in turn, may bring more cases before the courts. More cases might mean that more real atrocity stories will surface. This might move judges to respond. Nonetheless, even putting aside fees and damages, if I were representing a client, I would be happy to discover the more specific provisions of statutes such as those in Texas, Michigan and Kansas.

At least the more detailed statutes might affect the way we think about a number of classic problems. For example, Professors Slawson and Rakoff have written about the gap between the real deal and the paper deal. Parties negotiate at least some terms of their contract. Then one asks the other to sign a standard form

89. See *id.* at 1022-24. Cf. *id.* at 1020 (because of the vagueness of the term "unconscionable," judicial interpretation is varied, and as a result, there has not been substantial impact on merchant behavior).

90. CONN. GEN. STAT. ANN. § 42-110b(a) (West 1987). See, e.g., *Bailey Employment Sys., Inc. v. Hahn*, 545 F. Supp. 62, 70-74 (D. Conn. 1982) (misrepresentation to buyer concerning projected earnings of employment service franchise by franchisor constituted a deceptive trade practice), *aff'd* 723 F.2d 895 (2d Cir. 1983); *Murphy v. McNamara*, 36 Conn. Supp. 183, 416 A.2d 170, 176-77 (Conn. Super. Ct. 1979) (holding that a "Rent-to-own" agreement requiring a welfare mother to pay two and one-half times the retail price of a television set was unconscionable); *Conaway v. Prestia*, 191 Conn. 484, 464 A.2d 847, 851-53 (1983) (holding that the rental of apartments by landlords who had failed to obtain required certificates of occupancy constituted "unfair acts or practices"). But see *Web Press Serv. Corp. v. New London Motors, Inc.*, 205 Conn. 479, 482-84, 533 A.2d 1211, 1213-14 (1987).

91. TEX. BUS. & COM. CODE ANN. § 17.01 (Vernon 1987). See, e.g., *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (seller's alleged oral representation concerning condition of house could serve as basis of DTPA action even though the buyer, an attorney, had actual notice prior to closing that the property had been condemned); *Tri-Continental Leasing Corp. v. Law Offices of Richard W. Barnes*, 710 S.W.2d 604, 607 (Tex. App.—Houston [1st Dist.] 1985, no writ) (disclaimer provisions in copy machine lease found to be unconscionable where equipment was so defective that it failed to perform its intended purpose).

92. E.g., TEX. BUS. & COM. CODE ANN. § 17.50(b)(d) (Vernon 1987).

contract, or standard terms and conditions are introduced into the transaction in some other way. The other party often signs without understanding or even reading the standard terms. Moreover, the party that drafted the terms knows the other side will not read and understand. Slawson thinks courts should consider the reasonable expectations of the parties.⁹³ Rakoff would place on the party drafting the contract the burden of showing that any term changing the underlying law was reasonable.⁹⁴ The UTDP statutes may open the door to these approaches. The Texas courts, for example, have not allowed unnegotiated terms in standard form contracts to override the protective purposes of their Deceptive Trade Practices Act (DTPA).⁹⁵

Professor Unger notes that our contract law contains both individualistic and altruistic strands.⁹⁶ He argues that, as part of a much larger program leading to major social change, courts should fashion standards which require bargainers to consider each other's interests.⁹⁷ He criticizes liberal doctrines, such as economic duress, that grant courts "a roving commission to correct the most egregious and overt forms of an omnipresent type of disparity."⁹⁸ Do these unfair trade practices statutes reflect a limited expression of altruism in solving contracts problems, or do they have the capacity to help bring about Professor Unger's goal of comprehensive social change? Do these statutes grant more than a roving commission to correct only the most egregious and overt forms of unfairness? Although many of these statutes suggest only a limited opportunity to deal with atrocity situations, judges sympathetic to Unger's vision could use some of these statutes to rationalize part of his program. For example, the Michigan statute prohibits such things as "[c]harging the consumer a price which is grossly in excess of the price at which similar property or services are sold" and "[f]ailing to reveal facts which are material to the transaction in

93. See Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 23 (1984); Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 11 (1974); Slawson, *Standard Form Contracts and the Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530-31 (1971).

94. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1235-43 (1983).

95. Refer to notes 70-78 *supra* and accompanying text.

96. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 641 (1983).

97. *Id.* at 616-46.

98. *Id.* at 629.

light of representations of fact made in a positive manner."⁹⁹ While both provisions point toward the altruistic strand in contract law, neither is a bright line rule, and much is left to discretion and judgment. Nonetheless, judges could use the statutory language to rationalize rules demanding a high standard of good faith in the negotiation and performance of contracts.

Professor Linzer argues that rights flow from reasonable expectations generated by relationships rather than classic mutual assent.¹⁰⁰ Employees, for example, make transaction-specific investments and have dignitary interests.¹⁰¹ Many of the UDTP statutes would allow courts to protect expectations generated by relationships rather than focusing on the point of mutual assent.¹⁰² The *Williams* case could have been analyzed in relational terms. As Greenberg notes, Walker-Thomas' sales representatives were also collection agents.¹⁰³ One representative dealt with each customer throughout the relationship and got to know the customer's family, playing the role of a friend who visited regularly.¹⁰⁴ Since the monthly benefit check provided the primary source of income for most Walker-Thomas customers, the sales representatives scheduled visits to a customer's apartment on the day when the check was likely to arrive.¹⁰⁵ Poor people have difficulty cashing checks, and there is a high risk of being robbed just after they cash them.¹⁰⁶ Walker-Thomas representatives carried money and would cash welfare checks and deduct the required payment.¹⁰⁷ They knew the customer's income and saw the apartment.¹⁰⁸ They often suggested that the customer needed a new television set or a new couch and showed the customer how he or she could pay for it.¹⁰⁹ If their suggestions failed one week, they would be repeated, perhaps in a different form, on the next visit.¹¹⁰ When the customer faced financial difficulty, the sales representative could allow extra

time for payment.¹¹¹

In the *Williams* case, use of the cross-collateral clause¹¹² may have violated the tacit assumptions of the customer-representative relationship. Here a friend turned into a hostile aggressor, cleaning out Mrs. Williams's apartment as a form of coercion. While the Walker-Thomas representative was not a fiduciary, he was hardly a stranger dealing at arm's length. Again, at least some of the UDTP statutes offer a means of breaking with traditional case law and recognizing a relational interest worthy of protection. Walker-Thomas' management of the relationship could be viewed as a "deceptive practice."

Professor Rice has emphasized the costs of having a diversity of approaches to substantive justice.¹¹³ Much business in this country is conducted nationally or regionally. A large corporation may be faced with great diversity in the rules governing its business.¹¹⁴ Some states follow the common law and employ a restrictive reading of the Uniform Commercial Code while others have enacted broad protective measures such as the Texas Deceptive Trade Practices Act.¹¹⁵ Many statutes fall in between these extremes. Brandeis praised the states as social laboratories that, as they took different approaches, could learn from trial and error.¹¹⁶ Business, however, must create procedures either to adapt to different rules or to comply with the strictest one.

111. *Id.* at 385.

112. Under cross-collateralization, individual purchases are secured by all previous purchases taken as a whole, creating a security interest that endures until the consumer pays all balances due. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (1965).

113. See generally Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U.L. REV. 1 (1985) (discussing the income-distributive effects of the different state laws regarding consumer protection). Professor Rice is the authority on unfair and deceptive trade practices statutes. See generally Rice, *Uniform Consumer Sales Practices Act—Damages Remedies: The NCCUSL Giveth and Taketh Away*, 67 Nw. U.L. REV. 369 (1972) (arguing that although the Uniform Consumer Sales Practice Act is designed to give reparative relief, in practice it fails to help consumers recover their economic losses); Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L.Q. 307 (1969) (encouraging Massachusetts attorneys to use Chapter 93A to protect consumers from unfair and deceptive trade practices. Chapter 93A makes it economical to represent injured consumers even though their injuries are small.); Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968) (discussing the problems that may be encountered in enforcing consumer protection statutes).

114. See Rice, *Product Quality Laws*, *supra* note 113, at 4.

115. See *id.*

116. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

99. MICH. COMP. LAWS ANN. § 455.903(1)(z), (1)(cc) (West 1989).

100. Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 326-27 (1986).

101. *Id.* at 397-401.

102. *Id.* at 419-25.

103. Greenberg, *supra* note 30, at 382.

104. *Id.* at 383.

105. *Id.* at 382.

106. *Id.*

107. *Id.*

108. *Id.* at 383.

109. *Id.*

110. *Id.*

Rice suggests that our diversity of laws involves significant costs,¹¹⁷ and his argument is plausible. At the same time, these statutes may offer benefits to the public that outweigh these costs. We need empirical study of the impact of these statutes. Texas should provide a good test case.¹¹⁸ My February 1989 LEXIS search, for example, asked only for post 1987 cases mentioning the Texas statute. I found 144 appellate decisions of the Texas and federal courts reported during fourteen months.¹¹⁹ Many involved home builders and remodelers; slightly fewer involved automobile dealers. If any UDTP statute can be expected to have an impact on business practices, it should be this one. At present, we know little about the costs and benefits of the Texas DTPA.

B. Politics and Power

These statutes also could serve to bring politics and power into our class discussion of contract law. During the 1960s and 1970s, legislators found it hard to oppose these statutes, while in the 1980s we have heard about the glories of deregulation. Moreover, the statutes, by creating qualitative standards rather than bright line rules, grant wide discretion to judges. There are many roads to the bench in different states and at different times; judges carry with them varying notions of both legal and popular culture. While some judges see these statutes as a progressive reform, others view them as a costly and foolish interference with business and the market.

For example, Georgia and Kansas judges have interpreted their statutes narrowly. Their actions show the power of what Roscoe Pound called "taught tradition," which supports business interests by limiting unsound reformist statutes.¹²⁰ Georgia judges have read their statute so that it applies only to narrowly defined consumer transactions. Alleged misrepresentations, for example,

must be to consumers *generally* and not only to a particular consumer.¹²¹ The Georgia courts seem to have reduced their statute to regulating sales of expensive cars.

Heidt v. Potamkin Chrysler-Plymouth, Inc.,¹²² shows that the more things change, the more they stay the same. A buyer alleged that an automobile dealer had agreed, orally, to pay off the balance still due on the buyer's trade-in.¹²³ However, the form contract said the buyer was responsible for paying off any balance due.¹²⁴ The trial court directed a verdict for the dealer.¹²⁵ The appellate court affirmed¹²⁶ and determined that under the Georgia Fair Business Practices Act, one seeking relief must have relied on the misrepresentation.¹²⁷ The appellate court reasoned that because the buyer had a duty to read the contract, he could not have reasonably relied on the oral representation.¹²⁸ The court said: "[i]t is not the intent of the FBPA to protect consumers from their own lack of diligence and to render every written and ostensibly final sale of a product a potential source of liability for the seller."¹²⁹ Or, in Professor Patricia Williams' words, the parol evidence rule means that "[t]erms with respect to which the constructed reality (or governing narrative) of a given power structure agree, may not be contradicted"¹³⁰

Two recent Kansas decisions illustrate the role of power and politics in judicial interpretations of these statutes. The Kansas courts denied relief to a welfare mother (in a position similar to that of Mrs. Williams), while granting relief to a buyer of an expensive sports car. In *Remco Enterprises, Inc. v. Houston*,¹³¹ the Wyandotte County Legal Aid Society defended an action under the Kansas Consumer Protection Act.¹³² It sought to have the defendant declared, with no further indebtedness due the plaintiff, the owner of a television set.

121. See *Burdakin v. Hub Motor Co.*, 183 Ga. App. 90, 357 S.E.2d 839, 841 (1987).

122. 181 Ga. App. 903, 354 S.E.2d 440 (1987).

123. 354 S.E.2d at 441.

124. *Id.*

125. *Id.*

126. *Id.* at 442.

127. *Id.* at 441.

128. *Id.*

129. *Id.* at 442.

130. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 424 (1987).

131. 9 Kan. App. 2d 296, 677 P.2d 567 (1984).

132. *Id.* at 296-97, 677 P.2d at 569.

117. See generally Rice, *Product Quality Laws*, *supra* note 113 at 4.

118. See *Texas Trials and Tribulations*, Wall St. J., Nov. 27, 1987, at 10, col. 1 ("Southern Methodist University's Center for Enterprising . . . identifi[ies] Texas's civil justice system as the biggest barrier to attracting business to the state.") We can wonder what kind of proof was offered to support this statement.

119. Appellate reports, of course, tell us little about cases filed or decisions made by lawyers in their offices. We cannot discern how many of these cases would have been brought under common-law theories had no statute been passed in Texas. Nonetheless, it is clear that Texas courts see many cases involving the Deceptive Trade Practices Act.

120. See Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 366 (1940).

On September 11, 1980, Remco made a contract with the defendant whereby she rented a stereo component set with the understanding that if she made 69 payments of \$12, she would own the stereo.¹³³ She complied with this contract.¹³⁴ On September 13th, she made a similar arrangement for a television—she would own it if she made 104 weekly payments of \$17 each.¹³⁵ She made 68 payments and then defaulted. Remco sued to recover both the set and the past due rental payments.¹³⁶ The buyer was a 20 year old single mother of three who had completed only the ninth grade in school and was dependent upon AFDC payments of \$320 per month. The appellate court affirmed the trial court's finding that the arrangement was not unconscionable.¹³⁷ It said:

Although defendant would have had to pay 108% more than a cash customer, defendant received the benefit of not being responsible for service or repairs to the TV set, of not having to undergo a credit check or make a down payment, and of having the option to cancel the agreement at any time after one week. Most importantly, she received the benefit and use of a TV set which she might not have otherwise had. Although in retrospect it may seem to have been a bad bargain, the price disparity does not rise to the level of unconscionability . . . [D]efendant knew that she could return the set at any time she desired to terminate the agreement, . . . knew how to multiply 104 (weeks) times 17 (dollars), . . . was of average intelligence and was not taken advantage of by the seller . . . The record is devoid of any evidence of deceptive or oppressive practices, overreaching, intentional misstatements, or concealment of facts by plaintiff.¹³⁸

In *Willman v. Ewen*,¹³⁹ however, the Supreme Court of Kansas enforced the Kansas Consumer Protection Act. A woman made a contract with a dealer to buy a 1978 Chevrolet Corvette Indianapolis 500 Pace Car for \$13,800.¹⁴⁰ For over three months the

dealer misled her into believing that General Motors would fill her order.¹⁴¹ In denying a motion for summary judgment, the court said that this deception could have deprived her of the opportunity to obtain a pace car from another source.¹⁴² The dealer's actions after the failure to deliver the car were more than just a breach of contract, and they came within the Kansas statute.¹⁴³

How do we reconcile the two Kansas cases? Perhaps it is unfair to say no more than that Kansas judges will protect buyers of Corvettes but not poor welfare mothers who buy television sets. If we could not find a better distinction, I would wonder about the values of the kinds of people who become Kansas appellate judges. Of course, one case involves a misrepresentation while the other involves only overcharging. Yet the Kansas statute lists as a factor to consider in determining unconscionability "that, when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers."¹⁴⁴ The court considered whether the welfare mother's contract was, in the language of the statute, "excessively one-sided in favor of the supplier."¹⁴⁵ I wonder what it would take to convince the Kansas judges that a contract was excessively one-sided in favor of a supplier. Moreover, I am troubled by what I see as the insignificant reliance by the purchaser of the sports car.

Federal power and politics also shape the role of UDTP statutes. The United States Supreme Court has helped large corporations cope with bothersome state regulation, all in the name of the virtues of alternative dispute resolution. Corporate lawyers often put arbitration clauses into form contracts, which otherwise would be subject to state regulation.¹⁴⁶ Of course, firms drafting arbitration clauses usually retain some control over who will arbitrate.¹⁴⁷

133. *Id.*

134. *Id.* at 297, 677 P.2d at 569.

135. *Id.*

136. *Id.*

137. *Id.* at 303, 677 P.2d at 573.

138. *Id.* Contrast *Remco* with the Connecticut decision, *Murphy v. McNamara*, 36 Conn. Supp. 183, 416 A.2d 170 (Conn. Super. Ct. 1979) (in evaluating an unconscionability claim, the impact on the plaintiff must be considered, and forcing a welfare recipient to pay more than two-and-one-half times the regular retail price of a television set constitutes a violation of the Connecticut Uniform Trade Practices Act).

139. 230 Kan. 262, 634 P.2d 1061 (1981).

140. 634 P.2d at 1062.

141. *Id.* at 1063.

142. *Id.* at 1065.

143. *See id.*

144. KAN. STAT. ANN. § 50-627(b)(2) (1983).

145. *Id.* at § 50-627(b)(5).

146. *See Faruki, The Defense of Terminated Dealer Litigation: A Survey of Legal and Strategic Considerations*, 46 OHIO ST. L.J. 925, 973-74 (1985).

147. *See, e.g., DOMKE, DOMKE ON COMMERCIAL ARBITRATION* § 20:02, at 308 (G. Wilner rev. ed. 1984) (parties may designate in the agreement a specific person to act as arbitrator). *See also Note, Resolving the Conflict Between Arbitration Clauses and Claims Under Unfair and Deceptive Trade Practices Act*, 64 B.U.L. REV. 377, 407 (1984) (suggesting that in a consumer contract, the merchant's designation of a specific arbitrator may disadvantage the consumer).

Also arbitrators usually hold more pro-business values than jurors, and they seldom award large amounts as damages.¹⁴⁸

In *Southland Corp. v. Keating*,¹⁴⁹ the Supreme Court upheld this method of offsetting, controlling, or influencing state regulation of dependent relationships.¹⁵⁰ Thus, the federal arbitration act prevails over state regulatory statutes.¹⁵¹ Following the *Southland* decision, a federal Court of Appeals ruled that an arbitration clause in a franchise agreement makes a claim of unconscionability under the Texas DTPA subject to arbitration.¹⁵²

I think an honest teacher must present the judicial reaction to these unfair and deceptive trade practices statutes as highly disputed politics.¹⁵³ We cannot teach modern contract law with a straight face without considering the effect of the wildly divergent political views of California governors and the resulting State Supreme Court Justice appointments.¹⁵⁴ Nor can we ignore the political views behind the appointment of Judges Posner, Easterbrook, Coffee, and Manion to the United States Court of Appeals for the Seventh Circuit. And, at least until the recent election, we should have expected the largely proplaintiff populist Texas Supreme Court to read a UDTP statute very differently than an intermediate appellate court in Georgia or Kansas. The roads to those courts

148. See, e.g., Hyman, *Churning in Securities: Full Compensation for the Investor*, 9 U. DAYTON L. REV. 1, 26 (arbitration awards generally more conservative than jury awards); Comment, *Section 10(b) and Rule 10b-5 Federal Securities Law Claims: The Need for the Uniform Disposition of the Arbitration Issue*, 24 SAN DIEGO L. REV. 199, 205 (1987) (arbitration awards generally do not include punitive damages, which may be granted in litigation).

149. 465 U.S. 1 (1984). See also Note, *supra* note 147 (criticizing federal and state enforcement of arbitration agreements because they impair consumers' remedies under state unfair and deceptive practices acts). Compare Faruki, *supra* note 146, at 940-44 (suggesting use of arbitration clauses in dealer agreements to avoid state regulation).

150. *Southland Corp.*, 465 U.S. at 16.

151. *Id.* at 10-11, 16.

152. See *Ommani v. Doctor's Assocs., Inc.*, 789 F.2d 298 (5th Cir. 1986).

153. Professor Kennedy takes an extensive look at the moral, economic and political factors influencing judicial decisions. See Kennedy, *supra* note 5, at 1732, 1738-66.

154. In particular, we should note former governors Edmund G. "Pat" Brown, Ronald Reagan, Jerry Brown, and George Deukmejian. For a recent discussion of Governor Deukmejian's judicial appointments, see Egelko, *Duke's Court*, 7 CALIF. LAW. 28, 28-29 (June 1987) ("For years, the Supreme Court was George Deukmejian's nemesis. Now he has fashioned a court in his own conservative image.") Without understanding California politics, I cannot imagine understanding, for example, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), which reversed the trend of the California employment-at-will cases. See Fisher, *California Court Limits Suits By Dismissed Employees*, N.Y. Times, Dec. 30, 1988, § D, at 1, col. 1.

are travelled by lawyers who are likely to suspect statutes attacking business.

III. A CONCLUSION

If all is periphery or politics, what can we teach or write? We must remember Betty Mensch's argument that Williston continues to live because he provides structure to ward off the chaos of realism.¹⁵⁵ I am reminded of one of my students. She appeared in class with a slogan on her book bag that sums up so much: "I've given up my search for truth. Now all I want is a good fantasy!"

The UDTP statutes raise many issues for those seriously interested in the American institution of contract in the late twentieth century. Why were these statutes passed? Why were people dissatisfied with the common law and the U.C.C.? Do the statutes symbolize popular dissatisfaction with the ideology that rationalizes the dominant strand of contract law? Why has business been unable to repeal these acts? What have activist conservative judges done when faced by this kind of antimarket legislation? To what extent—if at all—do these statutes really matter? For example, how would Texas business people deal differently if there were no DTPA? Would freeing Texas business from the threat of DTPA litigation lower prices or would it increase misrepresentations and exploitation of the weak? The Texas statute, for example, makes it easier for plaintiffs to win, and it awards generous damages as well as attorneys' fees. This certainly gives Texas plaintiffs greater access to the courts. Are Texas consumers happier than those in other states, and if they are, does this matter? Even if Texas plaintiffs are happy, does their satisfaction come at the cost of businesses fleeing Texas to states which leave their citizens to sink or swim in the market place on their own? Or is the image of businesses fleeing to avoid statutes such as the DTPA only part of the propaganda of business interests?

155. Mensch, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753, 769 (1981).

Viewed in retrospect, Williston's majestic doctrinal structure may have been silly, but Corbinesque appeals to reasonableness and justice appear sloppy and formless by comparison. Williston's structure was, at least, a real structure, however misguided. Perhaps much Willistonian dogma survives simply because it provides a challenging intellectual game to learn and teach in law school—more fun than the close attention to commercial detail required by thorough-going realism.

Id.

Of course, it is possible that we may look back in the year 2001 and discover that these statutes have thrown academic contract and much of Article Two of the U.C.C. into the dustbin of history. More probably, in a very conservative America of the early twenty-first century, we may have found that these statutes were largely symbolic gestures with little real impact. The taught tradition of the common law and the law schools may turn out to be the Godzilla that slaughters the Bambi of the UDTP statutes. Judges in many states have and will confine the impact of these statutes to less than what we, reading the statutory texts in isolation, might expect. While most of the action favoring plaintiffs has taken place in Texas, even in Texas the sky is not the limit. We must remember *MacDonald v. Texaco, Inc.*,¹⁵⁶ where the plaintiff sued for damages under the state's DTPA. MacDonald asked at an Exxon station if they could install a fuel filter on his van.¹⁵⁷ The Exxon employees could not, but they directed him to a local Texaco station.¹⁵⁸ There a mechanic attempted to do the work, but set the van and its contents on fire.¹⁵⁹ When the van owner sued Texaco under the Texas DTPA, the trial court granted Texaco's motion for summary judgment.¹⁶⁰ The Court of Appeals affirmed.¹⁶¹ The owner, the court said, had not shown that his reliance on Texaco's misrepresentation was the "producing cause" of his loss.¹⁶²

You might ask: What misrepresentation? Remember when Bob Hope told us, "You can trust you car to the man who wears the star." This was the alleged misrepresentation. The court said, "MacDonald's admissions clearly establish that MacDonald was not drawn to Ray Hajevandi's Texaco station by any fond memories of Texaco advertising jingles. He stated in his interrogatory answers, 'I asked if there was a service station open where there was a mechanic. I was told that the Texaco station did mechanical work'"¹⁶³

Suppose, however, the plaintiff had gone to the Texaco station because of Texaco's commercial? Think of what this might have done to television if he had won on this ground! Think of what it

might have done to contracts teaching and research! Indeed, think what it might mean if we could trust our large corporations. As my student's book bag said, "All I want is a good fantasy!"

156. 713 S.W.2d 203 (Tex. App.—Corpus Christi 1986, no writ).

157. *Id.* at 205.

158. *Id.*

159. *Id.*

160. *Id.* at 204.

161. *Id.* at 206.

162. *Id.* at 205.

163. *Id.* at 205-06.