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Formalism and Functionalism in California's Unconscionability Doctrine: An Analysis of *Fuentes v. Empire Nissan, Inc.*

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I. Introduction

In *Fuentes v. Empire Nissan, Inc.*, a case currently pending in front of the California Supreme Court, a California Court of Appeal found that an employment arbitration agreement was not unconscionable.[1] The contract formation process was problematic: the agreement was imposed upon an employee as a condition of her employment; the employee was given only five minutes to review the document; she was not given the opportunity to ask questions about it; she received no copy of the agreement; and the agreement itself was a single block of text, filled with legalese, and written in a font so small and so blurry that it was "nearly impossible to read."[2] Despite the significant abuses in how the contract was formed, however, the Court of Appeal found the contract enforceable.[3] Without terms that were unconscionable in their own right, the court reasoned, a contract in California could not be held unconscionable, regardless of the degree of procedural

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[1] 90 Cal.App.5th 919, 923 (Cal. App. Ct. 2023) (review granted in 311 Cal.Rptr.3d 320 (2023)).
[2] *Fuentes v. Empire Nissan, Inc.*, No. 20STCV35350, 2021 WL 11581409, at *4-6 (Cal. Sup. Ct. 2021), *rev'd*, 90 Cal.App.5th 919 (Cal. App. Ct. 2023). While the Court of Appeal discussed the fact that the arbitration agreement was "largely unreadable" due to its "tiny and blurred font," the court did not focus on the other problems with the contract formation process. *Fuentes,* 90 Cal.App.5th at 923. The court found that resolving the procedural unconscionability issue was unnecessary, because of the lack of unfairness in the contract terms. *Id.* at 936.
[3] *Fuentes*, Cal.App.5th at 936.

abuse.[4] The character of the contract's formation process did not have any bearing on how a court should analyze the fairness of the contract's content.[5]

Fuentes reveals a tension in California's unconscionability jurisprudence. On the one hand, California courts distinguish between unconscionability in how a contract was formed ("procedural unconscionability") and unconscionability in the terms of the agreement itself ("substantive unconscionability").[6] Finding a contract unenforceable under the unconscionability doctrine requires a showing of both kinds of unconscionability.[7] This aspect of California's jurisprudence supports the *Fuentes* court's decision and its unwavering emphasis on the distinction between procedural and substantive issues. On the other hand, California courts must analyze unconscionability on a sliding scale: they must assess unconscionability on balance, allowing significant procedural unfairness to compensate for less significant substantive unfairness, and vice versa.[8] This sliding-scale aspect of California's unconscionability jurisprudence is functional, not formalistic. It recognizes that procedural and substantive unfairness are intertwined and that the unconscionability analysis must be holistic.[9] In this respect, the sliding-scale approach is in tension with the formalistic treatment of

[4] *Id.*
[5] *Id.* at 928 ("All deceptive and coercive procedures by employers can make it more likely employees do not fully understand, or do not understand at all, the arrangement to which they supposedly are assenting. If it is impossible to read, it will be impossible to understand. But once the parties have completed the contracting procedures, whether the substantive result is unconscionable is a conceptually separate question.").
[6] *OTO, LLC v. Kho*, 8 Cal.5th 111, 125 (2019).
[7] *Id.* at 125 ("Both procedural and substantive unconscionability must be shown for [unconscionability] to be established…").
[8] *Id.* at 125-26 ("[Procedural and substantive unconscionability] are evaluated on 'a sliding scale.' The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable. Conversely, the more deceptive or coercive the bargaining tactics employed, the less substantive unfairness is required.") (internal references and quotations omitted).
[9] *See id; Sanchez v. Valencia Holding Co., LLC*, 61 Cal.App.4th 899, 912 (2015) ("The ultimate issue in every case is whether the terms of the contract are *sufficiently unfair*, *in view of all relevant circumstances*, that a court should withhold enforcement.") (emphasis added).

procedural and substantive unconscionability, with the idea that they are conceptually distinct inquiries that must be treated independently.

This Note will argue that the California Supreme Court should reject the *Fuentes* court's formalism and embrace the sliding-scale approach's functionalism. Unconscionability should be analyzed in a holistic way. Such an approach would be more consistent with the text and legislative history of California Civil Code Section 1670.5 (the statute codifying the unconscionability doctrine in California), and it would be more desirable as a matter of policy.

II. *Fuentes* and the Tension in California's Current Approach to Unconscionability

Before arguing that California should embrace a functional, less formalistic approach to unconscionability, it is worth dwelling a bit more on the tension within the state's current unconscionability jurisprudence. This will help bring out the different possible approaches that California might take.

In *Fuentes*, the Court of Appeal leaned heavily on the distinction between substantive and procedural unconscionability. "Under California law," the court explained, "an agreement must be both procedurally and substantively unconscionable to be unenforceable."[10] Moreover, the court continued, the question of whether a contract was substantively unconscionable was "conceptually separate" from the question of whether it was procedurally unconscionable.[11] Whereas procedural unconscionability concerned the contract formation process, substantive unconscionability concerned the terms of the resulting agreement.[12] As the court put it:

> When an employer puts a contract in an unreadably minute font, this practice definitely is problematic, but not for substantive reasons. Rather, during contract formation, an employer's practice of using tiny print creates the same potential for surprise as can

[10] *Fuentes v. Empire Nissan, Inc.*, 90 Cal.App.5th 919, 929 (2023).
[11] *Id.*
[12] *Id.*

> practices like using baffling legalese, or imposing coercive time pressures, or preventing employees from consulting counsel. All deceptive and coercive procedures by employers can make it more likely employees do not fully understand, or do not understand at all, the arrangement to which they supposedly are assenting… But once the parties have completed the contracting procedures, whether the substantive result is unconscionable is a conceptually separate question.[13]

The *Fuentes* court thus emphasized that it was critical to keep the substantive and procedural unconscionability inquiries separate, because "allowing a single feature [of a contract] to count for both categories would nullify the requirement [of finding both kinds of unconscionability]."[14] Here, the court was rejecting two lines of argument. First, it was rejecting the idea that "fine-print terms" were indicative of substantive unconscionability, a proposition suggested by the California Supreme Court[15] and embraced in *Davis v. TWC Dealer Group, Inc.*,[16] a case relied on by the lower court decision that *Fuentes* reversed.[17] And second, the *Fuentes* court was rejecting the dissent's argument that unreadable terms were substantively unconscionable regardless of their content.[18] Fine print and readability, as far as the *Fuentes* majority was concerned, could only go to procedural unconscionability; they had no bearing on whether the substance of the agreement was unconscionable.

The *Fuentes* court thus emphasized one strand of California's unconscionability jurisprudence: the distinction between substantive and procedural unconscionability and the

[13] *Id.*
[14] *Id.*
[15] *OTO, LLC v. Kho*, 8 Cal.5th 111, 130 (2019) (explaining that "unconscionable terms impair the integrity of the bargaining process or otherwise contravene public policy or attempt to impermissibly alter fundamental legal duties" and "may include fine-print terms") (internal quotations and citations omitted).
[16] 41 Cal.App.5th 662, 674 (2019) (finding fine-print terms—"terms so small as to challenge the limits of legibility"—to be indicative of substantive unconscionability).
[17] *Fuentes v. Empire Nissan, Inc.*, No. 20STCV35350, 2021 WL 11581409, at *6-7 (Cal. Sup. Ct. 2021), *rev'd*, 90 Cal.App.5th 919 (Cal. App. Ct. 2023).
[18] *See Fuentes*, 90 Cal.App.5th at 939-40 (Stratton, P.J., dissenting).

requirement that a contract evidence both in order to be unenforceable under the unconscionability doctrine. This strand of California's jurisprudence, however, is in tension with another strand.

While California law requires a finding of both procedural and substantive unconscionability, it also assesses unconscionability on a sliding scale.[19] This second strand of California's jurisprudence suggests that procedural and substantive unconscionability are not as conceptually distinct as the first strand suggests they are. For example, pertinent to the facts of *Fuentes,* the California Supreme Court has explained that "the more deceptive or coercive the bargaining tactics, the less substantive unfairness is required [for a finding of unconscionability]."[20] Likewise, the Court has said that "[a] contract's substantive fairness must be considered in light of any procedural unconscionability in its making,"[21] and that the "ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement."[22] In this respect, "[s]ubstantive terms that, in the abstract, might not support an unconscionability finding take on greater weight when imposed by a procedure that is demonstrably oppressive."[23]

The sliding-scale aspect of California's jurisprudence thus suggests that the unconscionability analysis ought to be functional and holistic, with the substantive and procedural inquiries intertwined. On this approach, terms that might be acceptable in some circumstances are sufficient for a finding of unconscionability in others, depending on how those terms were arrived at.[24]

[19] *Id.* at 927-28; *OTO, LLC v. Kho*, 8 Cal.5th 111, 125-26 (2019).
[20] *Kho*, 8 Cal.5th at 125-26.
[21] *Id.* at 126 (internal quotations and citations omitted).
[22] *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 912 (2015); *accord Kho*, 8 Cal.5th at 126.
[23] *Kho*, 8 Cal.5th at 130.
[24] *See, e.g., id.* at 118 ("Even if a litigation-like arbitration procedure may be an acceptable substitute for the Berman process in other circumstances, an employee may not be coerced or misled into accepting this trade.).

Likewise, an ordinary feature of contract formation, such as adhesion, can merit a finding of unconscionability when combined with significantly unfair terms.[25]

If we emphasize the functionalism of the sliding-scale strand of California's unconscionability jurisprudence, we might ask: Were the terms in *Fuentes* "sufficiently unfair, in view of all the relevant circumstances, that a court should withhold enforcement?" And arguably, the answer is yes. Indeed, even if we assume that the substance of the *Fuentes* contract was a run-of-the-mill arbitration agreement,[26] and even if we bracket the *Fuentes* dissent's argument that unreadable terms are substantively unconscionable regardless of their content,[27] there is still a significant case for unconscionability.[28]

First, the arbitration agreement in *Fuentes* required Fuentes to give up fundamental rights, including her right to be heard in a public court and her right to a jury trial. Of course, some may argue there may not be anything inherently wrong with the waiver of these rights. Their waiver may not be against public policy, and it might even be desirable for some employees in certain situations.

[25] *Gentry v. Superior Court*, 42 Cal.4th 443, 469 (2007) ("Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced, contain a degree of procedural unconscionability even without any notable surprises, and 'bear within them the clear danger of oppression and overreaching.') (internal citations omitted).
[26] *Cf. Fuentes v. Empire Nissan, Inc.*, 90 Cal.App.5th 919, 940 (Cal. App. Ct. 2023) (Stratton, P.J., dissenting) (arguing that the arbitration agreement had distinctive features that rendered it substantively unconscionable, including that it allowed the car dealership to modify the terms unilaterally and that it required Fuentes to waive her right to a Berman hearing).
[27] *See id.* at 939-40 (Stratton, P.J., dissenting). The functionalist approach that I am advocating in this Note is compatible with the dissent's line of reasoning. The main difference between the dissent's approach and the functionalist approach in this Note is that the dissent's approach expands the concept of substantive unconscionability, finding substantive unconscionability in something other than the content of the terms of the agreement. The functionalist approach that I am advocating, on the other hand, would see a contract's procedural unfairness as impacting how a court should judge the fairness of a contract's content. While the two approaches are conceptually different, though, they are not necessarily incompatible or in tension. It is worth remarking, however, that one advantage of the functionalist approach is that it does not require expanding or confusing the distinction between procedural and substantive issues. It simply sees those issues as intertwined: courts should scrutinize the content of an agreement differently in the context of coercion and deceit, just as they should scrutinize contract formation processes more carefully in the context of terms that are significantly unfair in their own right.
[28] I gesture at the arguments that follow in David Beglin, *Sliding Scales of Justice? An Analysis of California's Approach to Unconscionability,* 112 CALIF. L. REV. (forthcoming, Oct. 2024) (*see* Section III.C.1).

However, "an unconscionability analysis must be sensitive to context."[29] And it is difficult to imagine a more oppressive and deceptive context than the one in *Fuentes*. The illegibility of the contract, combined with the coercive way in which it was imposed upon Fuentes, made it impossible for Fuentes to know what she was agreeing to. In this context, terms requiring the waiver of fundamental rights hardly seem fair or just. Courts should not be required to enforce the waiver of such rights when the party waiving them was coerced and deceived into doing so.

Second, in addition to requiring the waiver of fundamental rights, the arbitration agreement in *Fuentes* was arguably one-sided. Even if the terms applied equally to both Empire Nissan and Fuentes, there is no doubt that on balance those terms favored Empire Nissan. In particular, barring class and collective action before any dispute arose only benefited Empire Nissan, which would have no cause for class action against its employees, and only harmed Fuentes, who could have potentially benefited from class or collective action at the time the agreement was signed. Again, this is not to say that such terms are inherently unacceptable. Even assuming such terms are acceptable in most contexts, the contract formation process in *Fuentes* was not like most contexts. Given the severity of the procedural defects in *Fuentes*—the power dynamic between an employer and employee, the short time for review, the lack of an opportunity to ask questions, and especially the complete illegibility of the agreement—it seems reasonable to conclude that the terms here were simply too extractive to deserve enforcement. If a contract's formation process is as coercive and deceptive as the one in *Fuentes,* California's courts should not be required to enforce terms that extract something that a party might reasonably not want to give up or that might put the party in a worse position. Against the background of such severe procedural abuse, such terms should be treated as unconscionable.

[29] *Kho*, 8 Cal.5th at 130.

If we lean into the functionalism at the heart of the sliding-scale strand of California's unconscionability jurisprudence, then, there are significant arguments that even a run-of-the-mill arbitration agreement is unconscionable in a context like *Fuentes*. The foregoing analysis also provides one way to unpack the California Supreme Court's suggestion that "fine-print terms" are substantively unconscionable.[30] Such terms can be understood as terms that are sufficiently unfair or one-sided to be considered substantively unconscionable in light of the way that they are obscured and imposed upon a party.

To be clear, the foregoing analysis is not inconsistent with the idea that a finding of unconscionability requires both procedural and substantive unconscionability. That is, arguably the terms of the arbitration agreement in *Fuentes* were substantively unconscionable in light of the severe procedural unconscionability evidenced by the contract formation process. The foregoing analysis is certainly inconsistent, however, with the idea that the procedural unconscionability inquiry is conceptually separate from the substantive unconscionability inquiry and that a contract is unconscionable only if it passes some independent threshold of substantive unconscionability. The proposed analysis is driven, rather, by the idea that procedural unconscionability ought to factor into a court's inquiry into whether the terms of a contract are unconscionable, or too unfair or one-sided to merit enforcement. This analysis thus relaxes the formalism that *Fuentes* emphasized and embraces the functionalism at the heart of the sliding-scale approach to unconscionability.

III. Justifying a Functional, Holistic Approach to Unconscionability

The previous section aimed to draw out a tension between formalism and functionalism in California's current unconscionability jurisprudence. As with any tension, this tension can be

[30] *See id.*

resolved in two directions. In deciding the *Fuentes* appeal, the California Supreme Court could embrace formalism, maintaining a sharp distinction between procedural and substantive unconscionability and holding that a contract is unconscionable only if it meets independent thresholds of procedural and substantive unconscionability. On this approach, the sliding scale merely adjusts the degree of procedural or substantive unconscionability that a contract must independently evidence in order to be invalidated. The terms of a contract that was formed through a significantly unfair procedure, for instance, would still have to be unconscionable in their own right, considered in the abstract. In other words, the terms would have to rise above some minimal threshold of unfairness, regardless of the abuse in the contract formation process.[31]

Alternatively, the Court could embrace the functionalist, holistic strand of California's unconscionability jurisprudence, leaning into the idea that the ultimate question "is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement."[32] This would not require abandoning the distinction between substantive and procedural unconscionability, or even blurring that distinction, but it would at least mean treating substantive and procedural unconscionability as intertwined. In a context like *Fuentes*, then, where there is severe procedural unconscionability, a functionalistic approach would require a court's analysis of the contract's substantive unconscionability to be informed by the way in which the terms being analyzed were imposed upon the party claiming unconscionability. Terms that are acceptable in the abstract might nevertheless be unconscionable if they are imposed through a significantly oppressive or deceptive procedure.

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[31] Notably, embracing formalism would not necessarily mean upholding the *Fuentes* majority. The dissent in *Fuentes*, for instance, proffers an analysis that seems, at least in part, consistent with the majority's formalism. *See Fuentes*, 90 Cal.App.5th at 938-40 (Stratton, P.J., dissenting).
[32] *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 912 (2015); *accord Kho*, 8 Cal.5th at 126.

This section argues that the California Supreme Court would do well to embrace function over form and to overturn *Fuentes* on these grounds. Doing so would be more consistent with the text and legislative history of the statute codifying unconscionability in California, and it would advance important policy goals without bringing about undesirable consequences.

A. A holistic approach to unconscionability is more consistent with the text of California Civil Code Section 1670.5.

California's unconscionability doctrine is codified in Civil Code Section 1670.5. Nothing in the text of that section suggests that courts ought to find a contract unconscionable only upon a showing that it evidences both procedural and substantive unconscionability or that procedural and substantive unfairness must be assessed independently. In fact, the official comments to Section 1670.5 suggest that courts ought to take a more functional approach to unconscionability.

Section 1670.5 is comprised of two subdivisions. Subdivision (a) provides that "[i]f a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."[33] And subdivision (b) further provides that parties must be afforded "a reasonable opportunity to present evidence as to [the contract's] commercial setting, purpose, and effect."[34]

[33] Cal. Civ. Code § 1670.5(a).
[34]Cal. Civ. Code § 1670.5(b)

Because Section 1670.5 does not shed much light on how courts ought to evaluate unconscionability, the legislature adopted official comments, which were meant to guide courts in their application of the statute.[35] The most substantive part of these comments explains:

> This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subdivision (b) makes it clear that it is proper for the court to hear evidence on these questions. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.[36]

The text of 1670.5 and its official comments support a functional approach to the unconscionability doctrine, one that is not constrained by the formalistic requirement of independent showings of procedural and substantive unconscionability. Indeed, there is nothing in the text about such a two-pronged approach. Moreover, the text of the law affirmatively supports analyzing unconscionability holistically. It does so in two main ways.

First, the "basic test" articulated in the official comments is explicitly holistic in its approach. It instructs courts to evaluate "whether, in light of the background and the general needs of the case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[37] This test suggests that the unconscionability analysis ought to be flexible, responsive to the interplay between procedural and substantive unfairness. Indeed, the test is remarkably similar to the idea that the "ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all

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[35] Report on A.B. 510, Assembly Journal, 9231 (Sept. 5, 1979); *see also* Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L. J. 459, 492 (1995).
[36] Cal. Civ. Code § 1670.5, cmt. 1.
[37] *Id.*

relevant circumstances, that a court should withhold enforcement."[38] Like that idea, Section 1670.5's basic test is explicit that whether a contract's terms are unconscionable must be assessed in terms of "the background and the general needs of the case," considerations that certainly include the circumstances surrounding how the relevant contract was formed. In this respect, the basic test articulated in Section 1670.5's official comments suggests that procedural unfairness should directly bear on a court's evaluation of a contract's substance, and particularly its evaluation of whether the terms of that contract rise to the level of unconscionability.

Second, the principle underpinning Section 1670.5—"the prevention of oppression and unfair surprise"—further supports the idea that courts ought to consider procedural and substantive unfairness holistically. Oppression and unfair surprise, after all, have dual and interconnected procedural and substantive aspects. A contract might be oppressive either because of its extractive or unfair terms or because of the way in which those terms were imposed upon a party. Similarly, unfair surprise has to do with a contract's terms, which are what are found surprising; but it also implicates procedural issues, which can make the surprise unfair. If the official principle driving Section 1670.5 is thus the prevention of oppression and unfair surprise, this suggests that courts ought to consider substantive and procedural issues together, in a way that respects their interplay. Otherwise, as in *Fuentes,* a court might fail to vindicate the principle underlying California's unconscionability doctrine.

B. A holistic approach to unconscionability is more consistent with the legislative history and purpose of Section 1670.5.

In addition to its text, the legislative history of Section 1670.5 also supports courts taking a functional, holistic approach to unconscionability. Section 1670.5 was enacted in 1979 as part of

[38] *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 912 (2015); *accord Kho*, 8 Cal.5th at 126.

Assembly Bill 510, which addressed a deceptive scheme that targeted vulnerable homeowners.[39] The scheme involved door-to-door salespeople pressuring or deceiving homeowners into buying overpriced goods on credit, secured with a lien against their house.[40] The contracts imposed on the homeowners contained hidden fees, and when the homeowners failed to make payments, the contract would be assigned to a different company, which would foreclose with little notice and buy the house at a steep discount at a non-judicial auction.[41] AB 510 directly addressed this scheme. It prohibited financial institutions from entering into contracts that provided for assignment and increased procedural protections in the context of foreclosure and non-judicial auctions.[42] In addition to these specific statutory fixes, AB 510 also provided a more general protection, codifying the unconscionability doctrine in California Civil Code Section 1670.5.[43]

The history of Section 1670.5 thus suggests that it was meant to serve as a broad, flexible safety net.[44] Whereas AB 510's other provisions were fairly specific, targeting particular mechanisms used in the scheme that AB 510 was intended to address, Section 1670.5 is strikingly broad in its scope. Indeed, not only did Section 1670.5 adopt the flexible, open-textured language of Uniform Commercial Code Section 2-305 (see Section III.A above for a description of that language); it was also enacted as part of California's Civil Code, so that it would apply beyond the commercial context. As AB 510's author put it in a letter to the Governor, Section 1670.5 was meant to make "all unconscionable contracts voidable and also [to provide] that unconscionable provisions in a

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[39] Report on Enrolled Bill A.B. 510 from Department of Consumer Affairs to Edmund G. Brown, Jr., Governor of California.
[40] *Id.*
[41] *Id.*; *see also* J. Fenton, Digest of A.B. 510 (Aug 30, 1979).
[42] Report on A.B. 510, Assembly Journal, 9231 (Sept. 5, 1979).
[43] *Id.*
[44] This paragraph draws on Beglin, *supra* note 28, Section I.B. *Cf.* Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L. J. 459, 493 (1995) (arguing for a narrower interpretation of Section 1670.5, given that it was enacted as part of a bill that addressed a particular consumer protection issue).

consumer contract are unlawful."[45] In these respects, it seems fair to characterize the legislative goal of Section 1670.5 as being to serve as a flexible safety net, guarding against novel contractual abuses that might arise in a variety of future contexts.

Given the history of Section 1670.5, courts ought not to take an overly restrictive approach when analyzing unconscionability. In this respect, the formalism of the *Fuentes* court is contrary to how the law was meant to function. The strict separation of a contract's substantive and procedural elements, along with the requirement of some independent threshold of unconscionability with respect to both, works to undermine the necessary flexibility of the unconscionability doctrine, making it more difficult for courts to address the myriad ways in which procedural and substantive abuse can work together to create unconscionable contracts.[46] A functional, holistic approach to the unconscionability doctrine is thus more consistent with the legislative history and purpose of Section 1670.5, because it provides courts with the adaptability necessary for the unconscionability doctrine to serve its safety net purpose.

C. A holistic approach would advance important policy goals without significant drawbacks.

The text and history of Section 1670.5 thus suggest that California courts ought to take a functional approach to unconscionability, one that holistically assesses whether a contract is unconscionable in light of both its substantive and procedural aspects. Such a holistic approach would also be more desirable as a matter of policy.

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[45] Letter from Assemblyman Jack R. Fenton, Chairman, Assembly Judiciary Committee, to Edmund G. Brown, Jr., Governor of California (Sept. 13, 1979) (emphasis in letter).

[46] *See generally* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (arguing that a formalistic approach to unconscionability interferes with its ability to serve as a flexible safety net)*; see also Morris v. Redwood Empire Bancorp*, 128 Cal.App.4th 1305, 1316 (2005) (explaining that the "flexibility" of unconscionability doctrine is "necessary to its use as a judicial 'safety valve' to prevent gross injustice").

To begin, a holistic approach advances the key values underlying the unconscionability doctrine. Commentators generally recognize that the doctrine is meant to advance fair exchange and social welfare, on the one hand, and autonomy and freedom of contract, on the other.[47] Enhancing the doctrine's flexibility would serve both sets of these values. Indeed, consider *Fuentes.* As argued above, Fuentes not only gave up fundamental rights, but giving up those rights disproportionally disadvantaged her. Of course, this bargain might have been acceptable in other circumstances. But given the way in which the terms were imposed upon Fuentes, and given her position in relation to her employer, the agreement and its terms were hardly a model of fair exchange; it seems fair to say that Fuentes was harmed by the agreement. It would thus arguably advance fair exchange and social welfare to empower courts to step in and more closely scrutinize agreements like the agreement in *Fuentes.* Moreover, the significant coercion and deception involved in the contract formation process in *Fuentes* completely undermined Fuente's autonomy and freedom of contract. A more functional approach would thus also take more seriously the agency and liberty of parties to a contract, allowing these values to inflect a court's evaluation of whether a contract's terms are fair. In short, a case like *Fuentes* demonstrates the way that a more holistic approach to unconscionability, which

[47] Substantive unconscionability has historically been connected to the values of fair exchange and social welfare. *See, e.g., De La Torre v. CashCall, Inc.*, 5 Cal.5th 966, 976 (2018) (explaining that one historical justification of the unconscionability doctrine is to "protect social welfare"); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PENN. L. REV. 485, 487 (1967) (explaining that courts "may legitimately be interested… in what [a contract] provides"); Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 787-88 (2020) (describing substantive unconscionability as a reflection of the doctrine's historical focus on fair exchange). Procedural unconscionability, on the other hand, has historically been connected to issues of autonomy and free contract. *See, e.g., Gentry v. Superior Court,* 42 Cal.4th 443, 470 (2007) ("Thus, a conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely…"); Leff, *supra*, at 487 (tying procedural unconscionability to traditional defenses like fraud and defense and explaining that courts have a legitimate interest in "the way agreements come about"); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 294-95, n.7 (1975) (connecting unconscionability to the ability to police procedural issues that interfere with freedom of contract).

respects the interplay between procedural and substantive abuse, would allow the unconscionability doctrine to more flexibly serve its general policy goals.

A holistic approach would also allow the unconscionability doctrine to serve its historical purpose of promoting judicial integrity.[48] A formalistic approach to unconscionability, one that requires that procedural and substantive unconscionability be treated separately and that some independent threshold of each be met, limits the unconscionability doctrine's flexibility. This means that courts will sometimes be required to enforce contracts that are fundamentally unjust. Again, *Fuentes* is a prime example of this problem. Despite the significant injustice in how the contract was formed, and despite the fact that the unjust formation process deprived Fuentes of any knowledge of the crucial rights and advantages she was giving up, the *Fuentes* court felt obliged to uphold the agreement, because its terms, when considered in the abstract, were acceptable. This formalistic approach to the unconscionability doctrine, though, is at odds with the idea, deeply embedded in the doctrine, "that courts will not permit themselves to be used as instruments of inequity and injustice."[49] A functional, holistic approach, by contrast, would allow courts the flexibility to vindicate this basic principle of judicial integrity. Such an approach would thus honor the history of the unconscionability doctrine and the sliding scale approach, with their roots in courts of equity.[50]

[48] *See U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting). ("But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?"). Likewise, for a case cited approvingly by Cal. Civ. Code Section 1670.5, cmt. 1., *see Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (1948) ("We do think, however, that 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. That equity does not enforce unconscionable bargains is too well established to require elaborate citation.").
[49] *U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942).
[50] *See generally* John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PENN. L. REV. 931 (1969) (developing the sliding scale approach to unconscionability through an analysis of how courts approached unconscionability at equity).

Key to the value of the functional approach to unconscionability, then, is its flexibility. Still, many have worried about the practical consequences of such flexibility. Indeed, one of the main criticisms of the unconscionability doctrine, and one of the key justifications for formalism with respect to it, is the worry that the doctrine will lead to judicial overreach and uncertainty.[51] These worries, though, are overstated.[52] Indeed, the California Supreme Court has recently rejected worries about judicial overreach in the context of the unconscionability doctrine, remarking on the "cautious tread" that courts have taken.[53] Likewise, empirical work suggests that courts have generally been consistent and predictable in their application of the doctrine.[54] Of course, officially adopting a holistic approach might lead to a period in which courts must adjust, and such a period of adjustment would necessarily bring some degree of uncertainty. This, however, is not a unique worry about unconscionability, and there is no reason to think that courts will not eventually develop a sound, predictable jurisprudence when employing a more explicitly holistic framework.

Besides judicial overreach and uncertainty, one might worry about other practical consequences of relaxing formalism and embracing a more functional approach to unconscionability. The *Fuentes* court was worried about blurring the procedural and substantive unconscionability inquiries, for example, because it feared calling into question the enforceability of

[51] For an early such critic, see Leff, *supra* note 47, at 557. *See also OTO, LLC v. Kho*, 8 Cal.5th 111, 144, 146 (2018) (Chin, J., dissenting) (worrying that an approach that loosened the independent requirement for substantive unconscionability would be overly vague).
[52] *See generally* Beglin, *supra* note 28, Sections II.B.3; III.C.2.
[53] *De La Torre v. CashCall, Inc.*, 5 Cal.5th 966, 993 ("In light of such a cautious tread by the courts, the idea that '[j]udicial regulation would supplant market conditions in setting rates' and thereby drive out lenders appears lacking in empirical support").
[54] *See* Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 824 (2020) (explaining that contrary to "the myth that the unconscionability doctrine is unpredictable and inconsistent," the "results of cases involving the doctrine seem highly predictable"); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. UNIV. L. REV. 1067, 1107-10 (2006) (finding a number of predictive factors in the context of findings of unconscionability).

form contracts more generally.[55] But a holistic approach to unconscionability simply would not have this consequence. It is true that California treats adhesion contracts as containing a minimal degree of procedural unconscionability.[56] However, a holistic approach to unconscionability need not be blind to context. In fact, the point of a holistic approach is to be *more* sensitive to context. And the procedural issues with adhesion contracts are a far cry from the procedural issues evident in the contract formation process in cases like *Fuentes*. There is a big difference between an employer giving a standard arbitration agreement to an employee, who must accept the agreement in order to work for the employer, and the employer imposing the same agreement in a way that leaves the employee with no way to understand what they are actually agreeing to. Nothing about a holistic approach requires courts to lose their sense of nuance.

The *Fuentes* court was also worried about running afoul of the Federal Arbitration Act's preemption of state rules about arbitration.[57] This would be an issue, however, only if the application of the holistic approach was limited to arbitration agreements or relied on unique features of those agreements.[58] Indeed, there is no federal policy favoring arbitration agreements; state law must simply treat arbitration agreements the same as any other contract.[59] And a holistic approach to unconscionability would not inherently disfavor arbitration agreements. Even if the holistic approach would allow a court to invalidate an arbitration agreement like the agreement in *Fuentes*,

[55] *Fuentes v. Nissan Empire, Inc.*, 90 Cal.App.5th 919, 929 (2023) ("To nullify the element of substantive unconscionability would change the law. That change would make the unconscionability doctrine into a one-element defense where the sole issue would be whether there is procedural unconscionability. This would tend to call into question all form contracts—a profound change indeed.")
[56] *Gentry v. Superior Court,* 42 Cal.4th 443, 469 (2007).
[57] *Fuentes*, 90 Cal.App.5th at 929.
[58] *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341 (2011); *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) ("a court may not devise novel rules to favor arbitration over litigation").
[59] *Morgan*, 596 U.S. at 418 ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.")

the approach would permit that same agreement in contexts with less procedural abuse. And the holistic approach would treat other contract terms—including the waiver of other public rights—similarly.

Relaxing the formalistic strand of California's unconscionability jurisprudence, and embracing the functionalism of the sliding scale, would thus allow the unconscionability doctrine to operate more flexibly, thereby advancing the key values the doctrine is meant to serve: fair exchange, social welfare, autonomy, freedom of contract, and judicial integrity. Likewise, there is no reason to think that a more holistic approach to unconscionability would lead to judicial overreach or uncertainty, undermine the use of form contracts in the modern economy, or contravene the Federal Arbitration Act. In short, there is simply no significant reason to hold onto a formalism that is contrary to the text and history of Section 1670.5, and which hinders the ability of the unconscionability doctrine to serve its protective purpose.

IV. Conclusion

Fuentes reveals a tension in California's current unconscionability jurisprudence. On the one hand, that jurisprudence treats procedural and substantive unconscionability as separate issues and requires that contracts meet some threshold of both in order to be found unenforceable. On the other hand, California requires courts to assess unconscionability on a sliding scale, recognizing the reality that procedural and substantive issues are interrelated and that unconscionability ought to be assessed holistically. *Fuentes* also reveals the problems with an overly formalistic approach to unconscionability. This Note has argued that the California Supreme Court ought to reject *Fuentes's* formalism and to embrace the functionalism of the sliding scale. It should reverse *Fuentes* and explicitly adopt a framework that allows courts to evaluate unconscionability holistically, in terms of a contract's procedural and substantive unfairness and how those aspects of unfairness work

together. Such an approach would be more consistent with the text and legislative history of Section 1670.5 and would advance important policy objectives without harmful consequences.