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Adjusting Unconscionability as an Alternative to the "Fair Contracts' Approval Mechanism"

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ADJUSTING UNCONSCIONABILITY AS AN ALTERNATIVE TO THE “‘FAIR CONTRACTS’ APPROVAL MECHANISM”

Abstract

Courts are in the habit of enforcing contracts. Courts enforce contracts governing consumer transactions even though empirical data show consumers do not read those terms. The big question is, “Should they?” One legal scholar, Shmuel I. Becher, has answered that question with a resounding “yes, but differently.” Becher proposes a creative and comprehensive third-party approval system for consumer contracts, known as the “‘Fair Contracts’ Approval Mechanism.” In this Paper, I identify several fatal problems associated with Becher’s proposed system, and—given those problems—propose an alternative method of protecting consumers. Specifically, I suggest adjusting the unconscionability doctrine to include a sliding-scale analysis involving, on the one hand, the standard form contract’s length and, on the other, the complexity, value, or importance of the transaction to the consumer. I show how my “adjusting unconscionability” approach is preferable to Becher’s because it protects consumers from unfavorable terms while also maintaining consumers’ responsibility for the terms of their own bargains—all in a cost-effective manner.
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“FAIR CONTRACTS’ APPROVAL MECHANISM”

Daniel J. Cohn*

I. INTRODUCTION

A man walks down the street.
He says, “Why am I short of attention?
Got a short little span of attention.
Whoa, my nights are so long!”
-- Paul Simon, “You Can Call Me Al”¹

As technology continues to develop at a rapid rate and consumers turn more and more to online purchases involving standard form “browsewrap”-style contracts, consumers possess little time and energy to review the standard form contracts that govern their purchases.² Indeed, even the Chief Justice of the Supreme Court of the United States does not read the fine print associated with his online purchases or accompanying medication.³ A key question emerges: what is the law to do about it?

In this Paper, I address the problems inherent in standard form consumer contracts and the relevant empirical data.⁴ I then examine and, ultimately, discount a creative and comprehensive proposal meant to deal with these problems—Shmuel I. Becher’s “‘Fair Contracts’ Approval Mechanism.”⁵ Finally, I propose a cost-effective alternative: an adjustment to the unconscionability doctrine that employs a sliding-scale analysis that compares overall

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¹ PAUL SIMON, You Can Call Me Al, on GRACELAND (Warner Bros. 1986).
³ Weiss, supra note 2.
⁴ See infra Part II(A), page 3.
⁵ See infra Part II(B), page 3; infra note 28.
contract length to the significance, importance, or value of the transaction. Such an approach acknowledges consumers’ apathy and inability to bargain while still providing some mechanism for relief if standard form contracts are unreasonably long in relation to the transactions’ importance, value, or complexity.

Part II(A) of this Paper explains the most vexing problems associated with standard form contracts in consumer transactions—particularly online. Part II(B) summarizes what is to date the most comprehensive third-party approval system to be proposed to address those problems—Becher’s Fair Contracts Approval Mechanism (the “Becher Proposal”). Part III critiques the Becher Proposal in three ways: (a) it shows how the Becher Proposal fails to account for consumers’ unwillingness to read contract terms and consumers’ inability to bargain in their most common transactions; (b) it identifies insurmountable challenges in implementing the Becher Proposal; and (c) it demonstrates how the Becher Proposal is superfluous and unnecessary.

Part IV(A) of this Paper describes the unconscionability doctrine as it stands currently. Part IV(B) proposes and explains my alternative method of addressing standard form contracting in consumer transactions—adjusting the procedural unconscionability analysis for those transactions. Part IV(C) discusses why my proposal appears to be superior to the comprehensive Becher Proposal. Part IV(D) acknowledges and addresses likely criticism, and

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6 See infra Part IV(B), page 24.
7 See infra Part IV(B), page 24; Part IV(E), page 31.
8 The most basic problem is that consumers do not read contracts, but courts still enforce the contracts as if they have been read. See infra Part II(A), page 3.
9 See page 5.
10 See pages 8-23.
11 See page 23.
12 See page 24.
13 See page 27.
Part IV(E) outlines some of my own reservations.\textsuperscript{14} Ultimately, I conclude that adjusting the unconscionability doctrine is superior to the Approval Mechanism as a way to begin addressing the problem of substantive unfairness in consumer transactions involving standard form contracts.

\textbf{II. \hspace{0.5em} BACKGROUND}

Empirical data now support what we have recognized anecdotally for some time, namely, that consumers do not read the terms governing their transactions.\textsuperscript{15} Nevertheless, courts are still enforcing those contracts as if they were being read.\textsuperscript{16} Enter the Becher Proposal. The Becher Proposal attempts to address the problem of consumer standard form contracts by creating a third party approving body that reviews those form contracts and issues approvals on which consumers, merchants, and (at least to some degree) courts may rely.\textsuperscript{17} In this Part, I discuss the reasons change is advocated, and I then explore the Becher Proposal in some detail.

\textbf{A. \hspace{0.5em} The Fact-Based Impetus for Change}

Most of us need not spend much time soul-searching to realize and admit that we do not read contracts associated with our consumer purchases and transactions. Nor must we take time to ponder which terms in the transaction generally are most important and receive the bulk (if not all) of our attention. Those most important terms are price, quality, function, and—occasionally—return policies.\textsuperscript{18} Although the support for this contention previously was anecdotal, recent empirical studies now confirm this consumer trend: consumers typically do not

\begin{itemize}
\item[\textsuperscript{14}] See pages 138-159.
\item[\textsuperscript{15}] See infra note 19.
\item[\textsuperscript{16}] See infra note 22.
\item[\textsuperscript{17}] See generally Becher, infra note 28 (describing the proposal).
\item[\textsuperscript{18}] Schmitz, supra note 2, at 887 (identifying the most important terms to consumers); see also text accompanying infra note 74.
\end{itemize}
read the contracts governing their “everyday” transactions. This failure to read contracts is, at least in part, for good reason. After all, lengthy standard form contracts have become standard operating procedure for even the smallest purchases. For a wonderful example (at least on its face), consider the twenty-two-page contract governing a $0.99 song purchase on iTunes.

Despite this now well-documented consumer reality of consumers failing to read contract terms, courts typically have refused to alter their approach to enforcing consumer contracts to reflect that reality. Several reasons are advanced for maintaining, for the most part, traditional legal principles. These reasons including market efficiency, convenience and cost-savings, and consumers’ freedom to reject form contracts. That is, standard form contracts permit one draft of a document to apply to every purchase, eliminating the need for individually-drafted documents. Thus, the market becomes more efficient through the convenience and cost savings associated with not having to draft a new contract for each purchase. Additionally,

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20 Apparently, depending on how one views or prints the terms, they can be as many as fifty-six pages long. See Umika Pidaparthy, What you should know about iTunes’ 56-page legal terms, CNNTECH (May 6, 2011), http://articles.cnn.com/2011-05-06/tech/itunes.terms_1_itunes-users-terms-apple-users/3?_s=PM:TECH (describing the agreement as being fifty-six pages long).
21 iTunes Store Terms and Conditions, APPLE, http://www.apple.com/legal/itunes/us/terms.html (last visited Feb. 1, 2012); see also Pidaparthy, supra note 20 (observing Apple users are “frustrated” with the contract’s “eye-glazing length”). It is also worth noting the absence entirely of contracts involved in song purchases before digital copies were available (albums, cassette tapes, or CDs).
22 See, e.g., Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150-51 (7th Cir. 1997) (enforcing a form computer purchase contract—not even received until after the transaction was complete—requiring arbitration); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1109-09 (9th Cir. 2002) (finding that an employee assented to an arbitration term added after the employee was already hired because the employee could have opted out within thirty days).
23 Schmitz, supra note 2, at 864.
24 Id.
25 Id.
26 Id.
consumers bear responsibility for their own failures to shop for or negotiate more favorable contracts.\textsuperscript{27} Given courts’ steadfast adherence to traditional principles of contract formation, Professor Shmuel I. Becher has proposed a third-party approval system (the Becher Proposal) that, among other things, does not require a consumer to read approved terms and requires only a “relaxed duty” to read non-approved terms.\textsuperscript{28}

B. The Becher Proposal

One proposal acknowledges and responds to the reality that consumers tend not to read contracts by laying out a comprehensive for reforming contract law and gaining contract approval by an independent third party.\textsuperscript{29} The Becher Proposal contains two major elements.\textsuperscript{30} The first is a mechanical or procedural element that lays out the approval system’s function, structure, process, and interaction with consumers and merchants.\textsuperscript{31} The second element is the set of proposed legal effects—designed to address the standard form contract problems in consumer transactions—\textsuperscript{32} that flow from the mechanical element.\textsuperscript{33}

1. The Mechanics of the Becher Proposal

Becher suggests establishing a third-party body with authority to pre-approve standard form contract terms (or entire contracts).\textsuperscript{34} Becher refers to this body as a Fair Contracts

\textsuperscript{27} Id.
\textsuperscript{28} See generally Shmuel I. Becher, \textit{A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law}, 42 U. Mich. J.L. Reform 747 (2009) (proposing the standard form contract approval system and associated proposed changes in law, and addressing arguments for and against such a system); see also id. at 776, 786 (discussing the duty to read).
\textsuperscript{29} See generally Becher, \textit{supra} note 28 (describing his proposal).
\textsuperscript{30} See infra notes 31, 33.
\textsuperscript{31} See infra Part II(B)(1), page 5.
\textsuperscript{32} See infra Part II(B)(3), page 7.
\textsuperscript{33} See infra Part II(B)(2), page 6.
\textsuperscript{34} Becher, \textit{supra} note 28. Although Becher acknowledges advantages in an all-or-nothing approach, he ultimately favors partial approval because, according to Becher, partial approval would provide consumers “with a wider variety of contracts to choose from” and would discourage “a race-to-the-bottom” by sellers. \textit{Id.} at 760. Additionally, although Becher primarily advances a voluntary approval mechanism, he suggests that it may be permissible to require pre-approval in markets with vulnerable consumers or high volumes of activity, among other exceptions. \textit{Id.} at 788.
Approval Organization (FCAO). If the FCAO only approves certain contract terms and not others, the non-approved terms could be placed in a box at the beginning of the contract, while the approved terms could follow—outside the box—at the end of the contract. In this way, consumers would easily and quickly be able to differentiate approved from non-approved terms. Additionally, the FCAO would issue its own seal of approval, and could even develop two distinct seals—one for contracts approved in their entirety, and one designating only that some terms have been approved. Sellers, rather than simply being permitted to display the seal of approval, also may be required to display the seal.

2. The Legal Effects of the Becher Proposal

Once the approval process is in place, Becher proposes several legal consequences based on contract and term approval or non-approval. First, courts should “employ higher standards for evaluating claims of unconscionability” when dealing with contract terms that have been approved by the FCAO. Second, courts should apply the common law duty to read differently to approved and non-approved terms, with consumers having no duty to read approved terms and only a relaxed duty to read non-approved terms. According to Becher, such a relaxed duty will result in non-approved terms being harder to enforce than approved terms, which will encourage

35 Id. at 750. For ease of reference, I shall do the same.
36 Id. at 761.
37 Id.
38 Id. at 761-62.
39 Id. at 787. The rationale for this is that it “guarantees that consumers will . . . realize that a contract has been approved.” Id. It also signals to consumers not to spend time reading the terms and indicates a lower likelihood of success if they pursue litigation against the merchant. See id.
40 See generally id. at 775-82, 793 (outlining the consequences).
41 Id. at 776. The idea is that contract approval means a greater likelihood that terms are substantively and procedurally fair, and thus they “should enjoy a greater presumption against unconscionability.” Id. The reverse is also asserted. Id. Accordingly, merchants’ decision whether to seek contract approval should be “an important factor in examining an unconscionability claim.” Id. The assumption that merchants obtaining approval essentially will have fairer terms is arguable, however. Just because a merchant does not obtain approval does not mean its terms are more likely to be unfair. See id. at 770 (acknowledging that merchants might opt not to participate in the approval process because of transaction costs, even where their terms are entirely fair).
42 Id. at 766-68, 776.
sellers to use the approval process. Third, “courts should be vested with wide discretion to admit extrinsic evidence when dealing with non-approved contracts while taking a stingier approach towards extrinsic evidence in pre-approved contract cases.” Fourth, contracts (or individual terms) that have been approved by the FCAO would be given immunity from legal claims, and consumers would have a reduced burden of proof in lawsuits involving non-approved contract terms. Finally, the FCAO’s decisions to approve (or not to approve) a contract or term would be subject to judicial review.

3. The Purported Benefits and Cost Savings of the Becher Proposal

Becher claims that “[c]onsumers are likely to prefer approved contracts that have been examined by an expert institution, rather than examining the contract themselves or simply ignoring the contract they enter.” The FCAO seal would also “serve as an indication for potential buyers that there is no reason to carefully read approved terms, thus economizing on their time and limited attention.” If the FCAO mistakenly approved a contract or term that should not have been approved, the FCAO—rather than the consumer or the seller—will bear the cost of damages.

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43 Id. at 776. However, it is entirely unclear how this is so, since approved terms result in the consumer not having any duty to read whatsoever. See id. at 766-68. If there is no duty to read approved terms, and a higher duty (albeit relaxed from current standards) to read non-approved terms, then it seems the incentive—at least as far as the duty to read is concerned—is for the seller to use non-approved terms. See 17A C.J.S. Contracts § 193 (2011) (“O]ne who refrains from reading a contract and in conscious ignorance of its terms voluntarily assents thereto will not be relieved from his or her bad bargain.”); see also id. (stating that a person is under a duty to read contracts before signing, and if a person does not do so, the contract is, absent some exception, enforceable against the person notwithstanding the failure to read the terms). This idea is explored in more detail in infra Part III(C)(2), page 14.

44 Becher, supra note 28, at 777. Becher justifies this on the “assumption that non-approved terms are trickier for consumers” and then on the assumption that “unfavorable terms are more frequently accompanied by sellers’ oral explanation or advertisement . . . .” Id. Whether those assumptions are valid is questionable at best, but this Paper’s criticism of the Becher proposal is limited to what I perceive to be the most fatal.

45 Id. at 778.

46 Id. at 780-81. Becher also explores the possibility that the burden of proof shifts entirely to the seller. Id.

47 Id. at 794.

48 Id. at 786.

49 Id. at 787.

50 Id. at 789-90.
There also are some asserted advantages from the seller’s perspective. Even though sellers presumably would not be liable for using fair terms—even if those terms were not pre-approved by the FCAO—sellers nevertheless could “gain approval for fair and efficient terms in order to refrain from incurring expenses responding to frivolous suits.” Additionally, sellers who gain approval “minimize the prospects of suffering losses that are due to mistaken judicial decisions.” Sellers using approved terms also could “reduce transaction costs since less time is likely to be spent answering consumers’ questions” about contractual concerns, which would also reduce the need for sellers to train representatives to address legal and contractual questions. Becher also suggests that sellers could reduce legal fees and print expenses by using default terms pre-approved by the FCAO.

Becher lastly claims that the costs—to both parties and society—of litigation will be substantially reduced by the FCAO system. Because Becher proposes allowing punitive and other extra-compensatory damages in lawsuits related to contract terms, the use of the FCAO approval mechanism would reduce sellers’ potential liability and would reduce both the amount of litigation and the cost to sellers thereof. Moreover, Becher proposes that the use by both consumers and sellers of the FCAO mechanism will result in contracts that are fairer overall, thus resulting in less litigation.

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51 Id. at 771.
52 Id.
53 Id. at 772.
54 Id.
55 See, e.g., id. at 770, 773-74, 778.
56 See id. at 773-74, 782-83.
57 See id. at 772, 804.
III. THE UNWORKABILITY OF THE BECHER PROPOSAL

The Becher Proposal, while certainly a comprehensive and creative idea that genuinely attempts to address concerns about consumer purchases, is quite simply unworkable. Most importantly, it fails to address adequately the consumer reality it purports to serve. It also suffers from cureless overbreadth and radically alters some of the most basic areas of contract law. Thus, it cannot effectively be implemented. Each of these problems is addressed below.

A. An Inertia Problem

Let us assume for present purposes that consumers do not read the contracts governing their purchases and that they would value a third-party approval system. Let us further assume that consumers would take the affirmative step of looking to see if contracts or contract terms had been approved by the FCAO. The success of the FCAO system nevertheless depends entirely on the assumption that consumers alerted to possible irregularities, either by absence of approval or approval only of a few terms, would then take the time to read non-approved terms. However, if consumers already are apathetic or otherwise generally fail to read contract terms—especially due to limited time—then there is probably little room for optimism regarding consumers’ willingness to read the non-approved terms after checking for FCAO approval. This is especially true for two reasons. First, the FCAO seal would indicate only approval of some terms and the absence of the seal would simply indicate non-approval (rather

59 See infra Part III(A), page 9; infra Part III(B), page 10; see also infra Part III(D), page 19.
60 See infra Part III(C), page 11.
61 See Becher, supra note 28, at 761 (“Visual measures should be tailored to minimize consumers’ difficulties in distinguishing between the different parts (approved vs. unapproved) of the contract.”).
62 Id. at 748; see also Weiss, supra note 2 (stating that the Chief Justice of the Supreme Court of the United States admitted he does not read fine print); Becher, supra note 19, at 172 (observing that standard form contract terms “are among those attributes that are likely to be overlooked by consumers”).
63 Schmitz, supra note 2, at 874, 878.
than a determination that terms are in fact unfair to the consumer).  Second, the available data indicate consumers quite simply do not care what the terms are regarding most of their purchases. Thus, whatever the merits of the FCAO seal and approval process in alerting consumers to approved terms, consumers appear unlikely to find the time or energy to determine if any non-approved terms are so unfavorable to them that they might back out of the transaction.

**B. Consumers’ Inability to Bargain**

Probably one of the most overlooked flaws of the Becher Proposal is that it fails to account for consumers’ inability to bargain. That is, even if consumers are alerted to a possibly objectionable term, they are powerless to do anything about it: consumers simply are unable to bargain with sellers for more favorable terms. Certainly this reality is a powerful incentive for sellers not to change their contract terms, regardless of implementation of the FCAO program. Put differently, a contract approval process will not suddenly change the fact that consumers are unable to bargain for more favorable terms, even if put on notice by the FCAO program that some terms of the contract are unfavorable to them.

One could argue that the approval process as a whole inherently will encourage sellers to get their terms approved, thereby causing terms to be more consumer-friendly without requiring

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64 See Becher, supra note 28, at 761-62 (describing the seal as “signaling contracts’ quality to consumers). Although Becher provides that the seal would not issue if any of the non-approved terms makes the contract as a whole unfair, see id. at 762, that approach involves additional challenges. For instance, who is to decide what individual unfair term makes any given contract as a whole unfair, or what to do regarding the unfair terms that do not rise to such a level?


66 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) (“the times in which consumer contracts were anything other than adhesive are long past”); Becher, supra note 19, at 119 (“[Standard form contracts] are not a result of a negotiation process: they are offered on a ‘take-it-or-leave-it’ basis . . . .”); Schmitz, supra note 2, at 878 (observing that consumers do not read contract terms because of a “limited . . . ability to negotiate contract terms”); see also Mueller, infra note 108, at 250 n.7, 264 (indicating only eight percent of tenants even attempted to negotiate modifications to lease terms, and of that number, half were “completely refused”).

67 See supra note 66.
the consumer to negotiate for those improvements. However, merchants need not be terribly concerned about a so-called “race-to-the-top” because even if a particular merchant’s contract terms are substantially less favorable to the consumer than another merchant’s terms, consumers generally will not spend the time to shop for contracts.

C. Challenges in Implementation

Even if the FCAO were able to obtain funding and address consumers’ inability to bargain, it faces additional fatal flaws in its implementation. The first is overbreadth in the agency. The second flaw is that it—unrealistically—requires a fundamental change in contract law across dozens of jurisdictions.

1. Overbreadth in the Agency

The FCAO body Becher proposes would cover a vast range of subject matters and transactional areas regarding the contracts it is to review. That wide “jurisdiction” would result in the body’s inability to value and address individual consumer priorities and inability to obtain the requisite expertise in every field.

a. Inability to Value and Address Individual Consumer Priorities

Becher acknowledges outright that “consumers are heterogeneous, and what might seem to be efficient and fair for some types of consumers might not be so for others. Thus, different consumers might have varying preferences as to the scope of insurance or warranty they value . . . .” Yet the Becher Proposal cannot possibly—and does not—address this problem. To

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68 See Becher, supra note 28, at 772 (stating that the FCAO process might make sellers “more likely to engage in a ‘race-to-the-top’ . . . by pointing out a contract’s approval to potential customers”).
69 See Becher, supra note 28, at 802 (stating that the argument that “consumers can (and do) shop for different contracts . . . is . . . fallacious”); supra note 63 and accompanying text. Although Becher indicates that the argument consumers can shop for contracts is fallacious because of uniformity of contractual terms or contractual complexity, Becher, supra note 28, at 802, there are other, more generally applicable reasons consumers do not shop for contracts, see supra notes 62, 63 and accompanying text (outlining apathy and limited time as other reasons).
70 Becher, supra note 28, at 759; see also id. at 766 (“[C]ontractual clauses may be good for some kinds of consumers but not for others.”).
use Becher’s own example, a computer purchase might involve a one-year warranty or a three-year warranty, depending on the seller.\(^72\) For a consumer who replaces his computer every year, a one-year warranty might be completely acceptable. However, for a consumer who expects to use the computer for several years, the one-year warranty might be completely unacceptable. The FCAO cannot account for this disparity in consumer preference, and this limitation is fatal for an approving body designed to be the consumer’s agent.\(^73\)

It could be argued that—at least when it comes to consumer purchases—the problem of heterogeneity is exaggerated. After all, consumers tend to look mostly to obviously-salient terms: price, warranties, fees, and returns.\(^74\) Conspicuously absent from the list of terms consumers consider important are class action waivers, arbitration clauses, venue clauses, and the like.\(^75\) However, such an argument misses the mark. First, warranties are among the terms consumers consider important,\(^76\) and they are precisely the example used by Becher to illustrate a heterogeneous situation. Moreover, the difference in consumers’ priorities about warranties is reasonable. Some consumers may purchase an item for one particular purpose or use and do not require a warranty; other consumers may purchase the same item with extended use in mind, and thus they will value highly an accompanying warranty.\(^77\) Second, just because a consumer does not think of a particular contract provision as being most important, that does not necessarily

\(^{71}\) See id. (listing heterogeneity as an advantage to permitting partial approval of contract terms rather than looking to the entirety of the contract, but otherwise not discussing the problem posed by heterogeneous consumers except to acknowledge the “inherent limit is a crucial one, and it should be seriously taken into consideration”).

\(^{72}\) Id. I imagine a consumer would be hard pressed to find a computer with a standard three-year warranty. Nevertheless, consumer heterogeneity is a real concern with real implications for Becher’s proposal.

\(^{73}\) See id. at 768 (stating that “consumers can be viewed as delegating their duty to read to the FCAO”).

\(^{74}\) Schmitz, supra note 2, at 887.

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Indeed, that is precisely why the Uniform Commercial Code provides warranties of merchantability and fitness for a particular purpose. See U.C.C. § 2-314 cmt. 3 (“A specific designation of goods by the buyer does not exclude the seller’s obligation that they be fit for the general purposes appropriate to such goods.); id. § 2-315 cmt. 2 (“A ‘particular purpose’ differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the [buyer’s needs] . . . .”).
mean that consumers are ambivalent about the term or homogeneous in their approach to the term.\textsuperscript{78} Thus, the FCAO would not be able to address adequately individual consumer priorities.

\textit{b. Expertise Deficit}

Even if the FCAO could value and address individual consumer priorities, it will suffer from an expertise deficit. To be able to evaluate contracts and provisions governing any consumer subject matter, the FCAO would have to employ experts in every consumer subject matter.\textsuperscript{79} Although Becher simply concludes that the FCAO would possess the required expertise to function effectively,\textsuperscript{80} it is by no means clear that the FCAO will have the funding necessary to staff sufficiently so many expert positions.\textsuperscript{81} Indeed, the contrary appears to be true: government agencies are chronically understaffed and underfunded.\textsuperscript{82} In today’s economic and political environment, there does not appear to be any financial relief in sight for government agencies.\textsuperscript{83} Thus, it appears highly unlikely that Congress would create or fund an FCAO body.

\textsuperscript{78} For instance, most consumers likely do not consider arbitration clauses to be among the most important terms of their consumer purchases. However, some may still cringe at the thought of waiving the ability to sue while others could not care less.

\textsuperscript{79} See Becher, supra note 28, at 766 (acknowledging that “different fields of commerce require different ‘best practices’”).

\textsuperscript{80} See id. at 786, 794, 797 (summarily concluding that the FCAO would be equipped with superior knowledge).

\textsuperscript{81} Cf. Andrew W. Jurs, \textit{Science Court: Past Proposals, Current Considerations, and a Suggested Structure}, 15 VA. J. L. & TECH. 1, 11 (2010) (discussing funding for a test case in a new “Science Court,” but failing to address funding for such a fully-operational court in general or the methods by which to attract judges with specialized expertise); see also infra note 82.

\textsuperscript{82} See, e.g., \textit{Rightsizing the Federal Workforce}, CONG. DOCUMENTS, 2011 WLNR 10610114 (May 26, 2011) (asserting in congressional testimony that “federal agencies are understaffed” and “have far too few employees to complete their missions”); Robert Brodsky, \textit{OMB Nominee Vows Exhaustive Review of Agencies}, GOVERNMENTEXECUTIVE.COM (Sep. 16, 2010) (noting federal agency was “woefully understaffed”); Ed O’Keefe, \textit{Bill Proposes a 10 Percent Cut in the Federal Workforce}, WASH. POST (Jan. 12, 2011) (stating bill proposing a ten percent cut in federal workforce would leave federal agencies understaffed and underfunded); \textit{Federal Anti-Bias Agency Faces Severe Fiscal Crisis}, SAN FRANCISCO CHRONICLE, at A3 (Sep. 23, 1992) (noting EEOC was “so overworked and understaffed” that it needed an immediate budget increase to remain even minimally effective).

at all. Even if that hurdle were jumped, it is likewise doubtful that the FCAO would be able to amass the required expertise to evaluate effectively contracts across all areas of consumer transactions.

2. Fundamental Change in Basic Contract Law

Becher’s proposal alters three very fundamental areas of contract law. First, no longer, under Becher’s proposal, does the consumer have any substantial duty to read a contract before signing it. Becher is unclear about the exact legal effect of such a change, but presumably it would mean that because one does not have a duty to read a contract, one may be bound only by the terms of which one were actually aware. This being the case, a dispute, over either a non-approved contract term or a contract term approved by the FCAO but challenged by the consumer, could turn on the question of fact whether the consumer was actually aware of the term. This places courts in the unenviable position of having to decide the credibility of the consumer’s factual claim to that effect. Courts routinely are tasked with determining witness and party credibility; however, it seems counterproductive and inefficient to remove a flat, normative, common-sense rule of law requiring people to read documents to which they will be

84 See, e.g., Congress to review bill for agency consolidation, WASH. BUS. J., Feb. 1, 2012, 2012 WLNR 2292661 (indicating agency consolidation proposals would be required to “reduce the number of agencies” in the federal government); see also supra note 83 (detailing pending budget cuts and a political environment disfavoring expansion of government responsibility).
85 See supra notes 82, 83.
86 Each of these changes, moreover, would have to be adopted by every jurisdiction as well.
87 Becher, supra note 28, at 767-69, 776.
88 See id. (discussing how FCAO system would affect duty to read, and discussing relaxed duty to read non-approved terms, but not addressing at all a duty to read approved terms); 17A C.J.S. Contracts § 193 (2011) (stating that a person is under a duty to read a contract before signing, and if a person does not do so, the contract is, absent some exception, enforceable against the person notwithstanding the failure to read the terms, and also stating that “one who refrain[s] from reading a contract and in conscious ignorance of its terms voluntarily assents thereto will not be relieved from his or her bad bargain”).
bound, and replace it with a rule that ultimately will require courts to decide cases on a he-said-she-said basis.  

Second, the Becher Proposal creates dual unconscionability standards, one for contract terms that are approved and one for non-approved terms.\textsuperscript{90} Again, Becher is somewhat unclear about how the standards would differ in practice, suggesting only that “approved provisions should enjoy a greater presumption against unconscionability.”\textsuperscript{91} Assuming this statement means there should be greater degrees of both procedural and substantive unconscionability for consumers to prevail in claims involving FCAO-approved terms,\textsuperscript{92} the issue then becomes how much of an increase in each category is sufficient. Courts will still be placed in the common-law role of comparing the cases currently before them with cases previously decided. Moreover, to ensure the burdens remain distinct, courts will have to look both to cases dealing with their particular type of term (approved or non-approved) and cases dealing with the other type of term.\textsuperscript{93}

We need not address those problems inherent in such an approach, however, for there is a subtle but fatal problem in the idea of an increased burden of unconscionability regarding approved terms. Becher proposes that approved terms be placed outside of, and following, a box including non-approved terms.\textsuperscript{94} Thus, at least as it relates to the placement or “burying” of a term within a contract, it would be difficult to increase the procedural unconscionability burden

\textsuperscript{89} Cf. Roger Clegg, Reclaiming the Text of the Takings Clause, 46 S.C.L.R. 531, 576 (1995) (proposing a rule of law as a replacement for ad hoc, factual inquiry used in regulatory takings cases).

\textsuperscript{90} Becher, supra note 28, at 776.

\textsuperscript{91} Id.

\textsuperscript{92} For a summary discussion of the current state of the unconscionability doctrine, see infra Part IV(A).

\textsuperscript{93} That is, in the current scheme, there is only one analysis each for procedural and substantive unconscionability. See infra Part IV(A), page 23. Having dual unconscionability standards means that courts dealing with approved terms will engage in a procedural and substantive analysis by comparing cases doing the same for approved terms, but those courts will also have to look at the procedural and substantive analyses of courts addressing unapproved terms to ensure the standards—which are supposed to remain distinct, one higher than the other—do not end up bleeding back together. The reverse is also true.

\textsuperscript{94} Becher, supra note 28, at 761.
on consumers because approved terms could be required to come—at the earliest—only in the middle of the contract. Additionally, if the goal of the Becher Proposal is to adjust the law to conform to reality, the disparity-in-bargaining-power element of procedural unconscionability also could not be made more burdensome on the consumer because consumers have no bargaining power as it is. In other words, if consumers have no bargaining power, and Becher wants to keep the law consistent with reality, it would be unrealistic to increase the burden on the consumer to show a disparity in bargaining power because the disparity is already polarized. Aside from some oral misrepresentation, or some psychological pressure on the consumer or deceptive practice by the merchant, there really is no room to increase the burden on the consumer to show procedural unconscionability.

That being the case, we are left only with increasing the burden on the consumer to show substantive unconscionability, which involves a term that, generally speaking, is already “manifestly unfair or inequitable.” What standard, then, is a court to employ that is higher than manifest unfairness? Assuming we could identify one, it seems virtually impossible for a consumer to meet that standard. Perhaps in theory we can envision such a term: giving up one’s

95 See id. (discussing a requirement that non-approved terms come before any approved term).
96 See id. at 769 (“If one accepts the assertion that the law should be humble with respect to changing customary human habits, then one might follow recognized practices (such as consumers’ tendency not to read [standard form contracts]) unless some compelling justifications have been established.”).
97 See Concepcion, 131 S. Ct. at 1750 (“[T]he times in which consumer contracts were anything other than adhesive are long past.”).
98 See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (C.A.D.C. 1965) (indicating deceptive sales practice is one way for there to be an absence of meaningful choice establishing procedural unconscionability, which is determined by a “consideration of all the circumstances surrounding the transaction”); Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123, 133 (Cal. App. 1966) (outlining high-pressure environment as indicative of undue influence); Wattenbarger v. A.G. Edwards & Sons, Inc., 246 P.3d 961, 974 (Idaho 2010) (including high-pressure tactics and coercion short of duress among the factors indicating procedural unconscionability); In re Marriage of Shanks, 758 N.W.2d 506, 517 (Iowa 2008) (observing, in the context of the validity of a premarital agreement, that “the use of fraudulent or deceptive practices” is a factor “relevant to procedural unconscionability”).
firstborn child certainly seems worse even than manifestly unfair. But in practice it seems unlikely that a consumer contract would include a term that, in its substance, is worse than manifestly unfair. Thus, practically speaking, there appears to be no room for Becher’s higher standard of unconscionability, at least when applied in concert with Becher’s other recommendations.

In the third area of contract law changed by the Becher Proposal, Becher advances an abrogation of the parol evidence rule if the contract term at issue is not approved. Under the parol evidence rule, a written contract becomes the sole agreement between the parties, and extrinsic evidence generally may not be introduced to counter the meaning of the written contract. The most common exception to the parol evidence rule is to admit extrinsic evidence to ascertain the meaning of an ambiguous term.

Granted, the overall purpose of this part of the Becher Proposal is to encourage merchants to have their contract terms approved, and thus the courts would in those cases end up taking a traditional approach to parol evidence. However, in the absence of FCAO approval, courts could additionally be burdened by: the testimony of consumer plaintiffs and salespeople of seller defendants, adding once again to the courts’ responsibility to judge credibility; much more involved discovery, providing a likelihood of discovery disputes requiring court intervention and adjudication; and trials that are generally expanded and protracted, with effects that extend to appellate courts as well. While all of these consequences still are undesirable, they

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100 Becher, supra note 28, at 777. This proposal is based on two assumptions the truth of which is questionable. See supra note 44.
101 11 WILLISTON ON CONTRACTS § 33:3 (4th ed. 1990). “Extrinsic evidence is excluded [by the parol evidence rule] because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing [i.e., the contract] itself.” Id.
102 See 36 AM. JUR. 3D 331 Proof of Facts § 9 (1988) (also in WestLaw database, current through May 2011) (stating that extrinsic evidence is “routinely admissible” to understand ambiguous provision). There are other exceptions to the parol evidence rule—such as fraud, mistake, and the like. See id. §§ 10-21.
103 Becher, supra note 28, at 777.
overlook the most obvious problem with this approach: where a contract or term at issue is clear and unambiguous, there quite simply is no need for extrinsic evidence—whether or not the term was approved—because the purpose for permitting extrinsic evidence in the first place is to determine the meaning of an ambiguous provision.104

D. Superfluousness of the Proposal Generally

Another criticism of the Becher Proposal is that it is unnecessary—albeit for different reasons—in both large and small transactions. Consumers are invested and much more careful about contract terms in large transactions,105 and simply do not care about terms secondary to price in small transactions.106

1. Large Transactions or Those of Significant Import to the Consumer

In large transactions or those of significant import to the consumer, the consumer is likely to be much more heavily invested in the transaction and, as a result, is likely to read the contract’s terms,107 thus making the third-party approval process unnecessary. For example, one empirical study showed that eighty-two percent of people read the first residential lease agreement they signed.108 A more recent study revealed that more than half of consumers read the terms of their credit card contracts prior to signing them, and almost seventy-five percent

104 See 11 Williston on Contracts § 33:39 (4th ed. 1990) (stating that the admission of extrinsic evidence “is proper [in cases of ambiguity] to enable the court . . . to read the instrument in the sense the parties intended”). Although there are other permissible purposes for introduction of extrinsic evidence, see supra note 102, a consideration of the context in which Becher’s statement about extrinsic evidence appears lends itself to the belief that Becher’s extrinsic evidence proposal related to the interpretation of terms within the contract. See Becher, supra note 28, at 777 (discussing extrinsic evidence in the context of contract interpretation). Additionally, to the extent Becher was suggesting otherwise (i.e., that courts should favor extrinsic evidence more liberally in cases of non-approved terms where some fraud or misrepresentation is alleged), the distinction between approved and non-approved terms seems meaningless. That is, fraud or misrepresentation outside the four corners of the document should be dealt with the same way, regardless of whether or not the contract’s terms themselves were approved by the FCAO.

105 See infra Part III(D)(1), page 19.
106 See infra Part III(D)(2), page 20.
read the terms at some point. Finally, in another survey, more than seventy-five percent of individuals reported reading the terms of nursery school contracts, which obviously are of significant import to families. These numbers, while not representing the ideal of one hundred percent of respondents reading such terms, are nevertheless strikingly large, especially when contrasted with the almost-nil number of consumers reading the terms of more simple, everyday transactions. To the extent that the FCAO process is designed to compensate for consumers’ failure, as a whole, to read contract terms, it appears completely unnecessary when dealing with contracts consumers consider important.

2. Small Transactions or Those Not Particularly Important to the Consumer

Unlike transactions consumers consider important, in small transactions or transactions not particularly important to the consumer, the consumer is much less likely to care about non-salient contract terms—again making the third-party approval process unnecessary. In the same empirical study involving credit card contracts, and unlike consumers’ behavior and attitude in those transactions, more than half of consumers who read the terms associated with their last online electronics purchased considered the terms unimportant in their decision to purchase. Moreover, less than twenty percent of consumers who bought electronic items read the contract terms and believed those terms were important prior to making their purchase. Thus, it appears that when it comes to everyday consumer purchases, consumers care mainly

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109 Schmitz, supra note 2, at 886. These data also included credit card contracts executed—and terms available and read—online. Id. at 886, 896.
108 Id. at 875.
107 See infra Part III(D)(2), page 20.
106 See Schmitz, supra note 2, at 886 (“[C]onsumers may be more inclined to receive and read terms before agreeing to what they view as more significant contracts . . . .”).
105 See, e.g., infra notes 114 and 115, and accompanying text.
104 Schmitz, supra note 2, at 886.
103 Id.
about price and, if applicable and to a lesser degree, warranty and return policies. Because price is always known to the consumer without having to refer to the contract terms (and often times warranty and return policies as well), and the consumers generally view other terms as unimportant, the Becher Proposal also is unnecessary when it comes to small consumer purchases. Being unnecessary in both small and large consumer purchases, the Becher Proposal appears altogether superfluous.

IV. AN ALTERNATIVE METHOD: ADJUSTING THE EXISTING UNCONSCIONABILITY DOCTRINE

If the Becher Proposal is unworkable, is all lost? Certainly not. I propose an alternative method that would protect consumers by adjusting the existing unconscionability doctrine. This adjustment would consider, for procedural unconscionability purposes, the overall contract length in proportion to the significance, value, or importance of the transaction to the consumer. Such an approach is superior to the Becher Proposal because it integrates a cost-effective solution into an already-existing legal doctrine, requiring no additional resources to implement. Additionally, although my unconscionability proposal does maintain some of the normative aspects of contract formation (such as consumers being held to their bargains, even if they are bad bargains), there are good reasons for doing so. In any event, it at least is a big step in the right direction toward balancing the reality of consumer contracting and a disinterest in interfering with parties’ self-made, voluntary bargains.

116 See id. at 887 (listing price as the most important term for consumers). After all, it seems much less likely that a consumer cares about an arbitration clause or class action waiver for a $60 pair of shoes, or a $10 book, or even a $100 iPod.
117 See supra Part III(D)(1), page 19.
118 See infra Part IV(A), page 23; infra Part IV(B), page 24.
119 See infra Part IV(B), page 24.
120 See infra Part IV(C), page 27; infra Part IV(D), page 28.
121 See infra Part IV(E), page 31.
122 See infra Part IV(E), page 31.
A. *The Doctrine as it Stands Currently*

Unconscionability is a defense to enforcement of a contract, and thus is a matter of state law.\(^\text{123}\) The unconscionability doctrine is meant to counter defects in the formation of contracts (“procedural unconscionability”) as well as unfair and harsh terms in the substance of contracts (“substantive unconscionability”).\(^\text{124}\) Both procedural and substantive unconscionability must be present for a party to avoid enforcement of a contract or provision.\(^\text{125}\) Although there must be both procedural and substantive unconscionability, a sliding scale or balancing approach is most often used: the greater the substantive unconscionability, the less procedural unconscionability is required, and vice versa.\(^\text{126}\)

B. *Adjusting the Doctrine to Address Consumer Protection*

My proposal first involves a form of triage for consumer protection, opting to focus on the terms that keep consumers out of court because, once those terms are removed, courts can deal individually with other unreasonable terms. Next, I describe my proposed sliding-scale unconscionability adjustment in more detail.

1. **Triage for Consumer Protection**

   Although many different substantive provisions can be unreasonably harsh, perhaps the most substantively unconscionable provisions are those that restrict consumers’ access to the courts.\(^\text{127}\) As noted above, one of the common themes in the criticisms of the Becher Proposal is

\(^{123}\) See, e.g., *Concepcion*, 131 S. Ct. at 1746 (applying California contract law to an unconscionability claim).

\(^{124}\) 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 1990); *Concepcion*, 131 S. Ct. at 1746.

\(^{125}\) 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 1990).

\(^{126}\) 8 WILLISTON ON CONTRACTS § 18:14 (4th ed. 1990). “When there is clear procedural unconscionability, however, even minimal substantive unfairness may be enough to justify declaring the contract or clause unconscionable, and even a substantively fair bargain may be declared unconscionable if the procedural defects are great enough.” *Id.*

\(^{127}\) See Worman v. FedEx Ground Package Sys. Inc., 76 Pa. D.&C. 4th 292, 308, 2005 WL 4312127 (Pa. Com. Pl. 2005) (“Unconscionability is presumed where an arbitration clause reserves the right to access the courts in a lender, while restricting a consumer’s claims exclusively to arbitration . . . .”); *see also, e.g.*, Becher, *supra* note 28, at 781 (“unfair terms may prevent buyers from bringing their cases before courts in the first place”).
its painting with a wide brush. We need not create an entirely new procedure implemented through radical and fundamental changes in several areas of contract law to protect consumers effectively. Instead, we simply should resolve to protect consumers’ access to the courts, thereby ensuring the opportunity for judicial review of any other unfavorable contract terms and, thus, availability of remedies to consumers. Typically, this approach will involve particular scrutiny of arbitration and waiver clauses that prohibit consumers from filing suit, either at all or as a class action. In the context of standard form contracts—especially for routine, online purchases—protecting consumers’ access to the courts can be accomplished by adjusting the already-existent sliding-scale unconscionability doctrine.

2. Adjusting a Sliding-Scale Unconscionability Analysis

As discussed above, unconscionability analyses already are applied using a sliding scale, balancing the degrees of procedural and substantive unconscionability against each other. The proposed change essentially adds a small additional layer to the procedural unconscionability analysis. In cases involving claims of unconscionability in consumer transactions, courts should consider the length of the contract in relation to the transaction’s complexity, significance, and expense. The more complex, significant, and expensive a transaction, the more the parties will need to address and shift risk by inclusion of additional contract terms. In other words, more

128 See, e.g., David S. Schwartz, Claim-Suppressing Arbitration: The New Rules, 87 Ind. L.J. 239, 239–40 (2012) (arguing that arbitration clauses are “designed and intended to suppress claims [by consumers], both in size and number); Caban v. J.P. Morgan Chase & Co., 606 F. Supp. 2d 1361, 1366 n.3 (S.D. Fla. 2009) (observing that class action waivers releasing corporations from small-dollar claims could “violate the fundamental right of access to the courts”).

129 To the extent it can be argued that the Supreme Court in Concepcion held the Federal Arbitration Act preempted state-law unconscionability rules specifically aimed at arbitration clauses and class arbitration waivers, see Concepcion, 131 S. Ct. at 1747-48, there are a couple of workarounds. First, it would not be unreasonable or even imprudent to apply the proposed changes to all challenged contractual terms in a consumer contract. Second, the Federal Arbitration Act could be amended to permit the proposed changes. Third, it is possible the Supreme Court would include the proposed changes in its category of permissible steps to address concerns of adhesion contracts. See id. at 1750 n.6 (“States remain free to take steps addressing the concerns that attend contracts of adhesion . . . .”). Finally (and perhaps least likely), the Supreme Court could be persuaded to recede from its decision, opening the door to application of the proposed changes.

130 See supra notes 126, 127.
complex transactions typically involve longer contracts. Simple and everyday transactions typically are inexpensive and easy and quick to complete, and by their nature involve inherently little risk. Thus, one can imagine little need to include—and little legitimacy in including—pages and pages of contract terms governing such a transaction.

The test, then, is again one of balance. If a transaction is particularly inexpensive, simple, and routine, then placing even the most minutely substantively unconscionable term anywhere but at the beginning of a contract of any substantial length would constitute a high degree of procedural unconscionability sufficient to make the term unenforceable. The more involved, expensive, and complex the transaction, the more latitude is given regarding the length of the contract and the term’s placement within the contract. That is, placing the substantively unconscionable term on page two of a five-page contract, in a transaction in which five pages is quite reasonable under the circumstances, would probably not result in any procedural unconscionability. Between more sophisticated parties in larger transactions—say, the purchase of a home—the substantively unconscionable term might be placed anywhere in the contract without resulting in procedural unconscionability under this analysis.\footnote{Of course, there could be procedural unconscionability due to other defects in the formation of the agreement. And I do not foreclose the possibility of procedural unconscionability under the analysis I have proposed. The point here is that, with respect to the specific balancing test proposed to protect consumers from unconscionable terms in unreasonably long contracts, it is not unreasonable for a purchase and sale of a home to involve dozens of pages of binding terms.}

\footnote{My proposal is in many ways similar to the ideas recently expressed by Professor Melissa Lonegrass—namely, that procedural unconscionability should be refined to account for the reality of consumer contracting. Melissa T. Lonegrass, \textit{Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability} 46-47 (2011), download link available at \url{http://works.bepress.com/melissa_lonegrass/1/}. However, unlike Professor Lonegrass, I would not treat procedural unconscionability as established merely “by the existence of a consumer form contract of adhesion.” \textit{Id.} at 46. This is, in part, because of my concern for retaining some of the normative} Thus, an inverse analysis is applied: the simpler the transaction, the more procedural unconscionability results in burying a substantively unconscionable term in the middle of the contract; the more complex the transaction, the less procedural unconscionability results.\footnote{Of course, there could be procedural unconscionability due to other defects in the formation of the agreement. And I do not foreclose the possibility of procedural unconscionability under the analysis I have proposed. The point here is that, with respect to the specific balancing test proposed to protect consumers from unconscionable terms in unreasonably long contracts, it is not unreasonable for a purchase and sale of a home to involve dozens of pages of binding terms.}
The theoretical explanation for this approach is that the only conceivable purpose in creating a contract of substantial length for such an insignificant consumer transaction is to impose on consumers such a burden in reading the contract that they will choose not to do so. The only conceivable reason to create such a burden prohibiting consumers from reading the terms is that there are terms within the contract that are oppressively unfavorable to the consumer. At the very least, courts should begin to permit such a presumption, for “the times in which consumer contracts were anything other than adhesive are long past.”

Additionally, to favor disclosure and protect merchants, courts could presume an absence of procedural unconscionability if the substantively unconscionable terms are placed at the very beginning of the contract and visually distinguished from the remainder. This presumption would remain regardless of the length of the contract or the complexity of the transaction since the objectionable terms were placed at the very beginning of the contract.

**C. Apparent Superiority of this Approach**

There are several reasons to favor my proposed unconscionability adjustment over the Becher Proposal. First, the unconscionability adjustment keeps existing contract law intact without a radical and fundamental change. To the extent the adjustment does change the law of unconscionability as applied to consumer transactions, it does so by using a sliding scale that

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aspects of consumer contracting. See infra Part IV(D). Another reason not to treat procedural unconscionability as conclusively established by the existence of consumer standard form contracts is because such an approach would result in procedural unconscionability for every single modern consumer purchase. See Concepcion, 131 S. Ct. at 1750 (observing that all consumer contracts are now adhesive). Thus, there really would be no procedural unconscionability “requirement” at all. A more detailed exploration and comparison is beyond the scope of this Paper and thus is not pursued here. Nevertheless, to the extent that Professor Lonegrass suggests that courts should adjust their procedural unconscionability analyses to reflect the consumer reality, I completely agree, and my proposal is designed to do just that.

133 Concepcion, 131 S. Ct. at 1750.

134 The term can be visually distinguished through the use of capital, underlined, italicized or bold print, or some combination.

135 Cf., e.g., 17B C.J.S. Contracts § 940 (Westlaw, Database updated March 2012) (describing presumptions that parties intend to enter valid contract, intend each clause to have some effect, and intend what they say when contract is clear and unambiguous); SA-PG Sun City Center, LLC v. Kennedy, 79 So. 3d 916, 916 (Fla. Dist. Ct. App. 2012) (observing parties to contracts are presumed to know and understand the terms of the contracts).
courts are already familiar with using in unconscionability cases.\textsuperscript{136} Second, the unconscionability adjustment simply is a modification of a legal doctrine involving solely a question of law, and does not require the creation of a new federal agency (or a sub-unit therein) that would involve great effort and expense to staff, operate, maintain, and insure.\textsuperscript{137} Third, the unconscionability adjustment is designed primarily to address the most oppressive contract terms that prohibit consumers from asserting their rights in court, the result of which is to preserve resources until a live dispute requiring resolution (think: justiciability).

\textbf{D. Addressing Criticism}

As a criticism of the unconscionability adjustment, some would argue that the unconscionability adjustment retains a certain judicial and cost inefficiency associated with ad hoc judicial determinations. However, it appears as though those costs are less than the costs associated with the Becher Proposal.\textsuperscript{138} Consider the following logic:

(a) Few consumer purchases result in post-purchase problems;\textsuperscript{139}

(b) Of the consumers experiencing post-purchase problems, few will be unable to resolve the problems directly with the seller;\textsuperscript{140} and

(c) Of the consumers with post-purchase problems that cannot be resolved directly with the seller, few will be willing to take some additional action.\textsuperscript{141}


\textsuperscript{137}Becher proposes that the FCAO body would be liable for any erroneous decisions. Becher, \textit{supra} note 28, at 789-93.

\textsuperscript{138}See \textit{id.} at 800 (acknowledging that the proposal “would be costly”).

\textsuperscript{139}See J. Andrew Petersen & V. Kumar, \textit{Get Smart About Product Returns}, \textsc{Wall Street Journal} (Nov. 30, 2009), http://online.wsj.com/article/SB10001424052970203585004574392464143500106.html (finding a sixteen percent rate of product return).

\textsuperscript{140}See David Douthit, \textit{How to solve $16.7 billion product returns problem}, \textsc{EE Times} (Feb. 1, 2012 3:08 PM), http://www.eetimes.com/electronics-news/4235652/How-to-solve--16-7-billion-product-returns-problem?pageNumber=0 (observing that “companies focus on efficiently handling returns rather than preventing them”).

\textsuperscript{141}
Thus, only a very small percentage of consumers will end up requiring the use of judicial resources to resolve problems that either directly or indirectly involve the contractual terms of the purchase.\textsuperscript{142} Additionally, Becher’s proposal includes a provision permitting judicial review of FCAO approval of contract terms challenged by consumers.\textsuperscript{143} The involvement of the courts in reviewing FCAO approval of contract terms inevitably will lead to the same court battles as existed before the FCAO program, but this time with an additional party (the FCAO body). That is, courts would still be placed in the position of determining the enforceability of a term after reviewing whether or not that term should have been approved by the FCAO body. In this respect, merchants’ immunity against claims involving approved terms is something of a red herring: consumers need only add the FCAO body and an allegation of improper approval of the term to be able to attack the substantive term. Accordingly, there is no judicial inefficiency in the unconscionability adjustment that is not also present in the Becher Proposal.

A second criticism of the unconscionability adjustment is that it, too, requires a change in the law of each state. This is true. However, it requires only a slight adjustment of one already-existing doctrine.\textsuperscript{144} The Becher Proposal involves radical changes regarding the duty to read, the parol evidence rule, and unconscionability.\textsuperscript{145} Accordingly, while the unconscionability adjustment still involves a change in the law in each state, the change is much simpler and much more palatable for both legislatures considering adopting the adjustment by statute and common-

\textsuperscript{141} See, e.g., Jean Braucher, An Informal Resolution Model of Consumer Product Warranty Law, 1985 Wis. L. Rev. 1405, 1455-56 (1985) (discussing research indicating only about one percent of consumers complain to third parties in cases in which problems were perceived, and 0.2 percent of consumer complaints to third parties were to a lawyer or court).

\textsuperscript{142} Cf. Becher, supra note 28, at 774 (discussing some reasons few consumers sue sellers).

\textsuperscript{143} Id. at 794-95.

\textsuperscript{144} See supra Part IV(B)(2), page 25.

\textsuperscript{145} See supra Part II(B)(2), page 6.
law courts traditionally resistant to sudden and drastic change.\footnote{See, e.g., Marin K. Levy, The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts, 61 DUKE L.J. 315, 376 (2011) (observing courts sometimes resist significant change).} Therefore, the unconscionability adjustment is much more likely to be adopted without significant challenges.

Another potential criticism is that the unconscionability approach does not attempt to address the fact that consumers do not read contracts. To that criticism I answer a qualified, “Exactly!” Perhaps one of the greatest differences in the approach I take is that the unconscionability adjustment preserves some normative function of contract law. In other words, it provides for the non-enforcement of substantively unconscionable contract terms that, among other things, are placed anywhere other than at the beginning of contracts in simple, everyday transactions.\footnote{See supra Part IV(B)(2), page 25.}

What the unconscionability adjustment does not do, however, is relieve the consumer of the duty to make any substantial effort whatsoever to become familiar with the terms that will bind the consumer in the transaction.\footnote{But cf. Lonegrass, supra note 132, at 46 (arguing that procedural unconscionability should be established simply by existence of consumer standard form contract, and that such an approach is designed to reflect “the realities of consumer decision-making”). Professor Lonegrass’s approach, however, is perhaps a judicial analogue of Becher’s proposal, see id. at 46-47, and thus is disfavored to some degree because of its failure to put at least some responsibility on the consumer for his own bargain.} I concede outright that the normative implication—that consumers will have to make at least some effort to find and understand the terms of the agreement—will almost always run counter to consumer practice in reality.\footnote{See supra note 19 (discussing evidence that consumers do not read contracts).} But just because a normative interpretation differs from the reality does not mean that we should abandon the norm. After all, if the law were always to follow the habits of the people operating thereunder, then speed limits would have to be increased because most people drive faster than the speed limit.\footnote{Nat’l Survey of Speeding and Unsafe Driving Attitudes and Behaviors: 2002, Vol. 2 – Findings Report 1, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (Nov. 2003), available at http://www.nhtsa.gov/people/injury/drowsy_driving1/speed_volII_finding/SpeedVolumeIIFindingsFinal.pdf.} Indeed, speeding is so “pervasive” that about seventy-five percent of drivers speed on a regular
basis. Speeding is not a perfect analogy, but it makes the point: if consumers are going to enter into a transaction and be bound to its terms, they should bear at least some responsibility for knowing them.

In this way, the unconscionability adjustment is somewhat analogous to disclosure requirements, placing some responsibility squarely on the shoulders of the consumer. However, it does provide relief for consumers involved in transactions where sellers do not provide appropriate notice, in a contract of appropriate length, of unfavorable terms. Thus, the unconscionability adjustment requires the consumer on a basic level to inform himself of the terms to which he will be bound, but provides a way for courts to invalidate a term if it is placed within a contract of inappropriate (and burdensome) length.

**E. Some Reservations**

Having advanced an alternative to the Becher Proposal, and having argued in favor of its advantages over the Becher Proposal, I would be remiss if I did not include at least a brief discussion of some reservations of my own. There is yet one final criticism of my unconscionability adjustment that was not mentioned before and that is somewhat troubling, at least to someone who sympathizes with consumers. The adjustment encourages sellers to redraft their contracts such that the length is appropriate for the transaction. In the event sellers do not do so, and do not include terms unfavorable to the consumer at the very beginning of the

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151 Id.
152 See, e.g., Becher, supra note 19, at 175, id. n.19 (discussing state-required disclosure by merchants of certain contract term information to consumers); John E. Murray, Jr., *The Dubious State of the Rolling Contract Formation Theory*, 50 Duq. L. Rev. 35, 80 (2012) (mentioning consumer protection legislation that includes “disclosure requirements,” involving merchants taking affirmative steps to make consumers aware of certain terms of the contract).
153 See supra Part IV(B)(2), page 25.
154 See supra Part IV(B)(2), page 25.
contract, consumers will be able to avoid enforcement of the unfavorable terms by application of
the adjustment.\footnote{See supra Part IV(B)(2), page 25.}

This is all well and good. But what happens if sellers both refuse to shorten contracts for simple and routine transactions \textit{and} include at the very beginning of those contracts all terms unfavorable to the consumer? In other words, what would happen under my proposal if Apple kept its twenty-two-page contract for a $0.99 song, but moved all substantively unconscionable terms\footnote{I am not suggesting Apple actually includes unconscionable terms in its iTunes terms and conditions. I am merely posing a hypothetical.} to the very beginning of that contract? Under the unconscionability adjustment I proposed, the consumer could not avoid enforcement of the terms because, although the contract was too long when compared to the transaction’s importance and complexity, the seller placed the unfavorable terms at the beginning of the contract, prominently available for the consumer to see and understand.\footnote{See supra Part IV(B)(2), page 25.} This would be true even if the consumer did his part by reading that first page.\footnote{See supra Part IV(B)(2), page 25.} And since we have already established that consumers have no bargaining power,\footnote{See supra Part III(A), page 9.} the consumer would be entirely without recourse, being able neither to negotiate more favorable terms nor to avoid enforcement of the unfavorable terms.

Admittedly, this is the point where my beliefs conflict. On the one hand, it makes sense to permit parties to determine the terms of their own agreements, invalidating them only when there is some substantial deficiency or injustice in the process. On the other hand, recognition of the reality leads inexorably to a desire to do more to help “the little guy.” At some point very early in the road trip, these two paths fork and become mutually exclusive: doing more of one requires doing less (or, really, none) of the other. Put simply, there is no easy answer.
Ultimately, those responsible for adjudicating these controversies and determining public policy will have to make a decision about how much more involved to get in the formation of these transactions and the extent to which they will interfere with agreements made by competent parties. For now, though, despite my reservations, I am confident that the unconscionability adjustment is at least a step in the right direction that is not incredibly burdensome and completely impracticable.

V. CONCLUSION

Standard form contracts are not an easy disease to cure, and consumer contracting culture makes for apathetic and unhelpful patients. The Becher Proposal is certainly to be applauded for its boldness and ingenuity. However, it involves creating a new agency (or agency sub-unit) at great expense and effort in an economic and political environment that will not support such an undertaking, while at the same time radically altering foundational areas of contract law but failing to address adequately critical problems with consumer contracts.160 The proposal also provides for a method of judicial review that is sure to involve continued and substantial litigation over contract terms and their approval.161

I recommend taking a more conservative approach to the “treatment” of the consumer contract “disease.” Adjusting the unconscionability doctrine to consider the placement of terms within a contract and the overall length of the contract related to the transaction’s complexity or importance is a creative way to address consumer contracting problems without having to alter radically traditional areas of contract law and create an entirely new agency (or sub-unit). It also maintains some responsibility of the consumer in his transactions. Although it is not without its own limitations, it is a much better and more limited approach with a more practical and realistic

160 See generally supra Part III, pages 8-23.
161 See supra Part III(C)(2), page 14.
application. Thus, the unconscionability adjustment should be implemented as the first, measured step in addressing the problem of standard form consumer contracts.