COMMENT

ADDING INSULT TO INJURY: THE UNCONSCIONABILITY OF ALIMONY PAYMENTS FROM DOMESTIC VIOLENCE SURVIVORS TO THEIR ABUSERS

AMANDA NANNARONE*

In 2017, the #MeToo movement took social media by storm when individuals from all walks of life began openly sharing their experiences with sexual violence and gender-based harassment for the first time. Starting in the employment space and moving to other areas, the movement encouraged legal changes that improve gender equality. Alimony, which has received little scholarly attention in recent years, became of interest to #MeToo reformers who discovered current laws failed to adequately serve survivors' interests by forcing them to pay spousal support to their abusive ex-spouse. Instead of a uniform system that removed the possibility of survivors being required to pay spousal support to their abusers, lawyers and clients face a patchwork of statutes that vary wildly from jurisdiction to jurisdiction. Some jurisdictions prohibit considering any evidence of marital misconduct, while others leave it solely to the court's discretion. California is the only state that has affirmatively enacted legislation disqualifying alimony payments from survivors to abusers.

As state legislatures continually fail to implement proper laws, survivors' only hope in having alimony provisions in divorce settlements invalidated lies

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* Senior Staff Member, *American University Law Review,* Volume 69; J.D. Candidate, May 2020, *American University Washington College of Law*; B.A., Communications, Legal Institutions, Economics, and Government, *American University*. I dedicate this Comment to survivors of domestic violence. To those survivors: you are strong, you are brave, and you are not alone. Your stories matter and your voices are heard. #MeToo.

in judges' hands. Courts have used contract law for centuries to protect vulnerable people from being taken advantage of in their dealings with more powerful individuals. Particularly, the doctrine of unconscionability began as an equitable doctrine that courts invoked as a way to restrict enforcement of harsh, biting, and unreasonably one-sided agreements. Judges today can continue to use the doctrine of unconscionability as a way to deny enforcing divorce settlements that require survivors of domestic violence to pay spousal support to their convicted abusers because those payments represent a continuation of abuse and control. Survivors' freedom from abuse should not be obtained at such an unreasonably steep price and judges have the power to end that once and for all. Allowing this practice to go on creates fresh wounds on top of barely healed flesh, adds insult to indescribable injury, and prevents survivors from ever truly being free. In the #MeToo era, that is not acceptable.

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INTRODUCTION

In October 2017, the #MeToo movement took over social media, spurring a cultural revolution.[1] The movement centers on giving a voice to individuals, primarily women, who have been affected by gender-based violence.[2] #MeToo empowers survivors from all walks of life to discuss how domestic violence, sexual harassment, and sexual assault have impacted their lives, forcing both lawmakers and the courts to take notice and reevaluate their prior practices.[3] As the movement continues to grow, many areas of law that have not received #MeToo attention will be addressed in the courts as tolerance for these unconscionable acts continues to dissipate.

In particular, alimony is beginning to draw the attention of #MeToo advocates. In its series on #MeToo developments, Buzzfeed News reports that many states require domestic violence survivors to pay alimony to their convicted abusers as part of divorce settlements.[4] A study done by the American Bar Association in 2013 corroborated this finding.[5] This practice presents an issue of grave importance in family law courts across the country, as survivors challenge their duty to pay the individual who inflicted the severe mental, emotional, and/or physical trauma that caused the divorce.

Several states have already begun the process of reevaluating their laws in this area. California is currently the only state that disqualifies perpetrators of all kinds of abuse from receiving alimony payments from their victims.[6] Other states, like Virginia and New Jersey, have attempted to reform the system to prevent judges from even considering alimony payments if the recipient of the payments has a

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1. Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979 [https://perma.cc/Z9CX-87AJ].

2. Anna North, *The #MeToo Movement and Its Evolution, Explained*, VOX (Oct. 11, 2018, 3:15 PM), https://www.vox.com/identities/2018/10/9/17933746/me-too-movement-metoo-brett-kavanaugh-weinstein [https://perma.cc/654H-2D3E].

3. *Id.*

4. Robert F. Kelly & Greer Litton Fox, *Determinants Of Alimony Awards: An Empirical Test of Current Theories and a Reflection on Public Policy*, 44 SYRACUSE L. REV. 641, 642–43 (1993) ("Indeed, it appears likely that public policy analysis and legal discourse concerning alimony will intensify in coming years."); Ariane Lange, *The Law Made These Women Pay Up To Get Out of Their Abusive Marriages*, BUZZFEED NEWS (Oct. 5, 2018, 8:31 AM), https://www.buzzfeednews.com/article/arianelange/abusive-marriages-alimony-me-too-crystal-harris [https://perma.cc/3CYC-3W9N].

5. Amber James et al., *Chart 1: Alimony/Spousal Support Factors*, 46 FAM. L. Q. 522, 522–23 (2013).

6. CAL. FAM. CODE § 4325 (West 2019).

domestic violence conviction involving the payor, but those attempts have been unsuccessful.[7] The majority of the states follow a permissive approach, which gives judges discretion to consider domestic violence convictions as a potentially relevant factor when ordering alimony payments, resulting in inconsistent application.[8] In Nevada, domestic abuse is not considered a "compelling reason" for an unequal distribution of assets.[9] Such a discretionary, unpredictable system is counterproductive to the goals of family law courts and troublesome for many survivors attempting to break free from their abusers. As state legislatures continuously fail to act, survivors must look to judges to deny and invalidate problematic alimony awards.

While challenging these alimony provisions through the political process has been largely futile,[10] analyzing divorce settlements and associated alimony from a contract law perspective could prove to be an effective solution in the courts. Although only one court has tangentially considered the idea,[11] the doctrine of unconscionability provides a strong legal basis for prohibiting alimony payments from survivors to abusers in divorce settlements. This Comment argues courts should mandate that abusers be automatically disqualified from receiving alimony payments in divorces where the spouse receiving alimony has a criminal conviction for domestic violence against the other spouse because the unequal bargaining power of the parties, absence of meaningful choice, and unreasonable benefit to one party make these payments unconscionable.

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7. A.B. 399, 218th Legis., 1st Sess. (N.J. 2018); H.B. 2105, 2015 Gen. Assemb., Reg. Sess. (Va. 2015). The New Jersey bill is stalled in the state house and the Virginia bill failed to pass.

8. *Compare In re* Fenzau, 54 P.3d 43, 47 (Mont. 2002) (holding that consideration of abuse and other marital misconduct was properly used in making a determination), *with In re* Marriage of Casias, 962 P.2d 999, 1002 (Colo. App. 1998) (holding considerations of fault or marital misconduct are not relevant except under very narrow circumstances insofar as the misconduct had economic consequences). The District of Columbia has also taken steps to address this issue with a D.C. Council Member proposing legislation, nicknamed Elaine's Bill, that would prohibit abusers from "profit[ing] from [their] misdeeds." *See* Samantha Schmidt, *She Reported that Her Husband Abused Her. Then the Divorce Became 'Another Form of Abuse.'*, WASH. POST (Feb. 4, 2019), https://www.washingtonpost.com/local/social-issues/she-reported-that-her-husband-abused-her-then-the-divorce-became-another-form-of-abuse/2019/02/04/efa7ed8e-2653-11e9-90cd-dedb0c92dc17.

9. *E.g.*, Wheeler v. Upton-Wheeler, 946 P.2d 200, 203 (Nev. 1997) (per curiam) (holding that the court must defer to the legislature and since it remained silent on this particular issue citizens should use political process to enact changes in the legislation).

10. *See supra* note 7 and accompanying text.

11. *In re* Marriage of Kelkar, 176 Cal. Rptr. 3d 905, 912, 916–17 (Ct. App. 2014).

Part I introduces the principles underlying the formation and negotiation of contracts and discusses contract defenses as they were derived from the common law. Part I also examines the origins of divorce law and alimony practices and gives an overview of the psychological impact that trauma has on survivors. Part II analyzes how the doctrine of unconscionability can be applied to strike down divorce settlement provisions that require survivors to pay alimony to their abusers. Part II applies the elements of unconscionability derived from the common law to determine that the unequal bargaining power and unreasonable one-sidedness of the alimony provision benefit the abuser to the detriment of the survivor. Part II finally analyzes the benefits and consequences of courts using the doctrine of unconscionability to void alimony payments. Part III provides several policy arguments as to why invalidating these contracts is beneficial to survivors. Finally, this Comment concludes that in light of society's renewed commitment to protecting trauma survivors and their interests, judges should automatically disqualify abusers from receiving alimony payments from the individuals they harmed because allowing anything else is unconscionable.

I. BACKGROUND

A. Forming and Negotiating Contracts

Contracts are one of the pillars of our society, providing the foundation for a multitude of commercial transactions, from contracts to build roads or schools to employment agreements to private dealings between private citizens. Contracts must be executed properly and contain all the necessary components to make them enforceable.[12] Accordingly, all enforceable contracts must have the same basic elements: agreement, bargain, which must be expressed by a valid offer and acceptance, and consideration.[13] The *Restatement (Second) of Contracts* defines a promise as a manifestation of intent to act or refrain from

12. RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

13. Peter A. Alces, *Contract Reconceived*, 96 NW. U. L. REV. 39, 47 (2001) ("A promise that represents the coincidence of an Agreement, a Bargain, and Consideration is enforceable. If any one of those elements is missing, the promise is not enforceable, not at all.").

acting between the promisor and promisee.[14] An agreement is a "manifestation of mutual assent,"[15] the existence of which can be observed through a party's communications or overt acts.[16] This element is commonly referred to as the "meeting of the minds."[17]

The second necessary element of a contract is the bargain. A bargain is defined as an "agreement to exchange"[18] and is the product of "offer" and "acceptance."[19] An offer is when one party, the offeror, shows he is willing to enter into a bargain, leading a second party, the offeree, to understand he is invited to enter the bargain.[20] An offer is valid based on an objective reasonableness test, meaning that it includes reasonably certain terms that would tell a reasonable person that an offer has been made.[21] An acceptance occurs when an offeree agrees to the terms of an

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14. RESTATEMENT (SECOND) OF CONTRACTS § 2. The manifestation of intent can lead to many contract disputes as the parties may attach different meanings to the same words or conduct. *See id.* § 2 cmt. b.

15. *Id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

16. *Id.* § 3 cmt. b ("Manifestation of assent may be made by words or by any other conduct. Even silence in some circumstances is such a manifestation.").

17. *Id.* § 17 cmt. c. In cases where courts have found a mutual misunderstanding of a material contract term, they have held there was not a sufficient meeting of the minds and thus invalidated the contract. *See, e.g.*, Bayou Rapides Corp. v. Dole, 165 So. 3d 373, 378–81 (La. Ct. App. 2015) (holding that there was no contract between the parties when communication was informal and no formal written contract was created); Vohs v. Donovan, 777 N.W.2d 915, 916 (Wis. Ct. App. 2009) (holding that the contingency in the contract stating that the sale was subject to the sellers "obtaining [a] home of their choice" was not illusory); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 20 (outlining the effect of misunderstanding between parties).

18. RESTATEMENT (SECOND) OF CONTRACTS § 3 ("A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.").

19. *Id.* § 3 cmt. d.

20. *Id.* § 24.

21. To determine if an offer exists, courts may look at the subject of the offer, price (or what is being asked for), who the offer is meant for, and if the terms are tailored to those individuals. In some cases, advertisements have been held as valid offers to contract. *See, e.g.*, Pacitti v. Macy's, 193 F.3d 766, 772–73 (3d Cir. 1999) (holding that Macy's offer to become "Broadway's New 'Annie'" was a valid offer to contract); Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 639–40 (Ill. 1977) (holding that a college brochure describing criteria for assessing applicants was a valid offer); Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248, 1250–51 (Pa. Super. Ct. 1989) (holding that Chevrolet's advertisement giving away one of their cars for making a hole-in-one was a valid offer). *But see* Moulton v. Kershaw, 18 N.W. 172, 174–75 (Wis. 1884) (holding that advertisement terms were too general to be considered a valid offer to contract).

offer and communicates that approval to the offeror in the manner required by the contract.[22]

The final element of a contract is consideration. The *Restatement (Second) of Contracts* explains that consideration is the product of a bargain between the parties.[23] Valid consideration requires a sufficient exchange between the parties that balances both their interests.[24] Sufficiency is a largely fact-driven determination that involves looking at the promises made between the parties and requires more than a nominal exchange.[25]

The enforceability of a contract relies on the presence of these three elements because they legally bind the parties to perform the obligations as bargained for.[26] If one party fails to perform, the other party can file suit for damages for breach of contract or attempt to compel performance.[27] Subsequently, the breaching party can respond to the suit by raising a number of contract defenses.

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22. An acceptance must be made by the mode required by the contract. If the contract does not have an exclusive method of acceptance, a party can accept through either promise or performance of their end of the bargain. *See* Allied Steel & Conveyors, Inc. v. Ford Motor Co., 277 F.2d 907, 910–11, 913 (6th Cir. 1960) (per curiam) (holding that a suggested acceptance method was not an exclusive acceptance method); Davis v. Jacoby, 34 P.2d 1026, 1029–31 (Cal. 1934) (holding that a bilateral contract was established when only a promise to perform, rather than actual performance, was requested); Brackenbury v. Hodgkin, 102 A. 106, 107 (Me. 1917) (holding that performance binds the other party to act on their side of the bargain in unilateral contracts).

23. RESTATEMENT (SECOND) OF CONTRACTS § 71 (explaining how consideration can come in the form of money, promises, or forbearance from certain acts).

24. *See* Congregation Kadimah Toras-Moshe v. DeLeo, 540 N.E.2d 691, 692 (Mass. 1989) (holding a contract was never formed because the deceased's oral promise to donate to the congregation did not have valid consideration, as he gained no benefit in the deal); Earle v. Angell, 32 N.E. 164, 164 (Mass. 1892) (finding a promise of future performance is good consideration); Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) (finding forbearance is good consideration).

25. *See* Fischer v. Union Trust Co., 101 N.W. 852, 854 (Mich. 1904) (holding a daughter's payment of one dollar to her father in exchange for his payment on her mortgages did not form a valid contract because one dollar or mere affection does not constitute sufficient consideration).

26. RESTATEMENT (SECOND) OF CONTRACTS § 231 cmt. a ("Ordinarily when parties make such an agreement, they not only regard the promises themselves as the subject of an exchange, but they also intend that the performances of those promises shall subsequently be exchanged for each other.").

27. *See id.* §§ 346, 357.

B. Contract Defenses and the Doctrine of Unconscionability

Breaching parties can challenge breach of contract claims by using defenses to justify the failure to perform.[28] When evaluating contract defenses, the court must decide whether the breaching party's unique circumstances excuse performance.[29] The elements of each defense vary among different states.[30] The defenses can be applied to the contract as a whole or to individual clauses.[31] If a defense is applied only to an individual clause, courts would use the practice of severance, meaning the rest of the contract would remain enforceable and only specified clauses would be unenforceable.[32]

Unconscionability is one of many contract defenses that breaching parties can raise. The doctrine of unconscionability began as a common-law defense in courts of equity.[33] From its inception, the doctrine of unconscionability gave courts the power to invalidate harsh or oppressive bargains.[34] Equity courts saw this defense as a way to protect marginalized groups from agreements that took advantage of their weaknesses.[35] Courts of law were less likely to use the doctrine,

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28. Nancy Kim, *Mistakes, Changed Circumstances and Intent*, 56 KAN. L. REV. 473, 474 (2008) ("There are, however, situations where the parties have entered into a bargain and then sought either to avoid enforcement or to reform the contract terms.").

29. Debora L. Threedy, *Dancing Around Gender: Lessons From Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749, 754 (2010) (explaining how prevailing under contract defenses requires plaintiffs to plead for special protection).

30. Most states have adopted the elements from the Restatement with some legislatures adding additional elements. *Compare, e.g.*, S.D. CODIFIED LAWS § 53-4-3 (2019) (defining five factors that could sustain a duress defense), *with* CAL CIV. CODE § 1569 (West 2019) (defining three factors that could sustain a duress defense). While the South Dakota and California laws overlap to some extent, South Dakota's law enumerates two situations—"actual or threatened unlawful violent injury to the person or property," and "actual or threatened injury to the character of any such person or persons"—that could potentially be used to show duress for which California's law does not account. S.D. CODIFIED LAWS § 53-4-3(3)–(4).

31. 15 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 89.4 (2019).

32. *Id.* ("If the attainment is wholly avoided, if the degree of impropriety is not great, and if enforcement in part is not unfair and unreasonable, the court should be justified in declaring that the transaction is partially enforceable.").

33. Asifa Quraishi, Comment, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187, 191 (1991) (noting the concept of unconscionability started in equity courts that have been more willing and forceful in applying the doctrine than courts of law).

34. *See id.* at 192 (noting equity courts denied specific performance of a contract when the terms would cause severe hardship to one of the parties).

35. *Id.* (explaining how early courts applying the equitable doctrine of unconscionability sought to protect the "widows and the weak-minded").

oftentimes upholding oppressive deals as long as the necessary contract elements were present.[36] For this reason, early common-law cases provided little clarity on a specific definition or test to apply when analyzing potentially unconscionable contracts.[37] Common-law courts applied the subjective gap test for years before the Uniform Commercial Code (UCC) clarified and codified the doctrine.[38] Section 2-302 states as follows:

> If the 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.[39]

However, the UCC fails to give a bright-line test for unconscionability and instead merely provides guidelines for remediating the "tainted" contract.[40] Furthermore, the UCC only applies to a narrow set of contracts for the sale of goods and thus does not cover the settlements discussed in this Comment. In lieu of statutory or UCC guidance, courts must rely upon the common law in defining unconscionability.

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36. *Id.* at 192–93 (describing how courts at law struggled with the competing priorities of equity and freedom of contract and explaining that these courts sometimes prioritized laissez-faire market principles over fair or equitable results).

37. *Id.* at 194 (analyzing how most early common-law unconscionability cases provided very vague definitions).

38. U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 1977); Quraishi, *supra* note 33, at 194–95.

39. *Id.*

40. In the official comments to § 2-302, it states "[t]his section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable." *Id.* cmt. 1. While this provides judges with guidance on how to address issues as they arise, neither the text of the section nor the comments provide a specific definition for what constitutes "unconscionability." State legislatures have not been any more helpful in providing a clear definition in their statutes. Most states have adopted the UCC language in its entirety in their individual state contract codes and thus also fail to provide a clear unconscionability test or standard. *See, e.g.*, COLO. REV. STAT. § 4-2-302 (2019); HAW. REV. STAT. § 490:2-302 (2019); MO. REV. STAT. § 400.2-302 (2019); MONT. CODE ANN. § 30-2-302 (2019); WIS. STAT. § 402.302 (2019). Oddly enough, looking at these same states' property codes reveals that the state legislatures provided clear definitions of unconscionability for property contracts. *See* COLO. REV. STAT. § 38-33.3-112 (2019); MO. REV. STAT. § 448.1-112 (2019); WIS. STAT. § 707.06 (2019); *see also* 750 ILL. COMP. STAT. 5/502(b) (2018) (allowing judges to find property settlements unconscionable after considering the economic circumstances of the parties and any other relevant factors brought up by the parties).

Courts find unconscionability when a contract or contract term is grossly one-sided, providing benefit to one party while unnecessarily impoverishing the other.[41] Courts can also find unconscionability when the parties have grossly unequal bargaining power.[42] In these cases, one party typically takes advantage of the other's relatively weakened position or mental state to procure a better deal.[43] However, this factor is not entirely dispositive. If the parties have relatively equal bargaining power, a court could still find unconscionability.[44] Finally, courts can find unconscionability when one party lacks meaningful choice and cannot avoid the unconscionable obligation.[45] Unconscionability is often a difficult defense to prove; however, parties may be more likely to succeed on this defense if they can show two or more of the above elements are present.[46]

The Third Circuit provided a strong foundation for understanding unconscionability in *Campbell Soup Co. v. Wentz*,[47] a seminal case in unconscionability doctrine. In *Campbell Soup*, Campbell sued the

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41. CORBIN ON CONTRACTS, *supra* note 31, § 29.4 ("Typically the cases in which courts have found unconscionability involve gross overall one-sidedness or gross one-sidedness of a term disclaiming a warranty, limiting damages, or granting procedural advantages.").

42. *Id.* (explaining how inequality of bargaining power is an important consideration in determining unconscionability).

43. *Id.* (citing cases where the stronger party exploited by a weaker party because of the weaker party's ignorance, feebleness, lack of sophistication, or general naiveté).

44. *Id.* ("Unconscionability, however, may exist even where the parties are on 'about equal footing' or even where the oppressor is inexperienced compared to the oppressed."); *see, e.g.*, Elite Logistics Corp. v. Hanjin Shipping Co., 589 Fed. App'x 817, 818 (9th Cir. 2014) (finding arbitration clause in agreement between both corporations was unconscionable even though both companies approached the deal with relatively equal resources because Elite had to accept the terms or risk losing the business relationship); Paduano v. Express Scripts, Inc., 55 F. Supp. 3d 400, 418–19 (E.D.N.Y. 2014) (holding clause that eliminated the plaintiff corporation's discovery during arbitration unconscionable because it limited plaintiff's ability to effectively vindicate its rights despite the agreement being procedurally fair to the parties); Miller v. Coffeen, 280 S.W.2d 100, 103–04 (Mo. 1954) (en banc) (acknowledging the parties likely had similar bargaining power but holding other factors warranted a finding of unconscionability).

45. *Id.* (citing cases where individuals were forced to accept "take it or leave it" contract terms).

46. *Id.* ("Most claims of unconscionability fail. The mere fact that there is a lack of equivalence between the performances of the parties does not even get close to the establishment of unconscionability. A harsh result alone is an insufficient ground for a finding of unconscionability."); *see* Gimbel Bros., Inc. v. Swift, 307 N.Y.S.2d 952, 954 (Civ. Ct. 1970) ("A promisor can be relieved of his obligation, of course, but only when the transaction affronts the sense of decency without which business is mere predation and the administration of justice an exercise in bookkeeping.").

47. 172 F.2d 80 (3d Cir. 1948).

Wentzes for specific performance of a contract.[48] The contract required the Wentzes, owners of a small Pennsylvania farm, to sell Campbell, a New Jersey corporation, a specific quantity of carrots at a set price between twenty-three and thirty dollars per ton.[49] The Wentzes, upon learning the market value of the carrots was upwards of ninety dollars per ton, refused to perform their obligation to Campbell and sold to another buyer for a higher price.[50] Campbell filed to enjoin further sale by the Wentzes and compel performance of the contract.[51] While the Third Circuit found that specific performance was the correct remedy for a case of this nature, it affirmed the lower court's ruling for the Wentzes under the theory that the contract was "too one-sided an agreement to entitle the plaintiff to relief in a court of conscience."[52] The Third Circuit relied on several one-sided provisions in the contract, including a provision for liquidated damages upon breach by the Wentzes and another allowing Campbell to refuse deliveries under certain circumstances.[53] Specifically, the Third Circuit was troubled by provisions precluding the Wentzes from both holding the corporation liable for any carrots not accepted and from reselling the rejected carrots, effectively leaving the Wentzes with excess product and lost profit.[54] Under those facts, the court found Campbell had clearly drafted the contract with only its interest in mind at the expense of the Wentzes.[55]

In *Miller v. Coffeen*,[56] a subsequent case with similar facts, Coffeen executed a contract to sell his home for $2400 to Miller, even though the property was valued at $12,000.[57] When Coffeen realized the deal was unfair, he attempted to back out of the sale, but Miller sued to compel specific performance of the contract.[58] The court held that even though courts generally support freedom of contract in particularly hard bargains, the facts in *Miller* coupled with the gross

48. *Id.* at 81.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 83 (highlighting that the contract had "quite obviously been drawn by skilful draftsmen with the buyer's interests in mind").
53. *Id.*
54. *Id.*
55. *Id.*
56. 280 S.W.2d 100 (Mo. 1955) (en banc).
57. *Id.* at 102.
58. *Id.*

inadequacy of consideration made the deal inherently unfair.[59] Specifically, the court noted how Coffeen's age and inexperience in being a property owner were relevant in determining the fairness of the deal.[60] Those characteristics, coupled with contract terms that disadvantaged Coffeen and bolstered Miller's financial position,[61] created circumstances where enforcement would have gone against notions of justice and fairness.[62]

These prior cases focused primarily on unreasonable one-sided bargains but failed to delve into other unconscionability elements, such as difference in bargaining power and absence of meaningful choice. In later cases, courts began to address how the power differential between the parties and the practice of "take it or leave it" deals were critical in addressing unconscionability. In *Henningsen v. Bloomfield Motors, Inc.*,[63] the Supreme Court of New Jersey invalidated a contract that limited the amount of damages a couple could recover under the contract's warranty clause as unconscionable under the circumstances.[64] The purchase order signed by the Henningsens contained a clause that precluded any manufacturing or product defect claims that fell outside a ninety-day warranty period.[65] However, the clause was placed three-quarters of the way down on the back of the form in small font without any headings or margins indicating the presence of such an important provision.[66] Further, the signature line was on the front of the form along with two barely legible paragraphs telling the buyers that by signing, they fully agreed to all the terms laid out on both sides of the contract.[67] The drafters' concerted efforts to de-emphasize these clauses troubled the court.[68] Upon review of other similar automobile

59. *Id.*

60. *Id.* at 104.

61. *Id.* at 106.

62. *Id.* ("In short, in view of the shocking inadequacy of the consideration and the presence of the noted inequitable factors, enforcement of the contract would impose an unreasonable, disproportionate hardship upon the defendant, Coffeen, and, in all the circumstances, the justice of the decree of specific performance is not made to appear.").

63. 161 A.2d 69 (N.J. 1960).

64. *Id.* at 76.

65. *Id.* at 74.

66. *Id.* at 73.

67. *Id.* (highlighting that the provisions at issue were some of the most important in the contract but were difficult to read and "nothing about the format . . . would draw the reader's eye to them").

68. *Id.* (noting that most of the form was written in easy-to-read 12-point block print while the most important paragraphs were printed very close together in six-point script).

purchase orders, the court found that this de-emphasis was common industry practice, thereby forcing consumers into agreeing to these terms without any choice.[69] As such, the crux of the court's ruling in favor of the Henningsens focused on their lack of meaningful choice in entering into or negotiating the contract.[70]

In a similar case, *Carlson v. General Motors Corp.*,[71] the Fourth Circuit affirmed the denial of GM's motion to dismiss because there was a substantial showing that GM's durational limitations on implied warranties for defective diesel engines were unconscionable.[72] The Fourth Circuit found the plaintiffs had made a sufficient showing of the company's superior bargaining power through its use of a highly sophisticated, skillfully crafted contract.[73] Additionally, much like in *Henningsen*, the plaintiffs were able to show the durational limitations found in GM's contracts were industry practice, offering them little choice but to sign and accept the unfair policy.[74] More importantly, *Carlson* helped further clarify what courts will look to when making decisions about meaningful choice by stating "courts typically look to the parties' relative 'bargaining power,' 'sophistication,' 'knowledge' and 'expertise'" as relevant.[75]

In a watershed case on unconscionability, the D.C. Circuit followed an approach similar to the New Jersey Supreme Court in *Henningsen*. In *Williams v. Walker-Thomas Furniture Co.*,[76] the D.C. Circuit invalidated several unfair provisions of a furniture company's sales contracts.[77] The provisions at issue put the purchaser in default if any balance remained from any previous purchase, even if one of the items had been fully paid, since the purchaser was billed pro-rata.[78] Even if the cost of an item had been completely paid for, if another item was purchased in the interim and the purchaser defaulted, the store would consider everything purchased on credit as defaulted.[79]

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69. *Id.* at 84.
70. *Id.* at 86 (discussing how the weaker party is not usually in a position to look around for better contract terms, and that the consumer may even be stuck with the same contract terms from all contracting options).
71. 883 F.2d 287 (4th Cir. 1989).
72. *Id.* at 294.
73. *Id.* at 295–96.
74. *Id.* at 294.
75. *Id.* at 295.
76. 350 F.2d 445 (D.C. Cir. 1965).
77. *Id.* at 447.
78. *Id.*
79. *Id.*

The court noted the clause was contained in small font on the contract and that such a policy was so unusual that customers could not reasonably be expected to consent to it if they had diminished bargaining power.[80] In this particular case, Williams' lack of formal education, role as a single mother to seven children, and reliance on public assistance put her in a weaker position to bargain, choose a different store, or consent to such an impracticable deal.[81]

Accordingly, the D.C. Circuit held that unconscionability exists when an absence of meaningful choice on the part of one of the parties is coupled with contract terms that are unreasonably favorable to the other party.[82] This was the first time a court clearly laid out a test for determining both meaningful choice and unreasonable contract terms.[83] Furthermore, the court determined that a finding of unconscionability specifically required consideration of the fairness of the contract terms and the manner in which the contract was entered.[84] Regarding unreasonable contract terms, the court's test relied on a finding that the terms were "so extreme as to appear unconscionable according to the mores and business practices of the time and place."[85] The test for meaningful choice requires courts examine whether each party, given their specific characteristics, had a reasonable opportunity to understand the contract.[86] Instances of deceptive sales practices and terms hidden in small print were both recognized as important factors affecting one's ability to fully understand the deal.[87] The court also pointed out that the meaningfulness of the choice is negated by a gross inequality of bargaining power in many instances.[88]

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80. *Id.* at 449 ("But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.").

81. *Id.* at 448–49.

82. *Id.* at 449.

83. *Id.* ("Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.").

84. *Id.*

85. *Id.* at 450 (quoting 1 CORBIN, CONTRACTS § 128 (1963)) (stating that when determining reasonableness or fairness, courts should consider the contract's terms in light of the circumstances it was made under—a complex test that cannot be "mechanically applied").

86. *Id.* at 449.

87. *Id.*

88. *Id.*

Courts have also found contracts to be unconscionable in private agreements between ordinary citizens or in the context of employment. In *Waters v. Min Ltd.*,[89] Waters' boyfriend convinced her to sell a $189,000 annuity (that would have totaled $694,000 over twenty-five years) for substantially less money to satisfy his own bank debt.[90] The plaintiff sold her annuity without consulting with her attorney and then later brought suit for rescission of the contract, arguing unconscionability.[91] The Supreme Court of Massachusetts found for Waters and stated that the contract would not be enforced because she was involved in an accident many years prior that reduced her cognitive abilities and made her susceptible to influence.[92] Additionally, Waters had been abusing illicit substances for years with the help and encouragement of her boyfriend.[93] The court held that Waters' impaired mental state and susceptibility to her boyfriend's influence led to an unequal bargaining power between the parties.[94]

Similarly, in *Wollums v. Horsley*,[95] Wollums, a disabled, elderly man with little education or business knowledge, entered into a deal to allow Horsley, a savvy oil and minerals real estate tycoon, access to mine on Wollums's farm for well below market value.[96] In holding that the contract was unenforceable, the court emphasized that Horsley took advantage of Wollums's diminished capacity and lack of knowledge as to the value of his property to procure a more favorable bargain.[97] The court noted that courts of equity will only uphold deals when, in light of all the facts, the contract and the interactions between the parties appeared to be fair and just.[98] In this case, the bargain did not meet that standard and thus could not in good conscience be enforced.[99]

Finally, in *Odorizzi v. Bloomfield School District*,[100] a schoolteacher agreed to resign from his job after school administrators took

89. 587 N.E.2d 231 (Mass. 1992).
90. *Id.* at 232.
91. *Id.*
92. *Id.* at 234.
93. *Id.*
94. *Id.*
95. 20 S.W. 781 (Ky. Ct. App. 1892).
96. *Id.* at 782.
97. *Id.*
98. *Id.*
99. *Id.*
100. 54 Cal. Rptr. 533 (Dist. Ct. App. 1966).

advantage of him and threatened him with reputational harm.[101] The situation arose when the police arrested Odorizzi and questioned him for hours regarding his sexual orientation.[102] After his release, Odorizzi returned home where the school administrators accosted him and forced him to resign, threatening public disclosure of his sexual orientation and immediate termination from his job if he refused.[103] Admitting that he had not been thinking rationally and was unable to think clearly, Odorizzi acquiesced to the pressure and formally resigned from his job.[104] Afterwards, Odorizzi sued to revoke his resignation and reinstate his employment contract because he had been cleared of the criminal charges and felt that school administrators had unfairly compelled him to quit his job.[105] The court held his resignation invalid and found the school had put undue influence on Odorizzi by taking advantage of his clearly deteriorating mental and emotional state.[106] Much like in *Waters*, the court found Odorizzi had not been in a position to make a meaningful choice or to understand the gravity of the situation and that he clearly was the weaker party.[107] In both cases, the courts looked to the parties' mental state and susceptibility to influence as factors in establishing their ability to advocate for themselves, which are fundamental factors when analyzing a party's bargaining power.

C. Divorce in the United States

Contract law is essential to divorce settlements given that parties negotiate, agree to, and enforce the settlements like any other contract.[108] While public law used to govern divorce, courts have recently begun to consider divorce using traditional private law contract doctrine.[109] Parties commonly negotiate divorces by

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101. *Id.* at 538.
102. *Id.* at 537–38.
103. *Id.*
104. *Id.* at 540.
105. *Id.* at 537.
106. *Id.* at 540, 543.
107. *See id.* at 540; *see also* Waters v. Min Ltd., 587 N.E.2d 231, 234 (Mass. 1992) (explaining that the "gross disparity" between the parties was a factor in the court's unconscionability finding).
108. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 701 cmt. d (AM. LAW INST. 2000).
109. *Developments in the Law—Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2077 (2003) (explaining that some states have begun to permit antenuptial agreements rather after many

settlements that require the parties to mediate and come to an agreement regarding child custody and division of assets and property.[110] Courts use extra care when determining if they should enforce divorce settlements by looking at several factors such as the settlement's complexity, subject matter, and the special conditions under which the parties reach the settlement.[111] When a court approves a settlement, it becomes a court order and binding contract.[112] If either party violates any of the terms or conditions of the settlement, the non-violating party can sue for breach or ask the court to hold the violating party in contempt of a court order.[113]

Despite the advent of no-fault divorce and mediation, divorce settlements are generally "unhappy contracts" as they involve the dissolution of marital property.[114] This makes the outcomes unpredictable, especially when examining the specific circumstances of each couple.[115] The bargaining skills of the parties, the quality and help of their attorneys, and the anticipated benefit of going to court if settlement tactics fail necessarily affect the results of the settlement.[116] Other power dynamics, such as adultery, abuse, or substance use disorders, also affect the outcome of settlement negotiations.[117] If parties fail to agree on a divorce settlement, they are subject to the will of the court, where the judge is the ultimate

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years of holding such agreements invalid, demonstrating a shift "from a public status conception of marriage to one based purely on contract").

110. Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1180–81 (1999).

111. Margaret F. Brinig, *Are All Contracts Alike?*, 43 WAKE FOREST L. REV. 533, 539 (2008) ("About ninety percent of divorcing couples at some point file with the court what is variously known as a separation agreement, a property settlement agreement, or a stipulation.").

112. *Id.* at 540–41 ("This care may take the form of scrutiny for unconscionability or a special attention to procedural regularity, assistance of counsel, and disclosure.").

113. *Id.* at 539–40.

114. *Id.* at 541.

115. *Id.*

116. *Id.*; *see also* Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 12–13 (2012) (noting that separation agreements have become "the norm rather than the exception" in divorces and that courts are likely to enforce such settlements in the absence of fraud or duress).

117. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1537 (1983) ("[A] battered wife may be legally entitled to send her husband to jail, but her economic incentive not to do so may be overwhelming . . . . The husband and wife are treated as if they were equal bargaining partners, even though women are in fact systematically subordinated to men.").

decision-maker.[118] Going to court is equally as unpredictable as negotiating a settlement, especially depending on whether the state utilizes a fault or no-fault divorce system.

Divorce has changed dramatically in the United States since the mid-twentieth century, as changing societal views and norms made divorce more acceptable.[119] Divorce is either "fault-based" or "no-fault" in the United States, with each state individually determining which system to adopt.[120] Accordingly, some states have a mixed system in which they utilize both fault and no-fault divorces.[121] Prior to 1969, all states followed a fault-based divorce system, which allowed for the dissolution of marriage only under certain circumstances.[122] That year, California became the first state to adopt an entirely no-fault system, which spawned a revolution across the country.[123] Soon a divorce revolution began, and many states followed in California's footsteps either by amending their divorce statutes or outright repealing and replacing them.[124]

Legislatures justified implementing no-fault divorce laws for several reasons. Primarily, no-fault divorces do not require a determination of which party is innocent and which is guilty.[125] No-fault divorce relies on the incompatibility of the partners and their irreconcilable differences to sustain the dissolution of marriage.[126] This new focus makes divorces less restrictive, coercive, and acrimonious and allows judges to be neutral as they do not have to take a side or label one party as guilty.[127] The second purpose of the no-fault divorce system is to protect against collusion

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118. *See* Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not To Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 268 (2007) (describing the Best Alternative to a Negotiated Agreement, or "BATNA," as turning to a third party when negotiations fail); *see also* Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241, 260 (2005) (finding that divorces with fault considerations, such as domestic violence and child abuse, were more likely to go to litigation than to settle).

119. Jane Biondi, Note, *Who Pays for Guilt? Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 612–13 (1999).

120. Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. REL. 317, 317 (2002).

121. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 89–90.

122. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 5 (1987).

123. *See id.*

124. *Id.* at 6.

125. *See* Vlosky & Monroe, *supra* note 120, at 317.

126. *Id.*

127. *Id.*

between divorcing parties and migratory divorce.[128] Commonly, a wife and husband would fabricate a story to satisfy the grounds for divorce in their state.[129] Alternatively, with migratory divorce, one spouse would move to another state with more favorable divorce laws and file there.[130] By removing these barriers, no-fault divorce allows couples to dissolve their marriage at will and arguably helps men and women in abusive relationships.[131]

Despite these stated goals, no-fault divorce has been criticized and deemed a failure due to its unintended economic and psychological consequences, primarily on women and children.[132] Critics argue that when judges consider abuse in the alimony award, the injured spouse benefits financially and in terms of safety.[133] Accordingly, these critics advocate for allowing fault-based considerations in cases of egregious marital misconduct.[134] This dichotomous system of fault-based or no-fault divorce presents issues in other areas of judicial inquiry, namely alimony and dissolution of marital property where the acknowledgement of egregious marital misconduct is equally contentious.

D. Alimony in the United States

Alimony has been a part of the legal landscape for centuries, starting as a remedy in courts of equity.[135] The goal of alimony is to provide the parties with the opportunity for a fresh start, while also ensuring the lower-earning spouse has an equitable standard of living upon divorce.[136] Alimony requires looking at several factors, including, but not limited to, the spouses' earning capacity, total spousal assets, and

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128. *Id.*

129. *See* Biondi, *supra* note 119, at 613.

130. *Id.*

131. *See* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270–71 (1997) (describing how the creation of no-fault divorce allowed couples to divorce without having to fabricate a reason for their split).

132. Peter Nash Swisher, *The ALI Principles: A Farewell to Fault-But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213, 214 (2001).

133. *See* Swisher, *supra* note 131, at 275–76.

134. *Id.*

135. *See* Rachel Biscardi, *Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 W. NEW ENG. L. REV. 1, 6 (2014) ("Since 1785, courts have employed alimony as an equitable remedy in divorce cases, recognizing that during an intact marriage, spouses jointly decide how to divide responsibility for childrearing, household maintenance, and paid work.").

136. Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 47 (2011).

standard of living post-divorce.[137] Alimony used to be "permanent," as it was awarded for life and paid in periodic payments of a specified sum.[138] Given the concerns raised by having to pay former spouses indefinitely and widespread calls to reform this practice, most jurisdictions do not permit permanent alimony without explicit statutory authorization.[139] Instead, many states have begun to use rehabilitative alimony, which looks to compensate lower-earning spouses only until they have, with reasonable effort, become self-supporting.[140] Thus, rehabilitative alimony is limited in scope and promotes self-sufficiency.

The purpose of alimony is to recognize a spouse's interest and then compensate the spouse the proper amount of money for the time, labor, and assets invested into the marriage.[141] One theory of alimony is gain theory, which looks to compensate spouses for the amount of marital investment they put in to help raise future joint income.[142] Another theory of alimony is loss theory, which posits that alimony should compensate spouses for relying on a failed marriage and thus losing earning capacity or the opportunity to marry someone else.[143] These competing ideals about the purpose of alimony have manifested themselves differently, with loss theory being less common as it relies on fault determinations.[144]

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137. 24A AM. JUR. 2D *Divorce and Separation* § 668 (Aug. 2019 Update).

138. David H. Kelsey & Patrick P. Fry, *The Relationship Between Permanent and Rehabilitative Alimony*, 4 J. AM. ACAD. MATRIM. LAW. 1 (1988) ("A court could increase, decrease, or terminate alimony if the circumstances of the parties changed. Alimony could continue until the death of the recipient or the payor. This traditional type of alimony has become known as 'permanent' alimony.").

139. *See id.* at 1–3.

140. *Id.* at 1–2.

141. Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271, 279 (2011) ("Similarly, identification and measurement of a spouse's interest does not tell us whether that interest is compensable, i.e., whether alimony is appropriate. Identification of a spouse's interest may be an important first step, but a satisfactory theory of alimony must thus do more: it must explain why that interest is compensable.").

142. The most common scenarios where gain theory can be observed is in the case of one spouse contributing earnings or savings to the education of the other spouse, or one spouse staying home and taking care of children to free up time for the other spouse to advance his or her career. *See id.* at 280 (explaining that gain theory would compensate a spouse who invested time to raise the family's income for both restitution and his or her share in the investment in the marriage).

143. *Id.* at 284. The aim with loss theory is to put lower-earning spouses in as good of a position as they would have been in had the marriage continued. Unsurprisingly, loss theory mirrors the contract remedy of expectation damages. For information on expectation damages, see RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

144. Starnes, *supra* note 141, at 285.

Much like a divorce, parties can negotiate alimony by discussing the amount owed and then coming to an agreement written into a settlement.[145] However, alimony is contentious and is often left for the judge to decide.[146] If alimony is agreed upon in the settlement, it can be enforced and litigated like any other provision in a contract.[147] If one party fails to pay, the other party can seek judicial intervention.[148] The more common way alimony comes to court is when one party challenges the validity of the agreement prior to payment but after signing the settlement.[149] Alimony is still awarded in divorces today, notwithstanding the advent of no-fault divorce.[150]

The factors considered when determining alimony in no-fault divorces vary greatly from jurisdiction to jurisdiction, with some of them ignoring marital misconduct altogether.[151] Before 1968, with very few exceptions, courts considered marital misconduct when determining spousal support.[152] After the advent of no-fault divorce, the National Conference of Commissioners on Uniform State Laws (NCCUSL) accepted the Uniform Marriage and Divorce Act (UMDA), which advocated for a complete no-fault system.[153] Two sections of the UMDA stated that courts should determine spousal support "without regard to

145. Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 PIERCE L. REV. 163, 166 (2007) (stating that when a couple divorces, financial arrangements for child support, inter-spousal maintenance, and property division are typical).

146. *See* Biscardi, *supra* note 135, at 5, 20 (stating that because of the difficulty in settling alimony payments, more cases were brought to trial); *see also* Bryan, *supra* note 110, at 1214 (finding settlement negotiations often fail when a wife demands alimony from her ex-spouse).

147. John J. Michalik, Annotation, *Divorce: Power of Court to Modify Decree for Alimony or Support of Spouse Which Was Based on Agreement of Parties*, 61 A.L.R.3d 520 § 2(b) (1975).

148. *See generally* Linehan v. Linehan, 649 S.W.2d 837 (Ark. Ct. App. 1983) (challenging validity of alimony settlement).

149. *See* Shipley v. Shipley, 807 S.W.2d 915, 916 (Ark. 1991) (examining whether an agreement to pay alimony announced at a divorce proceeding was an independent contract); *see also* Bryan, *supra* note 110, at 1239 (asserting that a wife can later challenge an unfair agreement in court and petition for the agreement to be set aside if the judge "fails to intercept" the unfair agreement initially).

150. Laura W. Morgan, *Current Trends in Alimony: Where Are We Now?*, A.B.A. (Apr. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/april_2012/current_trends_alimony_law ("Alimony continues to stumble along, based on habit and precedent as much as logic, as part of the modern divorce case.").

151. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 775 (1996).

152. *See id.* at 776; Kachroo, *supra* note 145, at 170 n.37.

153. Wardle, *supra* note 121, at 86–87.

marital misconduct."[154] Some courts have adopted the language of the UMDA, finding that even in cases of egregious marital misconduct, allowing fault considerations for spousal support undermines the purpose of a no-fault divorce because it forces judges to take sides and make determinations of guilt.[155] Other courts have taken the opposite approach and instead allow for egregious or serious marital misconduct to be taken into account when making property or spousal support determinations.[156] More generally, these states allow for fault considerations in both divorce and alimony decisions.[157] However, what constitutes "serious or egregious marital misconduct" is largely up to the court's discretion, and there is no clear standard from jurisdiction to jurisdiction or even case to case.[158]

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154. *See* Ellman, *supra* note 151, at 776 (quoting UNIF. MARRIAGE AND DIVORCE ACT §§ 307, 308(b), 9A U.L.A. 147 (1987)).

155. *See In re* Marriage of Koch, 648 P.2d 406, 408 (Or. Ct. App. 1982); *see also* Mosbarger v. Mosbarger, 547 So. 2d 188, 191 (Fla. Dist. Ct. App. 1989) (applying no-fault principles even where wife had attempted to murder her husband); *In re* Marriage of Cihak, 416 N.E.2d 701, 702 (Ill. App. 1981) (refusing to consider that respondent had murdered petitioner as a factor in dividing marital property).

156. *See, e.g.*, Stover v. Stover, 696 S.W.2d 750, 751–52 (Ark. 1985) (finding egregious marital misconduct when wife conspired to kill husband); Robinson v. Robinson, 444 A.2d 234, 236 (Conn. 1982) ("While alimony, in whatever form, or an assignment of property is not to be considered either as a reward for virtue or as a punishment for wrongdoing, a spouse whose conduct has contributed substantially to the breakdown of the marriage should not expect to receive financial kudos for his or her misconduct."); Jones v. Jones, 155 So. 3d 856, 863 (Miss. Ct. App. 2013) (holding husband's cruelty and inhumane treatment was egregious marital misconduct that warranted the unequal distribution of property); Brabec v. Brabec, 510 N.W.2d 762, 763 (Wis. Ct. App. 1993) (finding egregious marital misconduct when wife solicited someone to murder her husband).

157. *See* Swisher, *supra* note 131, at 296 ("[A] substantial number of American states still retain various fault grounds for divorce, and still utilize certain fault factors in determining spousal support and determining the equitable distribution of marital property on divorce.").

158. *See, e.g.*, *In re* Marriage of Sommers, 792 P.2d 1005, 1010 (Kan. 1990) (holding an extramarital affair had no economic consequences and therefore did not reach the level of egregious marital fault); Smoot v. Smoot, 357 S.E.2d 728, 732 (Va. 1987) (holding spousal desertion was not a substantial cause of divorce and was not egregious enough to be taken under advisement); Barnes v. Barnes, 428 S.E.2d 294, 296–97 (Va. Ct. App. 1993) (holding that wife's post-separation adultery would not bar her from receiving spousal support since their mutual acts, and not her adultery, were the main cause of the divorce); Aster v. Gross, 371 S.E.2d 833, 837 (Va. Ct. App. 1988) (holding husband's misconduct did not have economic consequences that led to the dissolution of marriage and therefore was irrelevant in determining spousal support); O'Loughlin v. O'Loughlin, 458 S.E.2d 323, 326 (Va. Ct. App. 1995)

E. Current Status of Alimony Laws

As previously discussed, alimony statutes vary widely from state to state and can generally be separated into four categories: (1) statutes that expressly preclude courts from considering fault;[159] (2) statutes that require courts to consider fault;[160] (3) statutes that permit, but do not require, courts to consider fault;[161] and (4) statutes that remain silent on considerations of fault, allowing courts to decide.[162] While the alimony practices differ, the statutes themselves are surprisingly uniform in that most states include lists of factors that either can or must be used in making alimony decisions.[163] Remarkably, despite the advent of no-fault divorce, most states recognize that fault still potentially plays a role in alimony decisions.[164]

In examining the first category of alimony statutes, four states expressly note that no inquiry shall be made into, and no evidence shall be presented regarding, marital misconduct.[165] The second category, which is the second-largest, includes twelve states that permit, but that do not expressly require, the consideration of marital fault when determining alimony.[166] Most notably, Virginia originally planned to model its statute after the changes made by the

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(concluding noneconomic fault can be relevant when it involves serious and egregious marital misconduct that is the substantial cause of the marital breakdown).

159. *See* Kristine Cordier Karnezis, Annotation, *Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 A.L.R.3d 1116 § 4 (1978).

160. *See id.* § 6.

161. *See id.* § 5.

162. *See id.* § 3(a)–(b).

163. *Id.* § 2(a) ("Accordingly, whether fault is to be considered in awarding alimony or spousal support or determining property division pursuant to a no-fault divorce has often been left to judicial determination.").

164. *See* Swisher, *supra* note 131, at 303 (acknowledging several state courts and state legislatures consider fault in divorce or dissolution of marriage, even when the parties use a no-fault divorce path).

165. *E.g.*, ARIZ. REV. STAT. ANN. § 25-319 (2019); DEL. CODE ANN. tit. 13 § 1512 (2019); 750 ILL. COMP. STAT. 5/504 (2019); MONT. CODE ANN. § 40-4-203 (2019). Interestingly, Arizona allows for the consideration of damages arising from domestic abuse insofar as the damages add to monetary assets.

166. ALA. CODE § 30-2-52 (2019) (misconduct may be considered); ALASKA STAT. § 25.24.160 (2019) (conduct may be considered); IDAHO CODE § 32-705 (2019); LA. CIV. CODE ANN. art. 112 (2018) (requires taking into account instances of domestic abuse but the abuser can still receive money); MASS. GEN. LAWS. ch. 208 § 34 (2019); MO. REV. STAT. § 452.335 (2019); 23 PA. CONS. STAT. § 3701 (2019); S.C. CODE ANN. § 20-3-130 (2019); S.D. CODIFIED LAWS § 25-4-41 (2019) (statute precludes fault in property division; courts allow fault in alimony); TEX. FAM. CODE ANN. § 8.052 (West 2019); UTAH CODE ANN. § 30-3-5 (West 2018); VA. CODE ANN. § 20-107.1 (2019).

California legislature but adopted this lower standard due to political pressure.[167] The largest category is the third, which contains thirty-three states where the statutes are silent on marital fault and instead allow judges to decide alimony using any other factors deemed relevant.[168] Since the statutes in a majority of these jurisdictions do not give any guidance as to whether domestic violence is a relevant factor, judges must rely on cases that fluctuate on the issue, which allows for almost unbridled judicial discretion.[169]

California is the only state that falls into the final category, which requires marital misconduct, specifically domestic violence, to be a disqualifying factor for alimony determinations.[170] California passed

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167. *Compare* H.B. 2105, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (proposing a law that disqualifies alimony payments from survivors to abusers), *with* VA. CODE ANN. § 20-107.1 (allowing for the consideration of relevant circumstances, including domestic violence).

168. *See* ARK. CODE ANN. § 9-12-312 (2019); COLO. REV. STAT. § 14-10-114 (2019); CONN. GEN. STAT. § 46B-82(a) (2019) (does not specifically mention misconduct); D.C. CODE § 16-913 (2019); FLA. STAT. § 61.08 (2019) (mentions only adultery specifically but no other misconduct; other factors necessary to ensure justice and fairness); GA. CODE ANN. §§ 19-6-1, 19-6-5 (2019) (specifically lists adultery and desertion); HAW. REV. STAT. § 580-47 (2019); IND. CODE § 31-15-7-2 (2019); IOWA CODE § 598.21A (2019); KAN. STAT. ANN. § 23-2902 (2019); KY. REV. STAT. ANN. § 403.200 (West 2019); ME. STAT. tit. 19-A § 951-A (2019); MD. CODE ANN. FAM. LAW § 11-106 (2019); MICH. COMP. LAWS § 552.23 (2018); MINN. STAT. § 518.552 (2019); MISS. CODE ANN. § 93-5-23 (2019); NEB. REV. STAT. § 42-365 (2019); NEV. REV. STAT. § 125.150 (2019); N.H. REV. STAT. ANN. § 458:19 (2019); N.J. STAT. ANN. § 2A:34-23 (West 2019); N.M. STAT. ANN. § 40-4-7 (2019); N.Y. DOM. REL. LAW § 236(A)(1) (McKinney 2019); N.C. GEN. STAT. § 50-16.3A (2018); N.D. CENT. CODE § 14-05-24.1 (2019); OHIO REV. CODE ANN. § 3105.18 (West 2019); OKLA. STAT. tit. 43 § 121 (2019); OR. REV. STAT. § 107.105 (2018); 15 R.I. GEN. LAWS § 15-5-16 (2019) (allows for domestic violence to be considered in child support but not alimony); TENN. CODE ANN. § 36-5-121 (2019); VT. STAT. ANN. tit. 15 § 752 (2019); WASH. REV. CODE § 26.09.090 (2019); W. VA. CODE § 48-6-301 (2019); WIS. STAT. § 767.56 (2019); WYO. STAT. ANN. § 20-2-114 (2019).

169. *See, e.g.*, Huggins v. Huggins, 331 So. 2d 704, 707 (Ala. Civ. App. 1976) (holding evidence of fault is not permitted in making alimony determinations); Kretzschmar v. Kretzschmar, 210 N.W.2d 352, 356–67 (Mich. Ct. App. 1973) (allowing husband's abuse to be considered in determining alimony award); Carter v. Carter, 413 A.2d 55, 56 (R.I. 1980) (ruling wife's cruelty and substance use issues were relevant factors in terminating alimony payments from her ex-husband); *see also In re* Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972) (declining to allow fault considerations for alimony); Boyd v. Boyd, 421 A.2d 1356, 1357–58 (Me. 1980) (holding marital misconduct was not to be discussed in alimony considerations).

170. CAL. FAM. CODE § 4325 (West 2019); Sarah Burkett, *Finding Fault and Making Reparations: Domestic Violence Conviction as a Limitation on Spousal Support Award*, 22 J. CONTEMP. LEGAL ISSUES 492, 493 (2015) ("Section 4325 . . . creates a presumptive bar to alimony for spouses convicted of domestic violence, and supports other recently

section 4325 in 2002 after years of courts considering domestic violence to be largely irrelevant in no-fault divorce proceedings.[171] California legislators, upset by the common occurrence of domestic violence survivors being forced to pay alimony to their abusers, emphasized the unconscionability of the situation when passing the bill.[172] In 2013, the California legislature made amendments to other sections of its alimony laws, including barring alimony payments from a victim to an abuser convicted of a violent sexual felony.[173]

Section 4325 has received considerable attention from California courts.[174] Courts interpret section 4325 narrowly, invalidating payments only in cases where there was either a felony or misdemeanor conviction for domestic violence.[175] Furthermore, it seems no case exists where the abuser was able to overcome the presumption and be granted alimony.[176] As previously discussed, others have argued for similar legislation in their respective states, but these efforts have not yet been successful.[177]

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added provisions in the alimony statutes that respond to domestic violence in the context of divorce.").

171. Stasia Rudiman, *Domestic Violence as an Alimony Contingency: Recent Developments in California Law*, 22 J. CONTEMP. LEGAL ISSUES 498, 499–502 (2015) (explaining efforts in California to include domestic violence as a consideration in alimony awards, beginning with a 1995 amendment that disqualified one spouse who had attempted to kill the other from receiving payments).

172. Burkett, *supra* note 170, at 493.

173. CAL. FAM. CODE § 4324.5 (2019).

174. *See* Rudiman, *supra* note 171, at 504.

175. *In re* Marriage of Kelkar, 176 Cal. Rptr. 3d 905, 907–08 (2014) (terminating abuser's alimony award upon evidence of a nolo contendere plea for misdemeanor battery); *In re* Marriage of Freitas, 147 Cal. Rptr. 3d 453, 459–60 (2012) (terminating abuser's alimony award upon evidence of a nolo contendere plea for felony domestic violence charges); *In re* Marriage of Cauley, 41 Cal. Rptr. 3d 902, 906 (2006) (holding a spousal support agreement unenforceable so that respondent would not "finance his own abuse by appellant").

176. *See* Burkett, *supra* note 170, at 496.

177. *See supra* note 7 and accompanying text. The relevant Louisiana and Pennsylvania statutes specifically mention considering instances of domestic violence, but do not make a conviction disqualifying. *Cf.* LA. CIV. CODE ANN. art. 112 (2018) (requiring the court to consider instances of domestic abuse but permitting the abuser to still receive money); 23 PA. CONS. STAT. ANN. § 3701 (2019) (stating that marital misconduct is not relevant, except in cases of abuse). *See generally* Deborah J. Morris, Note, *"Breaking Up Is Hard to Do": Proposing Legislative Action in Order to Address the Problems Surrounding Alimony and Related Divorce Matters in South Dakota*, 61 S.D. L. REV. 81 (2016) (arguing that South Dakota should codify factors that judges must consider when determining alimony to protect against unfair, discretionary decisions).

F. The Psychological Impact of Domestic Violence

Domestic violence creates power dynamics in a relationship that carry over to alimony negotiations. Understanding the trauma domestic violence victims experience explains their state of mind in these negotiations. Unsurprisingly, domestic violence has a lasting impact on survivors' mental, emotional, and physical health.[178] Studies have found that women who have endured intimate partner violence are statistically more likely to develop illnesses such as post-traumatic stress disorder (PTSD) and depression in addition to a range of other chronic, life-threatening health conditions.[179] Naturally, psychiatric conditions such as PTSD change the way the brain and body react and process events or feelings.[180] Individuals diagnosed with PTSD can have a range of symptoms including "involuntary reexperiencing of the trauma (e.g., nightmares, intrusive thoughts), avoidance of reminders and numbing of responsivity (e.g., not being able to have loving feelings), and increased arousal (e.g., difficulty sleeping or concentrating, hypervigilance, exaggerated startle response)."[181]

Typically, these PTSD symptoms are brought on by "triggers," which can be sights, sounds, smells, people, or places that conjure up memories of past trauma.[182] The part of the brain that regulates the human response to stimuli, the amygdala, remembers that the particular trigger was involved in a previous negative experience and

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178. Agnes Tiwari, *Domestic Violence from a Health Perspective: Impact and Intervention*, *in* PREVENTING FAMILY VIOLENCE: A MULTIDISCIPLINARY APPROACH 221, 221–25 (Ko-Ling Chan ed., 2012).

179. *See id.* at 224 ("In the same meta-analysis, the weighted mean prevalence of post-traumatic stress disorder (PTSD) was 63.8%, which is also higher than the lifetime rates of between 1.3% and 12.3% in general populations of women."). While domestic violence affects all people regardless of gender, race, or sexual orientation, this Article refers to women because they experience domestic abuse at statistically higher levels. *See Domestic Violence Facts*, FEMINIST MAJORITY FOUND., https://www.feminist.org/other/dv/dvfact.html#notes [https://perma.cc/362S-4UAY].

180. BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 62–63 (2014) (explaining how trauma upsets the balance between the amygdala and medial prefrontal cortex, making it harder for individuals with PTSD to control their emotions and impulses).

181. Emily J. Ozer & Daniel S. Weiss, *Who Develops Posttraumatic Stress Disorder?*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 169, 169 (2004); *see also* Tiwari, *supra* note 178, at 224 (documenting the prevalence of PTSD).

182. LINDA SCHUPP, ASSESSING AND TREATING TRAUMA AND PTSD 18 (2d ed. 2015); *see also* VAN DER KOLK, *supra* note 180, at 67 (explaining how these reactions to triggers are largely outside of a person's control and can manifest in different ways as a result of different types of trauma).

tells the hypothalamus to react accordingly.[183] This reaction is known as the Flight, Fight, Freeze (FFF) response.[184] Once the FFF response is activated in people with PTSD, they may panic and flee from the situation or they may dissociate and lose all ability to think, speak, or feel because the trigger has forced them to relive their prior traumatic experiences.[185]

Reliving a traumatic event can take a toll on an individual's brain and body. According to psychiatrists, reliving a traumatic event can be worse than the event itself.[186] The adversarial divorce process will trigger memories of physical or emotional abuse for a victim, forcing them to relive traumatic events. This cycle of emotional turmoil severely impairs an individual's ability to advocate for themselves.

II. DIVORCE SETTLEMENTS THAT CONTAIN ALIMONY PAYMENTS FROM THE INJURED SPOUSE TO THE ABUSER ARE UNCONSCIONABLE UNDER THE CIRCUMSTANCES.

Family court judges should more frequently utilize the doctrine of unconscionability because it fairly and justly resolves disputes, goals that are shared with the family court system.[187] As discussed above, unconscionability began as an equitable doctrine as a way to protect "the widowed or weak-minded" and those who needed extrajudicial

183. SCHUPP, *supra* note 182, at 18, 20, 21; VAN DER KOLK, *supra* note 180, at 66.

184. Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLIN. L. REV. 359, 366 (2016) (explaining how the FFF response relates to trauma, which can in turn affect how clients relate to their attorneys and the court system); Braive, *The Fight Flight Freeze Response*, YOUTUBE (Mar. 31, 2016), https://www.youtube.com/watch?v=jEHwB1PG_-Q (detailing the body's biological FFF response); *see also* VAN DER KOLK, *supra* note 180, at 72 (discussing how reliving an event can cause several reactions including depersonalization which means the individual has shut down to preserve and protect herself).

185. *See* VAN DER KOLK, *supra* note 180, at 67 (providing several examples of how individuals may experience an traumatic flashback); SCHUPP, *supra* note 182, at 20 (describing the body's panic response during a traumatic experience).

186. *See* VAN DER KOLK, *supra* note 180, at 66–67.

187. *See* Bryan, *supra* note 110, at 1238–40 (explaining how judges are required to review divorce settlements before approving them but rarely do a close reading and simply serve as a rubber stamp); *see also* Jane M. Spinak, *Reforming Family Court: Getting It Right between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 13 (2009) (explaining the founders of family courts envisioned a system that sought to effectively assist, support, and protect children and families). If the goal of family courts is to support and assist families, judges should take a more active role in achieving that by using the authority they are given to stop unfair agreements before these agreements are approved.

protection.[188] Unsurprisingly, both alimony and family law further similar objectives.[189] Given that family courts are equitable in nature, and courts consider alimony to be an equitable remedy upon divorce, applying the doctrine of unconscionability to alimony provisions in divorce settlements is not only appropriate but also fair.[190] Regardless of the type of divorce, courts should prohibit abusers from receiving alimony payments from their former partners when the former partner has a domestic violence conviction. These alimony provisions are unconscionable given the extraordinary imbalance in bargaining power; physical, mental, or emotional imbalance between the parties; absence of meaningful choice on the part of the victim; and presence of contract terms that are unreasonably favorable to the abuser.

A. Survivors Lack Meaningful Choice When Entering into Settlements that Require Them to Pay Alimony to Their Abusers

The first element of an unconscionability defense is lack of meaningful choice. The unconscionability defense frequently arises in cases where consumers have entered into adhesion contracts, or contracts that are uniform across an industry, leaving the consumers no option but to take the unfavorable terms.[191] Adhesion contracts are unfavorable because they give the drafting party unbridled power and prevent the signing party from modifying or negotiating the terms.[192] In both *Carlson* and *Henningsen*, the courts looked at the standard practice of utilizing adhesion contracts across the car industry and found that this "take it or leave it" system greatly disadvantaged consumers.[193] Allowing corporations to have a monopoly over the industry with little recourse for injured patrons

188. Quraishi, *supra* note 33, at 192; *see supra* notes 33–35 and accompanying text.

189. *See supra* note 136 and accompanying text; *see also* Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 32, 42 (2006) ("Some of the legal rules affecting marriage and divorce reflect the concept of contract, and many of the developments in these family law rules aim to further equality and individual self-determination.").

190. *See* Hamilton, *supra* note 189, at 65 ("[Couples] have more freedom . . . to alter by contract the financial consequences attendant to the dissolution of their marriage. Even these contracts, however, often are scrutinized by courts to ensure that their enforcement would not offend public policy.").

191. *See supra* notes 76–88 and accompanying text.

192. Allison E. McClure, Comment, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1499–1500 (2006).

193. Carlson v. Gen. Motors Corp., 883 F.2d 287, 295–96 (4th Cir. 1989); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 89 (N.J. 1960).

troubled both courts for good reason. While these cases did not involve interpersonal relationships or divorce settlements, courts have identified problems with adhesion contracts in employment contracts, among other situations.[194]

As discussed above, the court in *Williams* held aggrieved parties had a meaningful choice if, in light of all the circumstances, they had the opportunity to decide whether and how to enter into the contract.[195] The court stated that if the parties, given their obvious education or lack thereof, had a reasonable opportunity to understand the terms of the contract then, absent any presence of deceptive sales practices or hidden terms, the parties meaningfully chose to enter into the deal.[196]

Applying this test to alimony provisions in divorce settlements, abused spouses clearly lack meaningful choice. Domestic violence has a significant impact on victims' abilities to participate in settlement negotiations.[197] Abused spouses may feel as if they do not have the ability to advocate for their own self-interest or may not be comfortable expressing their needs.[198] If this is the case, abused spouses may be unable to decide whether and how they want to resolve the alimony dilemma. On top of that, continued exposure to the perpetrators coupled with frequent discussion of the trauma poses a mental and emotional safety threat to abused spouses, thereby further weakening their ability to participate fully in the process and comprehend the severity of what they agreed to.[199] In addition, a triggering event could further disadvantage abused spouses. Abused spouses may be triggered by something as innocuous as a ceiling fan, the clicking of a pen, or someone's cologne. If during

194. *See* McClure, *supra* note 192, at 1506–07.

195. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); *see* McClure, *supra* note 192, at 1502–03 (analyzing the *Williams* decision).

196. 350 F.2d at 449.

197. *See* Linda Neilson, *At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases*, 52 FAM. CT. REV. 529, 537 (2014) ("In addition is the concern that exposure to domestic violence has created a heightened susceptibility to settlement suggestion that could negatively affect the settlement process."); Bryan, *supra* note 110, at 1219–21 (stating that in the instance of an abusive spouse, the control exercised by the abusive spouse can make it difficult for the abused spouse to meaningfully contribute to divorce negotiations).

198. *See* Neilson, *supra* note 197, at 534 ("Mental health experts tell us that harm from domestic violence can create a psychological inability, particularly in stressful surroundings, to recall, much less disclose, harmful, traumatic events.").

199. *Id.* at 540 (discussing how evaluating abused spouses is imperative in making a determination on whether they can participate fully and equitably in negotiations); Bryan, *supra* note 110, at 1219–22.

settlement discussions a trigger appears, their ability to negotiate, let alone be mentally present, vanishes.[200]

The time after leaving an abusive situation is the most dangerous.[201] Given what is known about the FFF response and a trauma survivor's heightened sense of self-preservation,[202] abused spouses may be willing to agree to anything to escape their abusers and protect themselves as quickly as possible.[203] Victims do not fully understand or recognize the gravity of a situation when they may be looking for the quickest way out. The *Williams* court designed their test to prevent this exact situation.[204]

Furthermore, alimony is largely unpredictable, unreliable, and discretionary.[205] Survivors have no choice but to acquiesce, as not paying would hold them in contempt of a court order, leading to future legal proceedings.[206] This internal psychological battle is analogous to a consumer purchasing a car and adhering to unfavorable terms because the consumer lacks the ability to procure a better deal elsewhere. Much like in *Carlson* and *Henningsen* where the purchasers had to accept limitations on liability as that was standard industry practice, survivors have no other meaningful choice but to pay their abusers, especially in states that refuse to consider

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200. *See supra* Section I.F; *see also* Bryan, *supra* note 110, at 1231 (describing how PTSD can make battered women seem unreliable to courts).

201. *Why Do Victims Stay?*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay [https://perma.cc/9S8P-EDLY] (explaining the risks associated with leaving an abusive relationship because of the abuser's continued desire to control the victim). Furthermore, studies have also shown that an abuser's access to a firearm significantly contributes to a victim's lack of safety. *See* Jessie Van Amburg, *This Is How Many Women and Families are Affected by Domestic Violence*, TIME (June 2, 2016), http://time.com/4354035/domestic-violence-statistics [https://perma.cc/RDB7-YQ55] ("If there is a gun in a household where there is a domestic violence situation, the risk of homicide jumps by 500%."). *See generally* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, FACT SHEET: GUNS AND DOMESTIC VIOLENCE, https://www.speakcdn.com/assets/2497/guns_and_dv0.pdf [https://perma.cc/DFC8-2TDH] (describing how firearms can be used to control survivors of domestic violence).

202. *See supra* notes 182–83 and accompanying text; Bryan, *supra* note 110, at 1231–32.

203. Neilson, *supra* note 197, at 541.

204. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965) (holding that a contract should be considered "in light of the circumstances existing when the contract was made," including whether a contracting party had a meaningful choice in the transaction).

205. *See* McMullen, *supra* note 136, at 49–51 (stating that alimony does not have clear principles in the ways other aspects of divorce do and that results vary in each case).

206. *See supra* notes 147–48 and accompanying text.

marital abuse in alimony determinations.[207] More troubling is that in states where judges may consider any additional factors but decide that domestic abuse is not relevant, victims are again faced with the difficult situation of following a court order to their detriment.[208] Even if victims move to set aside the settlement, courts may not reconsider, thus leaving the victims stuck with what they had signed.[209] Consequently, in most jurisdictions, victims face an outcome where they must pay alimony to their abusers.[210] This lack of ability to find a more favorable alternative was central to the court's holding in *Henningsen*.[211] As such, this is a "take it or leave it" system because survivors are legally bound to cooperate, satisfying the first element of unconscionability.

However, courts are particularly wary of finding a lack of meaningful choice given their preference for freedom of contract.[212] If judges determine abused spouses did meaningfully agree to the unfavorable settlement agreement, the abused spouses can still overcome the decision upon a showing of unequal bargaining power.[213] The next section provides arguments proving unequal bargaining power is prevalent in alimony negotiations between abusers and victims.

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207. Carlson v. Gen. Motors Corp., 883 F.2d 287, 295–96 (4th Cir. 1989); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 89 (N.J. 1960); *see supra* note 165 and accompanying text.

208. *See In re* Williams Marriage, 199 N.W.2d 339, 345 (Iowa 1972) (declining to allow fault considerations for alimony); Boyd v. Boyd, 421 A.2d 1356, 1358 (Me. 1980) (holding marital abuse was not to be discussed in alimony considerations); Wheeler v. Upton-Wheeler, 946 P.2d 200, 203 (Nev. 1997) (finding that marital abuse may only be considered to the extent it caused economic harm to one spouse).

209. *See* Bryan, *supra* note 110, at 1239–40 (noting how women are unlikely to win on motions to set aside or vacate a divorce settlement).

210. CAL. FAM. CODE § 4325 (2019).

211. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 89 (N.J. 1960).

212. *See, e.g.*, Baltimore & Ohio Sw. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900) (explaining courts should maintain and enforce contracts).

213. McClure, *supra* note 192, at 1502.

B. Gross Inequity in Bargaining Power Between Survivor and Abuser Leaves the Survivor Unable to Properly Negotiate a Settlement

Typically, in cases involving unconscionability, the relationship is between either a corporation and an average citizen[214] or a corporation and a party with less resources or education.[215] However, courts have also recognized unequal bargaining power in interpersonal relationships.[216] In such cases, taking into account the parties' education, relationship, and resources is relevant in an inquiry about the power dynamics. For example, in *Wollums*, the court paid special attention to the fact that the plaintiff who sold his house at an unfair price was elderly, disabled, uneducated, and relatively poor compared to the business-savvy, wealthy buyer.[217] The *Williams* and *Waters* courts focused on similar facts. In *Williams,* the plaintiff was an uneducated, single mother of seven children on public assistance.[218] In *Waters*, the plaintiff was mentally unwell and was suffering from a substance abuse disorder, which her boyfriend encouraged.[219] In each of these cases, the courts found that the disadvantaged parties did not stand a chance in advocating for themselves against their more powerful counterparts, whether it was a corporation,[220] a businessman,[221] or a manipulative ex-boyfriend.[222]

Some will argue the above alimony cases were not examples of unequal bargaining power because the victims were both the higher-earning spouse and were likely supported by counsel. While women are statistically more likely to be victims of abuse[223] and are also more

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214. *See* Carlson v. Gen. Motors Corp., 883 F.2d 287, 295–96 (4th Cir. 1989); *Henningsen*, 161 A.2d at 86.

215. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

216. *See* Waters v. Min Ltd., 587 N.E.2d 231, 234 (Mass. 1992); *see also* Wollums v. Horsley, 20 S.W. 781, 781–82 (Ky. 1892) (holding buyer, an experienced businessman, took advantage of seller, an older gentleman with little education, during private contract for seller's home).

217. 20 S.W. at 781.

218. 350 F.2d at 448.

219. 587 N.E.2d at 232.

220. Carlson v. Gen. Motors Corp., 883 F.2d 287, 295–96 (4th Cir. 1989); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960).

221. 20 S.W. at 781.

222. 587 N.E.2d at 232.

223. COLO. COALITION AGAINST DOMESTIC VIOLENCE, FALSE ALLEGATIONS OF ABUSE—OR NOT?; UNDERSTANDING THE REALITY OF DOMESTIC VIOLENCE & SEXUAL ASSAULT, https://www.violencefreecolorado.org/wp-content/uploads/2013/11/ CCADV-CCASA-Fact-Sheet-on-Myth-of-False-Allegations_updated-2.21.14.pdf

likely to be awarded alimony than to pay it,[224] the rise of female employment and educational attainment increases the likelihood that courts will order female victims of domestic abuse to pay alimony.[225] Furthermore, as *Wollums* and *Waters* demonstrate, the victim is the one with an advantage given the victim's financial stability. Of course, this poses the question: if all of these facts exist, can the higher-earning spouse with arguably more resources really be the party with less power? The answer to that question is yes, especially in cases of domestic violence.[226]

Domestic violence is analogous to the power imbalance in all of the unconscionability cases because the very nature of abusive relationships puts survivors on unequal footing.[227] Abusive relationships are all about power and control; abusers exert control over victims through physical, sexual, or psychological abuse, commanding every facet of victims' lives.[228] Unsurprisingly, victims stay in abusive relationships because they fear leaving, have no access to their

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[https://perma.cc/P6GK-JUPH]; Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence*, 17 FAM. ADVOC. 14, 14 (1995).

224. *See* McMullen, *supra* note 136, at 58.

225. *Id.* at 54 (highlighting that between 1970 and 2007 the percentage of husbands who had wives with a higher income rose from 4 percent to 22 percent). While this Comment does not focus on either heterosexual or same-sex marriages, the probability of a woman paying alimony may be especially likely in same-sex marriages. Same-sex couples experience domestic violence at nearly the same rates as, or potentially more than, those in heterosexual relationships. *See* CTR. AM. PROGRESS, LGBT DOMESTIC VIOLENCE FACT SHEET 1 (2011), https://cdn.americanprogress.org/wp-content/uploads/2012/12/domestic_violence.pdf [https://perma.cc/D23L-5TCJ]. Female same-sex couples are also more likely to have one partner earn significantly more than the other, given the comparatively high incomes of lesbian women. *See* Danielle Paquette, *The Surprising Reason Why Lesbians Get Paid More Than Straight Women*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/25/the-surprising-reason-why-lesbians-get-paid-more-than-straight-women. While few studies focus on same-sex intimate partner violence, it is reasonable to believe that a victim may have to pay alimony to an abuser.

226. *See infra* notes 236–44 and accompanying text; *see also* Brinig, *supra* note 118, at 549–50 (explaining that, in a family law context, fault-based circumstances were more material in the outcome of settlements than typical factors such as income or wealth).

227. *See* Steve Mulligan, *Redefining Domestic Violence: Using the Power and Control Paradigm for Domestic Violence Legislation*, 29 CHILD. LEGAL RTS. J. 33, 35 (2009) (explaining the power and control model where abusers employ a range of techniques to assert total dominance over a victim).

228. *Types of Abuse*, WOMEN AGAINST ABUSE, http://www.womenagainstabuse.org/education-resources/learn-about-abuse/types-of-domestic-violence [https://perma.cc/R5D5-5WJ8].

bank accounts, or lack support from friends or public resources.[229] Domestic violence is characterized by a pattern of coercive behaviors utilized to isolate and dominate a victim.[230] Abusers employ these isolation techniques as a means of annihilating a victim's autonomy and self-worth.[231] The result is a person who has lived for years in an alternate reality created and controlled by their perpetrator.[232]

Clearly, people who have endured years of "or else" threats and coercive control will be conditioned to agree to their abusers' demands because resistance or disagreement has never been a viable option. With such profound and lasting effects on self-esteem and agency present, the benefits of settling and negotiating alimony are virtually non-existent.[233] When individuals have lived through an abusive relationship that has eroded their ability to stand up for themselves, they are, by default, at a disadvantage from the moment they approach the bargaining table.[234] Even if victims are supported by counsel, they are unlikely to be able to advocate for their own interests because of the toll the abuse has taken on their ability to make choices or communicate their needs.[235]

Financial abuse can further weaken a victim's bargaining power. In cases where the battered spouse is the breadwinner, it is not necessarily true that she has an advantage over the abuser. More plausibly, the victim did not have access to her finances or have control over monetary decisions for the duration of the relationship.[236] Financial control is a common form of psychological abuse and can have detrimental effects on the victim.[237] Examples of

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229. MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 47 fig.4.3 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/G8UF-99Z9] (41% of female victims reported having an intimate partner control their ability to make decisions and 22% of female victims reported having an intimate partner control their income).

230. Kristy Candela, Note, *Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes*, 54 FAM. CT. REV. 112, 115 (2016).

231. *See* Mulligan, *supra* note 227, at 36.

232. *See* Candela, *supra* note 230, at 115.

233. *See* Bryan, *supra* note 110, at 1223.

234. *Id.* (suggesting that despite mediators' claims to balance power, balancing power in an abusive relationship can be impossible).

235. Bryan, *supra* note 110, at 1180–83.

236. *See* Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. PA. L. REV. 363, 374 (2013).

237. *Id.*; *see also Some Abusers Are Getting Awarded Alimony: How an Archaic Alimony Law Further Victimizes Survivors*, DOMESTIC SHELTERS (Nov. 22, 2017),

financial control include "preventing the victim's access to joint bank accounts; forcing the victim to deposit income into accounts controlled solely by the abuser; putting the victim on an allowance; and preventing the victim from accessing financial information—both about her household's finances and about personal finances generally."[238] Victims may also be in extreme debt without knowing.[239] If the abuser has used one or more of these tactics, the victim has been relying on him for money despite her higher income. If this is the victim's reality, she may be unable to afford an attorney, and even if she can, she may run out of money if the abuser uses these tactics to unnecessarily exhaust any legal funds she has access to.[240] Predictably, feelings of hopelessness and helplessness are quite common among victims given the diminished control they have over their lives.[241] Earning more money is useless if victims are unable to access it and use it to their advantage. The situation is futile for victims, leaving them worse off in a fight against formidable opponents.

The *Waters* case most clearly demonstrates this point. In *Waters*, the plaintiff's boyfriend used his control over the plaintiff to convince her to sell a large portion of her assets.[242] Despite the fact that the plaintiff was more financially stable than her boyfriend and could arguably afford a decent attorney, the court still found the deal unconscionable because of the boyfriend's coercive tactics.[243] Furthermore, the court paid special attention to the plaintiff's mental state, noting that her boyfriend had forced her to use drugs and financially abused her by maxing out her credit cards, putting her into debt.[244] When she contracted to sell her assets, she was "represented" by her boyfriend, meaning he controlled the negotiations, and she had no choice but to agree to his terms.[245] The parties clearly did not have equal bargaining power. Applying this case to alimony settlements demonstrates sufficient evidence supports a finding that victims

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https://www.domesticshelters.org/articles/in-the-news/some-abusers-are-getting-awarded-alimony [https://perma.cc/R4PD-G93M] (discussing how an abuser's control of family finances and resources can isolate the abused spouse).

238. Littwin, *supra* note 236, at 374.

239. *See* Littwin, *supra* note 236, at 365 (introducing the idea of "coerced debt," described as when an abuser uses the victim's credit "via fraud or duress").

240. *See* Bryan, *supra* note 110, at 1175–76.

241. *See* Dutton & Waltz, *supra* note 223, at 17–18.

242. Waters v. Min, Ltd., 587 N.E.2d 231, 232 (Mass. 1992).

243. *Id.* at 234.

244. *Id.*

245. *Id.*

approach settlement negotiations at an inherent disadvantage, satisfying the second element of unconscionability and disproving arguments to the contrary.

An abuser's ability to manipulate a survivor's weakened mental an emotional state to procure a better deal contributes to unequal bargaining power between the parties. Courts will usually find unconscionability when one party takes advantage of the other's relatively weakened position or mental state to procure a better deal.[246] In *Odorizzi*, the court rescinded the plaintiff's resignation because the school administrators used the plaintiff's diminished mental state, lack of sleep, and personal anxiety to force his resignation.[247] The administrators preyed upon the fact that the plaintiff was unable to think clearly or make rational decisions to get the outcome most favorable for them.[248] Similarly, in *Waters*, the plaintiff was highly susceptible to influence given her injuries from a car accident at a young age and her impaired judgment from persistent drug use that was encouraged by her boyfriend.[249] Her boyfriend convinced her to sign onto an unfair deal knowing he could use her debilitated state to get his friends and himself a bargain.[250]

Abusive relationships are analogous to cases where one party is susceptible to undue influence, mostly because abusers will play on victims' fear and shame to keep victims quiet or procure a more favorable deal.[251] Much like substance use disorders or other mental illnesses, domestic violence and traumatic experiences bear significantly on victims' mental and emotional state.[252] Because victims will likely be triggered by speaking to or about their abuser, they will likely dissociate or relive their trauma during alimony negotiations.[253] When in that state of mind, the rational part of the brain shuts down completely and the amygdala and hypothalamus, often referred to as the animal parts of the brain, take over.[254] In such a situation, victims would be rendered unable to ask questions, think,

246. Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 543 (Dist. Ct. App. 1966).
247. *Id.*
248. *Id.*
249. 587 N.E.2d at 232.
250. *Id.*
251. *See* Bryan, *supra* note 110, at 1220–21; Neilson, *supra* note 197, at 537.
252. *See supra* Section I.F.
253. *See supra* note 184 and accompanying text.
254. *See supra* notes 182–83 and accompanying text.

or present facts without severe mental distress.[255] Many abusers would likely take advantage of that reaction because it gives them continued power and control over the victim.[256] Most jurisdictions bar couples with a history of domestic violence from participating in mediation or dispute resolution for these exact reasons.[257] Because of the nature of trauma, survivors cannot possibly approach negotiations on a level playing field.

C. Divorce Settlements that Require Alimony Payments Are Unreasonably One-Sided

Courts determine the final element of an unconscionability defense, an unreasonably one-sided bargain, by looking at the totality of the circumstances, particularly in terms of the agreement itself. In both *Campbell Soup Co.* and *Miller*, the courts were concerned by clauses in the contract that had clearly been drawn by the more sophisticated party and were so unfair that no reasonable person would have agreed to such terms.[258] Even in the other cases previously discussed, the courts seemed to focus on how the contracts were so lopsided in one party's favor that the other party had not likely consented to or actually understood the severity of the deal.[259] Particularly, *Williams* clearly defined a standard for unreasonably one-sided contracts, stating terms that are "so extreme as to appear unconscionable according to the mores and business practices of the time

255. *See* Neilson, *supra* note 197, at 537 ("Domestic violence can cause long-term heightened apprehension, lingering fear, as well as [sic] host of psychological harms resulting in reduced self-esteem, reduced ability to respond assertively and to withstand settlement pressure, as well as a number of psychological conditions that can only be diagnosed by a mental health professional.").

256. *See* Burkett, *supra* note 170, at 497.

257. *See* Bryan, *supra* note 110, at 1223 ("If the battered wife and her abusing husband settle their divorce dispute through mediation, the likelihood of an unfair custody and/or financial agreement increases."); Neilson, *supra* note 197, at 532 (noting the "the potential for psychological harm from renewed contact with an abuser, expanded opportunities for violators to maintain contact, to intimidate and to control or to delay final decisions; and the potential for suppression of concerns about domestic violence and safety" as reasons for not using mediation for couples with a history of abuse).

258. Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948); Miller v. Coffeen, 280 S.W.2d 100, 105–06 (Mo. 1955) (en banc).

259. *See* Waters v. Min, Ltd., 587 N.E.2d 231, 234 (Mass. 1992) (finding the boyfriend's representation of the plaintiff in the agreement was used to manipulate her into signing a contract that benefitted the boyfriend at plaintiff's detriment).

and place" are unenforceable.[260] Contracts, as noted earlier, require a bargain.[261] In these cases, a bargain is non-existent because one party has all the benefit while the other gets nearly nothing in return.

Applying the standard from *Williams*, requiring domestic violence survivors to pay alimony to their abusers goes against the mores and business practices of today's society. Domestic violence has been an issue of grave concern in this country for decades.[262] The most notable legislation on the topic is the Violence Against Women Act (VAWA),[263] which was passed by Congress based on social science research and public outcry over the harmful effects of gender-based violence.[264] Reform efforts geared toward helping victims of domestic violence also garnered support at the state and local level, in part because of increased attention to the prevalence of abuse and trauma.[265] These reforms have continued well into the twenty-first century, most recently leading to the #MeToo movement, which has worked on changing the power dynamics in many industries and sparked reform in various areas of law.[266] In particular, several different business sectors have taken reform initiatives towards reducing workplace sexual harassment and assault.[267] Given this

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260. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) (quoting 1 CORBIN, CONTRACTS § 128 (1963)).

261. RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981).

262. Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 354–56 (2008) (discussing the history of domestic violence abuse recognition in the United States).

263. 34 U.S.C. §§ 12291–512 (2012).

264. H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.) *as reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (describing the effects intimate partner violence has on women and children); S. REP. NO. 101-545, at 28 (1990) ("The purpose of the Violence Against Women Act of 1990 is to provide the kind of comprehensive response to violent crime that American women need today.").

265. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993) ("Largely in response to the women's movement in the late 60's and the 70's, significant legal reform efforts in the past twenty years have been directed at ending domestic violence and creating a broad array of legal remedies for battered women.").

266. North, *supra* note 2.

267. *See* Jordain Carney, *Senate Approves Bill Reforming Congress's Sexual Harassment Policy*, THE HILL (Dec. 13, 2018, 11:01 AM), https://thehill.com/homenews/senate/421207-senate-approves-bill-reforming-congresss-sexual-harassment-policy [https://perma.cc/NG2U-6Q8Q]; Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW CHARITABLE TR. (July 31, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/ metoo-has-changed-our-culture-now-its-changing-our-laws [https://perma.cc/WB37-G2MY].

extensive outpouring of support for improved domestic violence and sexual harassment policies and the clear statement from businesses that gender-based violence and harassment will no longer be tolerated, judges could readily find that alimony payments from victims to abusers go against the standards of today's society.

Additionally, much like the lopsided bargains in *Campbell Soup Co.* and *Miller*,[268] alimony payments from abused spouses to abusers are unreasonably hard on victims. These agreements give a clear benefit to abusers, as they not only continue wielding power and control over the victims but also get to do so while getting paid.[269] Victims do not see a single benefit from such an agreement. Victims will be forced to relive their experiences; they will be retraumatized by simply knowing that they are still beholden to the person they physically escaped from, and they will be faced with legal consequences if they do not perform accordingly. As above, a multitude of factors forced the victim into such a situation; however, there remains a general consensus that the reasonable person would never agree to such a provision.[270] Enforcement of these payments, as the court found in *Miller*, goes against notions of justice and fairness, rendering them unconscionable and accordingly, unenforceable, satisfying the final element.[271]

D. Forcing Survivors to Pay Alimony to Their Abusers Contradicts Public Policy

States that adopt a system disqualifying alimony payments from survivors to abusers have several public policy incentives to do so. Adopting legislation like California's sets a clear standard that the state has a zero-tolerance domestic violence policy and removes the unpredictability of judicial discretion while also providing clear guidelines for when alimony should be disqualified.[272] Allowing mere "consideration" of domestic

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268. Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948); Miller v. Coffeen, 280 S.W.2d 100, 105–06 (Mo. 1955) (en banc).

269. *See* Burkett, *supra* note 170, at 497.

270. *See* Neilson, *supra* note 197, at 546 ("Survivors of domestic violence report acceptance of agreements that they do not believe sufficiently protect themselves or their children, not so much as a consequence of direct threats . . . as much as from lack of self-esteem, fear, manipulation, harm from domestic violence and the psychological need to escape from these relationships as quickly as possible.").

271. *See Miller*, 280 S.W.2d at 105–06 (finding that when there is "shockingly inadequate consideration" for a contract, the terms of the contract are unenforceable).

272. *See* Burkett, *supra* note 170, at 497; *see also supra* note 175 and accompanying text.

violence as a factor does not guarantee survivors will be victorious and still presents issues of unconscionability and undue influence.[273]

However, given the conviction limitation, adopting a regime of this nature has some fundamental issues. Domestic violence is greatly underreported.[274] Moreover, while some jurisdictions utilize mandatory prosecution practices, many do not.[275] In the latter situation, cases set for trial are later often dropped because the victim refuses to approach the stand, likely for valid health and safety concerns.[276] In those cases, evidence likely favors conviction, but prosecutors lose the opportunity to obtain one.[277] Consequently, despite an overwhelming amount of evidence of abuse, victims would still have to pay alimony because their former spouses are never formally convicted.

This legislation may encourage reporting by victims, addressing some of those valid concerns. Under a prohibition on alimony payments, victims may be more likely to seek convictions as doing so will ensure they do not have to pay money to their abusers.[278] Furthermore, this policy may encourage individuals who were afraid to divorce their

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273. *See supra* note 166 and accompanying text (listing state statutes that allow consideration of domestic violence as a factor judges may consider).

274. *See* Neilson, *supra* note 197, at 538 ("[F]ew domestic violence incidents are reported to police. Thus, the absence of a police record is not a reliable indicator that serious coercive domestic violence has not occurred."); *see also* S N, *Domestic Violence Statistics: 70% of Cases Go Unreported*, MIC (July 12, 2012), https://www.mic.com/articles/10919/domestic-violence-statistics-70-of-cases-go-unreported [https://perma.cc/DXW9-QPMP] (demonstrating the low rate of reporting in abuse and sexual violence cases).

275. *See* Sarah Lorraine Solon ed., *Domestic Violence*, 10 GEO. J. GENDER & L. 369, 405 (2009) (discussing how some jurisdictions have adopted "no-drop" prosecution policies, which limit prosecutorial discretion in pursuing domestic violence cases).

276. *See* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 857 (1994).

277. *Id.*

278. *See* Burkett, *supra* note 172, at 495. Burkett raises a few questions about whether California's alimony law would increase incidences of false reports by abusers. While this is a common concern amongst individuals who are wary of implementing a strict ban on alimony payments from survivor to abuser, it is misguided. Research shows that an overwhelming majority, between 63% to 74%, of domestic violence allegations in family court are truthful. *See* COLO. COALITION AGAINST DOMESTIC VIOLENCE, *supra* note 223, at 1. Of the remaining one-third to one-quarter of cases, only a small percentage have been found to be demonstrably false. *Id.* (showing false domestic violence accusations track closely to low rates of false rape allegations). Unfortunately, due to police investigative practices and confusing legal standards, the bulk of the remaining claims have insufficient evidence to support a finding for conviction. *Id.* at 2.

abusers out of fear of overpaying alimony to finally leave an unhealthy environment.[279] However, most importantly, a system that prohibits alimony payments from victims to abusers supports victims in their healing and removes systematic re-traumatization.[280]

CONCLUSION

When domestic violence occurs and victims are finally able to remove themselves from an abusive situation, the courts should offer a place of support and safety. By allowing otherwise, courts are adding insult to years of injury. After decades of legislative efforts to promote better treatment of domestic violence victims in other areas of the law, it is time for family law, specifically alimony, to catch up. Forty-nine states have alimony statutes that permit abusers to receive alimony payments from individuals they physically, mentally, emotionally, and financially abused. The only state that precludes this abhorrent policy is California. Since legislatures will not likely amend their laws,[281] judges must wield their unbridled discretion and declare alimony payments from victims to abusers unconscionable.

As a defense arising from courts of equity, unconscionability provides a strong legal background for invalidating alimony payments that are negotiated into divorce settlements. In analyzing the alimony payments from abused to abuser, the practice evidently meets modern standards of unconscionability. Domestic violence, as discussed above, puts victims at a weaker mental state and lowers bargaining capacity, making it difficult for them to adequately agree and negotiate settlements. Additionally, forcing victims to advocate for their needs and discuss their trauma in the presence of their perpetrator is retraumatizing and may discourage them from disclosing relevant information.[282]

In ordering survivors to pay alimony to the people they may have been trying to escape for years, the system forces renewed contact between victims and abusers while also putting survivors' health and safety at risk. Survivors, willing to do anything to get away from their tormentors, possibly did not fully understand the above consequences when they signed the settlement agreement. Accordingly, holding the

279. Burkett, *supra* note 170, at 497.

280. *See* Katz & Haldar, *supra* note 184, at 365–66 (reporting the widespread problem of family abuse and discussing the effects of trauma).

281. *See supra* note 167 and accompanying text.

282. *See supra* note 234 and accompanying text.

alimony payments in the settlement valid and enforceable would be unconscionable given the circumstances. As discussed above, courts do not necessarily need to hold the entire settlement unenforceable under the doctrine of severance.[283] The judge could simply strike the alimony provision from the contract and allow the divorce to proceed as normal. These alimony practices disproportionately harm domestic violence survivors, so whether judges hold the entire settlement invalid or just remove the offensive provision, the underlying conclusion is that as a matter of contract law, courts should not enforce the alimony agreements.

Survivors of domestic violence have endured enough at the hands of their abusers. Survivors have been repeatedly coerced, isolated, and traumatized, causing feelings of hopelessness and shame. Reaching out and asking for help continues that pattern. The price of freedom from abuse should not be the cost of an alimony award. Forbidding these payments sends a clear signal to legislatures that domestic violence will no longer be tolerated in the #MeToo era and prevents courts from rewarding abusers at the victims' expense.

283. *See supra* note 32 and accompanying text.