Contract, in the Age of Sustainable Consumption

Brooke Overby*

I. INTRODUCTION

It has been at times fashionable to characterize American law much like a human being, as an entity that moves through periods of development and changes with the years. In contract theory, attempts to draw contract law's lifeline have engaged some of the most illustrious names in the field. Perhaps one of the most well known scholars in this genre is Karl Llewellyn. Llewellyn saw undulating periods in the development of the common law, those periods in which a Grand Style—one focused on elegant reasoning, principles and policies—predominated, and those periods in which a Formal Style—one rule-oriented and logical—predominated.[1] For Grant Gilmore, another leading scholar of an earlier generation, codification of contract law could be a countervailing response to the common law case law method, and that codification itself could face obsolescence with age.[2] Gilmore also believed American law could pass from the Ages of Discovery, Faith, and Anxiety.[3] While announcements of the death of Law might from time to time come forth,[4] these announcements were always in the midst of rumors of continued

* Professor of Law, Tulane University School of Law. I would like to thank Jeanne Carriere and Jean Sternlight for their comments on earlier versions of this essay.

1. KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); *see also* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 206-52 (1973) (providing a detailed account and analysis of *The Common Law Tradition*).

2. *E.g.*, Grant Gilmore, *On Statutory Obsolescence*, 30 U. COLO. L. REV. 461 (1967) (discussing the interrelationship between common law and codification).

3. GRANT GILMORE, THE AGES OF AMERICAN LAW 19-98 (1977).

4. *E.g.*, GRANT GILMORE, THE DEATH OF CONTRACT 1-3 (1974) ("We are told that Contract, like God, is

vitality.

Where is contract law now? This symposium honoring the life and career of Professor David Vernon seems an appropriate time to address this question, though the question is perhaps a bit out-of-fashion. Professor Vernon's career as a contracts scholar and teacher spanned much of the last five decades. The century just ended, the century in which Vernon spent most of his life, was a romantic time, if only to the author (who experienced little of it), when the journey through Sales was on horseback,[5] when news of the death of Contract might reverberate through cathedral towns, styled perpendicular or styled gothic,[6] and when the most efficient legal solution was not necessarily considered the best route to travel. Continuing the metaphor of a journey, experienced travelers know that there are times when it is appropriate to sit down, examine the map and route, and figure out exactly where in the world one is and where one is going. Such a map check for American contract law is perhaps long overdue.

The world is now in the midst of the phenomenon known generally as globalization.[7] This Article explores the challenges to current American contract law, particularly its approaches to consumer fairness issues, from a facet of globalization that (continuing Gilmore's approach) might be called "The Age of Sustainable Consumption." The increasing internationalization and interdependence of countries and regions of the world associated with globalization have resulted in numerous initiatives at the international level that address consumer protection, commercial issues, sustainable development, and sustainable consumption. This Article explores one of those initiatives,

---

dead. And so it is. Indeed the point is hardly worth arguing anymore."); Owen Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986) (anticipating the impact of critical legal studies and law and economics movements).

5. *See generally* K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); K.N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939).

6. *See* K.N. Llewellyn, *On the Good, the True, The Beautiful, in Law*, 9 U. CHI. L. REV. 224, 231-32 (1942).

7. The term "globalization" is difficult to pin down with complete precision and can mean many things to many people. The phenomenon might simply best be defined as the increasing interdependence of all areas of the world. Subsidiary to that basic definition are questions regarding the *causes* of globalization (such as technological advances, a movement to an information society, or recent political developments) and the *attributes* of globalization (such as global markets, international institutions, changes in modes of cultural transmission, or the media's reach). Often, and if only to provide content to the otherwise vague term, particular attributes of globalization are equated to and treated as coexistent with the term "globalization." *E.g.*, GEORGE SOROS, GEORGE SOROS ON GLOBALIZATION 1 (2002) (defining globalization as "the development of global financial markets, the growth of transnational corporations, and their increasing domination over national economies").

While globalization is usually raised as a recent phenomenon, the world has in actuality been connected, culturally and economically, for centuries. *See generally* DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS (1998) (detailing a comprehensive world economic history). What is perhaps different about present times is the speed and ease of the connections, as well as nations' views toward living in a connected world. As an example, in the distant past, a Portuguese ship sailing from Lisbon to Macao in the sixteenth century might have taken many years to finish her journey, with the risk of much loss of life and cargo. *See* JONATHAN D. SPENCE, THE MEMORY PALACE OF MATTEO RICCI 64-92 (1984) (account of late sixteenth century sea transportation from Portugal to India and the Far East). Responses to letters sent by the Jesuits in China to Rome might be received in six or seven years, as a charitable estimate. *See id.* at 66. However, in the present day, physical presence in distant places can be established in hours and virtual presence can be established by e-mail in seconds. Thus, even though globalization is not recent, the causes and attributes of globalization in the present age create the aura of innovation that so frequently surrounds the term.

the *United Nations Guidelines for Consumer Protection* (*Guidelines*), which has played a significant role in advancing consumer law reform efforts around the world.

Originally intended to guide developing countries in such reforms, the United Nations' efforts shifted in the late 1990s to address issues of sustainable consumption. With this move, the *Guidelines* are as relevant to the industrialized West as they have been in other parts of the world. This Article examines the somewhat uneasy intersection of American contract law fairness doctrines with the principles laid out by the United Nations in the *Guidelines*. The American approaches often can reflect local Western perspectives on the sanctity of agreement, individual freedom, and equal bargaining power. However, as will be discussed, judicial application of these doctrines can often conflict not only with the fairness principles laid out in the *Guidelines*, but also with legal approaches to similar issues in other countries.

That surface inquiry into contract fairness issues at the local and international levels and the potential tensions that exist both between national legal systems and between local doctrines and emerging international norms raises a deeper question, albeit speculative, at this stage in the history of globalization. What impact will globalization potentially have on American law, specifically contract law? The general globalization debate raises the issue of the role Western values play or should play on the international stage and the correlative issue of the role that international norms should play in domestic law reform agendas. It will be argued that this debate has the potential to impact domestic contract law and policy in upcoming years.

This possible impact poses a thorny dilemma for American theorists. For, in spite of the tradition of a living law, a great deal of American contract law and scholarship now seems to proceed from a perspective of universalism. American universalism assumes, often tacitly, that domestic theories in contemporary American debate are valid not only across the world, but throughout time. In other words, the assumption is made that such theories are valid transculturally and objectively true. Although such a universalist mindset is seen most prevalently in the neoclassical economics movement that forms the groundwork for the law and economics school in domestic scholarship,[8] an attitude of universalism can be found in virtually every area of law.[9] A question may be one of efficiency, market rationality, or even significant justice issues such as human rights, but nonetheless, an universalist inquiry usually adopts the local American perspectives on those concerns and, in its extreme forms, eschews the global context in which we must act and live.

Realistically viewed, American universalism is perhaps just another stage in the life of law, one genuinely reflective of the human desire for certainty and, perhaps, even analytically necessary. It is a tidy construct nonetheless. American universalism in domestic scholarship also may be a stage that, at least in its present form, may not withstand the challenges that globalization brings.

The globalization debate has shattered the pre-1990 worldview on international

8. *Cf.* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 17 (1995) ("[M]any neoclassical economists have come to believe that the economic method they have discovered provides them with the tools for constructing something approaching a universal science of man.").

9. *See generally* Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996) (containing a comprehensive discussion of universalism and perspectivism in philosophy, and addressing questions of human rights).

relations and politics, and two new competing paradigms for global politics have emerged. Along with that fundamental shift, a host of international institutions and organizations such as the United Nations have begun to significantly influence international commercial issues. It is this potential clash between the local and the global that will call into question the current state of American contract law and undercut Western universalist tendencies in the upcoming years. How the United States accommodates concerns raised at the international level through initiatives such as the *Guidelines* will be one of the major challenges for lawmakers and scholars in the future.

This Article begins with an account of the history and substance of the *United Nations Guidelines for Consumer Protection*. A discussion of the intersection of the *Guidelines* and the prevailing American approaches to fairness issues addressed in the *Guidelines* follows. Against that backdrop, the parameters of the globalization debate are explored and its potential impact on local law is discussed. This Article argues that, if the West wishes to play an influential role on the international commercial stage in the future, domestic contract law scholars must adopt a self-conscious strategy of engagement with developments occurring at the international level, such as those at the United Nations.

II. THE UNITED NATIONS GUIDELINES

It is not surprising, in recent years, to witness an expanding supra-national centralization movement in many areas of commercial law. Nevertheless, the boundaries of, and players in, that movement are still in flux. Most often the flashpoints for conflict, as centralization proceeds, are international trade and financial organizations such as the International Monetary Fund, the World Trade Organization, and the World Bank. Those organizations' trade and economic policies have been at the center of the debate on the impact of globalization.[10] The United Nations, however, in recent years also has emerged as a key player in promoting international harmonization of commercial laws, most frequently through model legislation promulgated via The United Nations Commission on International Trade Law (UNCITRAL).[11] UNCITRAL is perhaps most well-known for The United Nations Convention on Contracts for the International Sale of Goods (CISG), a comprehensive code governing international sales of goods that has attained widespread influence via individual nation ratification (or other similar acts of acceptance) throughout the world. Similar UNCITRAL harmonization efforts, which have had varying degrees of success, address commercial issues such as cross-border insolvency, international payments, and electronic commerce. When drafting model legislation, however, UNCITRAL has fairly self-consciously avoided delving into consumer protection issues that might raise substantial concerns over fairness.[12]

---

10. *See generally*, SOROS, *supra* note 7 (containing a description of WTO, IMF, and World Bank and their shortcomings in meeting problems raised by globalization); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (providing an account of failures of IMF and the Treasury Department in addressing concerns of developing countries).

11. An overview of the activities of UNCITRAL is available through its website, at http://www.uncitral.org/en-index.htm (last visited Sept. 30, 2002).

12. *See, e.g.*, *United Nations Convention on Contracts for the Int'l Sale of Goods*, Art. 2, 1489 U.N.T.S. 3, 19 I.L.M. 668 (excluding "goods bought for personal, family or household use"); *UNCITRAL Model Law on*

With business and trade concerns addressed through the UNCITRAL, consumer issues at the United Nations have taken a different path. The consumer initiatives adopt a substantially less formal technique for harmonization than is seen with the UNCITRAL's model laws. The following sections discuss those United Nations initiatives over the last few decades.

A. The 1985 Guidelines

The United Nations' initial treatment of consumer issues occurred in the 1980s, when the United Nations considered, and the General Assembly adopted, its *Guidelines for Consumer Protection*.[13] Intended as a "comprehensive policy framework" for assisting governments in promoting consumer protection, the *1985 Guidelines* were directed at assisting developing and newly independent countries, at strengthening their consumer protection policies and legislation, and at establishing an internationally recognized set of basic objectives for consumer protection.[14] The *1985 Guidelines* recognized basic "legitimate needs" common to all consumers including: (1) protection of consumers from health and safety hazards; (2) "promotion and protection of the economic interests of consumers;" (3) ensuring "access of consumers to adequate information to enable them to make informed choices according to their individual wishes and needs;" (4) "consumer education;" (5) "availability of effective consumer redress;" and (6) freedom to form consumer groups and ensuring opportunity to participate in decision-making processes affecting them.[15]

Electronic Commerce, G.A. Res. 51/162, U.N. GAOR, Art.1 n.** (1996) ("This Law does not override any rule of law intended for the protection of consumers.").

13. U.N. G.A. Res. 39/248, U.N. GAOR, (1985) [hereinafter *1985 Guidelines*].

14. *See Consumer Protection Guidelines for Sustainable Consumption: Report of the Secretary-General*, U.N. Comm. On Sustainable Dev., 6th Sess., Agenda Item 1, at 1, U.N. Doc. E/CN.17/1998/20/1998 (1998), *available at* gopher://gopher.un.org/00/esc/cn17/1997-98/consumer/CONSRPT (last visited Sept. 10, 2002); *see also Background paper for the United Nations Inter-Regional Expert Group Meeting on Consumer Protection and Sustainable Consumption: New Guidelines for the Global Consumer* ¶ 1.1, *available at* gopher://gopher.un.org/00/esc/cn17/1997-98/consumer/CONSUMER (last visited Sept. 10, 2002) (discussing focus of 1985 initiative) [hereinafter *Background Paper*]. The stated objectives of the *1985 Guidelines* were:

> (a) To assist countries in achieving or maintaining adequate protection for their population as consumers;
> (b) To facilitate production and distribution patterns responsive to the needs and desires of consumers;
> (c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;
> (d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;
> (e) To facilitate the development of independent consumer groups;
> (f) To further international co-operation in the field of consumer protection;
> (g) To encourage the development of market conditions which provide consumers with greater choice at lower prices.

1985 Guidelines, *supra* note 13, ¶ I.1. The *1999 Expanded Guidelines* discussed *infra* did not alter these objectives, but added the promotion of sustainable consumption to the list. *See infra* text accompanying notes 40-49.

15. *1985 Guidelines*, *supra* note 13, ¶ II.3.

The *1985 Guidelines* were not intended to be binding on countries.[16] Rather, the principal goal of the *Guidelines* was to serve as a framework for law reform efforts in developing countries.[17] The *Guidelines* suggested that, in those efforts, "each Government must set its own priorities and timebound targets for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures."[18] Governments were urged to provide and maintain an infrastructure adequate to develop, implement, and monitor their consumer protection policies.[19] Consumer protection policies were to benefit all sectors of the population, particularly rural populations.[20] The *1985 Guidelines* also detailed with greater specificity the standards to which governments should adhere in the areas of physical safety, economic interests, safety and quality standards, distribution facilities, redress, and information and education programs.[21] The general principles of the *1985 Guidelines* also acknowledged that enterprises should obey the laws of the nation in which they do business and the international standards ascribed to by that nation.[22] The *1985 Guidelines* concluded, after noting the potentially positive role of universities and research enterprises in developing the policies suggested,[23] by outlining the goals to be met by international consumer protection policies and initiatives.[24]

The *1985 Guidelines* have had significant international impact.[25] They have played a critical role, not only in advancing an emerging international consumer movement, but also in encouraging national law reform efforts outside of the United States. Many countries have implemented significant consumer protection measures because of the *Guidelines*,[26] and the *Guidelines* continue to serve as a standard by which these measures can be evaluated. Domestically, the response has been quite different, for it appears that the *1985 Guidelines* have received scant attention.[27] However, the indifference to the *Guidelines* in the United States is not substantially variant from local attitudes toward the

---

16. *See* David Harland, *The United Nations Guidelines for Consumer Protection: Their Impact in the First Decade*, *in* CONSUMER LAW IN THE GLOBAL ECONOMY 5 (Iain Ramsay ed., 1997) ("It is important to realize that the Guidelines are clearly not binding on countries as a matter of international law.").

17. *See id.* at 5-6 (discussing the initial focus of the *1985 Guidelines*).

18. *1985 Guidelines*, *supra* note 13, ¶ II.2.

19. *Id.* ¶ II.4.

20. *Id.*

21. *Id.* ¶¶ 7-42; *1999 Expanded Guidelines*, *infra* note 39, ¶¶ 9-41. Some specific provisions regarding fairness and redress are discussed *infra* text accompanying notes 53-56.

22. *1985 Guidelines*, *supra* note 13, ¶ II.5.

23. *Id.* ¶ II.6.

24. *Id.* ¶¶ 43-46.

25. *See* Harland, *supra* note 16, at 6-10 (discussing the influence of the *Guidelines* across the world).

26 *Id.* (discussing legislative initiatives).

27. Recent computer searches conducted in the legal periodicals databases of WESTLAW (TP-ALL) and LEXIS (Library Lawrev; File Allrev) pulled up only a handful of articles that even mentioned the U.N. *Guidelines*, and of those that did mention the *Guidelines*, the discussion was ordinarily quite brief. Most frequently the *Guidelines* are used to assess international consumer protection issues, *e.g.*, Robert G. Vaughn, *Chilean Consumer Protection Standards and the United Nations Guidelines on Consumer Protection: A Comparative Study Revealing Regional Conflicts*, 22 N.C. J. INT'L L. & COM. REG. 1 (1996) (evaluating Chilean law in light of the *Guidelines*). However, the *Guidelines* are rarely if ever used to evaluate domestic American issues.

United Nations generally.[28] Irrespective of American avoidance, the years following the approval of the *Guidelines* brought more global activity and progress regarding consumer issues.[29]

B. The 1999 Revisions and the Move to Sustainability

Recently the *Guidelines* were amended and expanded to include issues of sustainable consumption.[30] The impetus for these amendments was the adoption in 1992 of Agenda 21—a comprehensive plan addressing issues impacting the global environment.[31] Agenda 21, the *Rio Declaration*,[32] and the *Statement of Principles for the Sustainable Management of Forests*[33] were adopted at the 1992 United Nations Conference on Environment and Development (Rio Conference) held in Rio de Janeiro, Brazil.[34] In this sweeping, environmentally focused effort, unsustainable levels of consumption were identified as closely linked to environmental degradation. One important theme of the Rio Conference was the postulate that it was no longer tenable to separate environmental from economic issues, as perhaps was the case before. As stated in Agenda 21,

> [p]overty and environmental degradation are closely interrelated. While poverty results in certain kinds of environmental stress, the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in industrialized countries, which

---

28. *See* SOROS, *supra* note 7, at 11-14 (including a discussion of the United Nations shortcomings and of the United States' indifference to the United Nations). Mr. Soros recognizes the valuable role that the United Nations could play as an international political organization, but argues that structural limitations, most particularly the concept of state sovereignty, undercuts the U.N.'s effectiveness, as does ineffective exercise of authority through the Security Council. *Id.* at 12-13.

29. A discussion of international, national, and regional developments in consumer areas following the *1985 Guidelines* can be found at *Background Paper*, *supra* note 14, ¶ 2.1.

30. *Draft Report: Commission on Sustainable Development*, U.N. ESCOR, 3d Sess., Agenda Item 10, ¶ (4)(45)(E), U.N. Doc. E/CN.17/1995/L.1.Add. 1 (1995), *available at* http://www.un.org/esa/sustdev/cpp14.htm#report [hereinafter *Report on the Third Session*].

31. Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/ConF.151.26 (1992), *available at* http://www.un.org/esa/sustdev/agenda21text.htm [hereinafter *Agenda 21*].

32. The *Rio Declaration* focused on the specific relationship between sustainable development and the environment. *See generally Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm [hereinafter *Rio Declaration*].

33. *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1 (1992), *available at* http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm.

34. *See* Agenda 21, *supra* note 31. The U.N. General Assembly adopted the *Declaration on the Right to Development* in 1986. *See Review of the Implementation of the Declaration on the Strengthening of International Security*, U.N. GAOR, 41st Sess., Annex, at 1-5, U.N. Doc. A/41/128 (1986). That recognition of a "right" to development was itself a highly controversial move. *See* Isabella D. Bunn, *The Right to Development: Implications for International Law*, 15 AM. U. INT'L L. REV. 1425, 1432-36 (2000) (providing a history and critique of the right to development). The concept of "sustainable development" places some boundaries on exercise of the right. *See, e.g.*, *Rio Declaration*, *supra* note 32, at Principle 3 ("The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.").

is a matter of grave concern, aggravating poverty and imbalances.[35]

The Rio Conference also led to the creation of the U.N. Commission on Sustainable Development,[36] which subsequently recommended revision and expansion of the *1985 Guidelines* to include guidelines for sustainable consumption patterns.[37] In addition to the Commission's recommendations, political changes in the years after 1985 and the increase in global trade also suggested that revisions to the *Guidelines* were warranted.[38] The revisions to the *Guidelines* suggested by these events were adopted in 1999 by the General Assembly.[39] The *1999 Expanded Guidelines* are based on the *1985 Guidelines*, but integrate the principle of "[t]he promotion of sustainable consumption patterns" as a legitimate need the *Guidelines* intend to meet.[40] The *1999 Expanded Guidelines* advance sustainability as a concept integrally related to global environmental issues[41] and to concerns over equality, both among persons and among countries.[42] The new detailed guidelines on promoting sustainable consumption also address the economic, social, and environmental facets of sustainability. Recognizing sustainability should be a concern and responsibility for everyone—individuals, private organizations, governments, and policy-makers—the *Expanded Guidelines* urge governments to promote sustainable consumption through legal regulations and policies,[43] encouragement of environmentally responsible products and services,[44] development and use of national and international health and safety standards,[45] environmental testing of products,[46] safe management of harmful substances,[47] promotion of the health-related benefits of sustainable consumption,[48] and encouragement of the transformation of unsustainable consumption

---

35. *See* Agenda 21, *supra* note 31, ¶ 4.3. Chapter 4 of Agenda 21 deals comprehensively with the role of sustainable consumption.

36. United Nations Commission on Sustainable Development, About Commission on Sustainable Development, http://www.un.org/esa/sustdev/csdgen.htm.

37. *See Report on the Third Session, supra* note 30, ¶ (4)(45)(E).

38. *Background Paper, supra* note 14, ¶ 2.3 (discussing reasons for the revision of the *Guidelines*).

39. G.A. Res. 54/449, U.N. GAOR, 54th Sess., at 21 (1999), *available at* http://www.un.org/esa/sustdev/dec54-449.pdf [hereinafter *1999 Expanded Guidelines*].

40. *Id.* ¶ II.3.(g) (adding sustainable consumption as a legitimate need).

41. Paragraph 4 of the *1999 Expanded Guidelines*' "General Principles" provides that:

> Unsustainable patterns of production and consumption, particularly in industrialized countries, are the major cause of the continued deterioration of the global environment. All countries should strive to promote sustainable consumption patterns; developed countries should take the lead in achieving sustainable consumption patterns; developing countries should seek to achieve sustainable consumption patterns in their development process, having due regard to the principle of common but differentiated responsibilities. The special situation and needs of developing countries in this regard should be fully taken into account.

Id. ¶ II.4.

42. Paragraph 5 of the *1999 Guidelines*' "General Principles" provides "Policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the basic human needs of all members of society, and reducing inequality within and between countries." *Id.* ¶ II.5.

43. *Id.* ¶ III.G.44, 50-55.

44. *Id.* ¶ III.G.45.

45. *1999 Expanded Guidelines, supra* note 39, ¶ III.G.46.

46. *Id.* ¶ III.G.47.

47. *Id.* ¶ III.G.48.

48. *Id.* ¶ III.G.49.

product patterns.[49]

All of this may seem quite distant from domestic contract law. However, the movement to sustainability in the *1999 Expanded Guidelines* suggests a significant, albeit subtle, shift in focus from the original *1985 Guidelines*. Although the expansion of, and additions to, the original *Guidelines* most immediately and obviously address environmental concerns,[50] the concept of sustainable consumption advanced by the *1999 Expanded Guidelines* bears on the general subjects of American law and globalization. The American consumer society and consumer markets are critical parts of Western consumption patterns. As recognized by the *1999 Guidelines*, those patterns in industrialized countries can have impacts around the world. Thus, even local contract policies can have an international dimension.

The *1999 Guidelines* also reflect a shift in perceptions of the duties and responsibilities of nations *inter sese*. While the *1985 Guidelines* largely served as a framework to assist developing and underdeveloped countries in crafting fledgling consumer protection laws, the addition of sustainability results in guidelines that cover much more expansive ground. Under the *1999 Guidelines*, developed, industrialized countries themselves have significant responsibilities in achieving internal sustainable levels of consumption. This move constitutes a substantial change in emphasis in the intervening years, one from facilitating the advancement of economic development in non-Western countries to recognizing the role that domestic policies can play beyond their borders.

The conceptual shift of sustainability from purely local, with nations acting independently, to global, with nations recognizing their interdependence, can be linked to rising concerns over the global impact of the attributes associated with globalization,[51] such as increased volume of international trade and the influences that dominant cultures may now have internationally. As the U.N. Commission on Sustainable Development suggested in 1999, local consumption rates are fundamentally related to a complex dynamic between markets, globalization, and local culture and institutions:

> Globalization and its impacts on consumption and production patterns
>
> 12. Governments, in cooperation with relevant international organizations and in partnership with major groups, should:
>
> (a) Undertake studies of the impacts of globalization, including the positive and negative impacts of trade, investment, mass media, advertising and marketing in all countries, in particular developing countries. The studies should examine ways and means to mitigate negative impacts and use opportunities to promote more sustainable consumption and production patterns and open and non-discriminatory trade;
>
> (b) Undertake studies on the role of the financial sector in promoting sustainable consumption and production, and further encourage voluntary initiatives suited to national conditions for sustainable development by that

49. *Id.* ¶ III.G.50.

50. *See, e.g.*, Joel S. Hirschhorn, *Pollution Prevention Comes of Age*, 29 GA. L. REV. 325 (1995) (analyzing pollution control in terms of sustainability).

51. *See supra* note 7.

sector;

(c) Increase their efforts to make policies on trade and policies on environment, including those on sustainable consumption and production, mutually supportive, without creating disguised barriers to trade;

(d) Study the benefits of traditional values and local cultures in promoting sustainable consumption.[52]

These recommendations suggest that the *1999 Expanded Guidelines* currently raise more comprehensive integral concerns regarding the need for fairness, the positive and negative impact of local values and cultures globally, the role of international financial markets in advancing or undermining sustainable consumption, and the consequences of the expanded reach of the now-global media.

Thus, the *1999 Guidelines* and the interjection of sustainable consumption as a consumer policy concern reflect critical shifts from the *1985 Guidelines*, which were largely directed to countries outside of the West and which viewed internal national initiatives as largely irrelevant across cultures. As well as influencing developing countries, the *1999 Expanded Guidelines* are intended equally to influence the developed West and its consumption patterns. Along with the *Guidelines*' change in intended audience is a deeper shift in international consumer policy that is illustrated by a reorientation of consumer issues within the context of globalization. Taken seriously, the *Guidelines'* recognition of developing countries' responsibilities in the global economic community, of the interconnections that now exist between countries, and of the impact that local commercial policies can have globally, suggest that we have entered a new age, that of sustainable consumption.

If the last decade has brought this profound shift in emphasis, two important questions exist for American legal professionals. First: How well do local law and policy conform to the *Expanded Guidelines*? Second, and perhaps more fundamentally: *Should* international concerns such as those expressed in the *Expanded Guidelines* be a valid basis upon which to evaluate local positions and doctrines, and if so to what degree? The remainder of this Article addresses these questions.

III. AN INWARD GLANCE AT FAIRNESS IN LIGHT OF THE GUIDELINES

The *1999 Expanded Guidelines* suggest that Western industrialized countries take an inward look at domestic consumption patterns. And although the West is an intended audience of the *Expanded Guidelines*, it would not come as a great surprise if, as with the *1985 Guidelines*, the *Expanded Guidelines* were to continue to receive scant attention in the United States. This attitude of neglect, even if benign, is unfortunate because the *Guidelines* question important components of domestic contract law, such as the treatment of fairness concerns in American contract law.

52. *See* Decision 7/2, Comm. on Sustainable Develop., 7th Sess., ¶ 12 (1999), *available at* http://www.un.org/esa/sustdev/ccp14.htm. The Commission noted a major role of government is to "increase the understanding of the role of advertising and mass media and marketing forces in shaping consumption and production patterns," and the importance of education at all levels with curricula that takes "into account gender perspectives and the special concerns of older people." *Id.* ¶¶ 7(c)-(d).

A. Contract Fairness: The U.N. Guidelines and United States Compared

The *Guidelines*, both in their original and expanded forms, take an aggressive and broad stance on the issue of consumer contract fairness. Paragraph twenty-one of the *Expanded Guidelines* suggests that "[c]onsumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts and unconscionable conditions of credit by sellers."[53] The *Expanded Guidelines* also suggest that marketing and sales practices "be guided by the principle of fair treatment of consumers."[54]

The emphasis on fairness continues throughout the *Expanded Guidelines*' treatment of contractual relations, even to the point of dispute resolution. With respect to ensuring redress of rights, the *Expanded Guidelines* provide:

> 32. Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers.
>
> 33. Governments should encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaint procedures, which can provide assistance to consumers.
>
> 34. Information on available redress and other dispute-resolving procedures should be made available to consumers.[55]

In short, the *Expanded Guidelines* establish as basic operative principles fairness, which includes protection of consumers from abuse,[56] and adequacy of redress.

In American contract law consumer fairness issues generally are addressed mainly on a case-by-case basis through the doctrines of unconscionability[57] and good faith and fair dealing.[58] Judicial application of these doctrines often focuses on individual freedom by protecting and promoting choice and consent. American courts shy away from intervening in the free exercise of perceived choice, usually rejecting paternalism as a justification for intervention. The antipathy of courts toward government interventions into private contracts extends deep into American history. In 1889, the United States

---

53. *1999 Expanded Guidelines*, *supra* note 39, ¶ III.B.21.

54. *Id.* ¶ III.B.22.

55. *Id.* ¶¶ III.E.32-34.

56. *See id.* ¶¶ I.1.(c) (objective of the principle is ensuring "high levels of ethical conduct"), I.1.(d) (objective of the principle is curbing "abusive business practices").

57. *E.g.*, U.C.C. § 2-302 (1999) (doctrine of unconscionability in contracts for the sale of goods). For a discussion of the history and future of the Code's section on unconscionability, see Carol B. Swanson, *Unconscionable Quandary: U.C.C. Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359 (2001).

58. *E.g.*, U.C.C. § 1-203 (1999) (general duty of good faith in UCC). Existing approaches toward good faith and fair dealing in American contract law are discussed in A. Brooke Overby, *Bondage, Domination and the Art of the Deal: An Assessment of Judicial Strategies in Lender Liability Good Faith Litigation*, 61 FORDHAM L. REV. 963 (1993).

Supreme Court defined an unconscionable contract as that contract which "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[59] An unconscionable deal, in other words, falls somewhere in the shadowy area between insanity and depravity. The courts' tradition of refusing to intervene in contracts other than in the face of the most obvious unfairness (as evaluated by the judge), if even to intervene at all, continues to the present day, as the following quote from a Florida unconscionability case demonstrates:

> People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.[60]

A similar approach to good faith and fair dealing also predominates current case law, in which moral or ethical concerns all too frequently give way to the demands of the market.[61]

---

59. Hume v. United States, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (1750 Chancery Ct.) (Lord Hardwicke, J.)).

60. Steinhardt v. Rudolph, 422 So. 2d 884, 890 (Fla. Dist. Ct. App. 1982), *review denied*, 434 So. 2d 889 (Fla. 1983); *see also* Geldermann & Co. v. Lane Processing, Inc., 527 F.2d 571, 576 (8th Cir. 1975) ("It is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated."); Nelson v. Rice, 12 P.3d 238, 243 (Ariz. Ct. App. 2000) (rejecting the paternalist role of courts); Obaitan v. State Farm, 1997 WL 208959, at *3 (Del. Ch. Apr. 17, 1997) ("While the insured citizens of this state may be protected by our courts from unconscionable acts by their carriers, we are yet to be so paternalistic that we act as parens patriae to prevent them from suffering the consequences of inept bargaining skills."); NEC Tech. Inc. v. Nelson, 31 U.C.C. Rep. Serv. 2d (CBC) 992 (Ga. 1996) (same approach as *Steinhardt*); Schlottach v. Schlottach, 873 S.W.2d 928, 932 (Mo. Ct. App. 1994) ("Unconscionability is defined as 'an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.'").

61. The varying judicial and scholarly strategies toward addressing good faith issues are discussed in Overby, *supra* note 58. Judge Richard Posner's comments on good faith excerpted below fairly exemplify the prevailing judicial hostility to any expansive interpretation of the obligation of good faith in American contract law. Posner states that:

> Despite its moralistic overtones it is no more the injection of moral principles into contract law than the fiduciary concept itself is. It would be quixotic as well as presumptuous for judges to undertake through contract law to raise the ethical standards of the nation's business people. . . .The contractual duty of good faith is thus not some newfangled bit of welfare-state paternalism or (*pace* Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harv. L. Rev.* 1685, 1721 (1976)) the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth-century cases, a few examples being *Bush v. Marshall*, 47 U.S. (6 How.) 284, 291, 12 L.Ed. 440 (1848); *Chicago, Rock Island & Pac. R.R. v. Howard*, 74 U.S. (7 Wall.) 392, 413, 19 L.Ed. 117 (1868); *Marsh v. Masterson*, 101 N.Y. 401, 410-11, 5 N.E. 59, 63 (1886), and *Uhrig v. Williamsburg City Fire Ins. Co.*, 101 N.Y. 362, 4 N.E. 745 (1886).

Market St. Assoc. Ltd. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (some internal citations omitted).

This often dominant American attitude of nonintervention into contracts illustrates some divergences between the *U.N. Guidelines* and domestic theory. While the former strongly emphasizes fairness and protection as core themes, the latter has a tendency only to police the margins of those areas, addressing only the most egregious harms. Moreover, under domestic theory such policing often occurs largely through the litigation process, leaving resolution of fairness concerns to a case-by-case process. Admittedly, the current stance in the United States facilitates market transactions and checks judicial rewriting of contracts. While the case-by-case process leads to possibly inconsistent and unjust results, the process does allow parties to freely raise fairness concerns and to be heard by the judiciary (if access to a judicial forum is permitted). However, does current American doctrine protect the most vulnerable members of our community? As the following section will show, the answer is at best an ambiguous "somewhat."

B. A Study in Contract Vulnerability: Protecting the Elderly

The rugged domestic approach to fairness, with its assumptions of equal bargaining power and equitable distribution of resources between contracting parties and among citizens and consumers generally, raises serious concerns when issues of race, gender, wealth disparity, and other questions of American inequality are thrown into the mix. In other words, current approaches, to a large extent, often avoid a context specific inquiry in favor of an inquiry that abstracts contracting parties as rational, self-maximizing individuals with equal access to resources. The abstraction runs into difficulty, however, when issues of vulnerability that defy these assumptions are present in real life cases. Even assuming that some American citizens are rational, self-interested individuals, certainly not all are, or can be, at all times. Yet, existing fairness doctrines often proceed from this assumption.

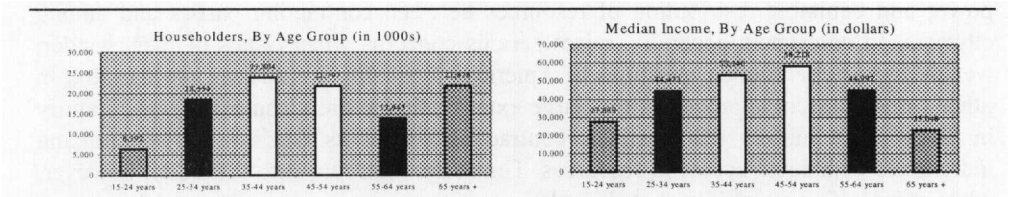
As an example, consider the issue of protecting vulnerable members of American society, such as the elderly. An aging population in the United States[62]—comprised of persons with substantially lower income, on average, than younger segments of society[63]—increasingly is beginning to challenge the traditional American understanding

62. Data from the 2000 Census shows that the elderly (65+) population in the United States has increased twelve percent since 1990, with the most rapid increase occurring in the highest subgroups of the elderly population (85+ and 75-84). *See* LISA HETZEL & ANNETTA SMITH, U.S. DEP'T OF TREASURY, CENSUS 2000 BRIEF, THE 65 YEARS AND OVER POPULATION: 2000 1 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf. The aging of the Baby Boom generation (traditionally viewed as those persons born between 1946-64) will lead to a substantial growth in the elderly population in upcoming decades. *See* FRANK B. HOBBS & BONNIE L. DAMON, U.S. DEP'T OF TREASURY, 65+ IN THE UNITED STATES 2-1-2-2 (Bureau of the Census 1996), *available at* http://www.census.gov/prod/1/pop/p23-190/p23190-f.pdf.

63. According to reports from the 2000 Census, the median income of householders age 65 years or older was $23,048. *See* CARMEN DENAVAS-WALT ET AL., MONEY INCOME IN THE UNITED STATES: 2000 2 tbl. A, http://www.census.gov/prod/2001pubs/p60-213.pdf. Although the 65+ age group is the second largest householder group in the United States, the median income is the lowest of all household groups, as the following two tables illustrate:

of fairness, the boundaries of choice, and the West's antipathy toward paternalism. It is not surprising, in light of current demographics, to observe what appears to be an increasing number of legal concerns that specifically impact the elderly. Perhaps disproportionately to the rest of the American population, the elderly are targets of fraud,[64] predatory and abusive lending,[65] and financial abuse.[66]

The recent Ohio case of *Matthews v. New Century Mortgage Corp.*[67] exemplifies the type of predatory practices that victimize elderly Americans. *Matthews* involved four separate mortgages made by several mortgage lenders to four single, elderly women with limited incomes.[68] Each of the women asserted that the mortgage transactions were induced by fraud, were unconscionable, and violated numerous state and federal statutes. Central to their claims was the common theme that the mortgage lenders individually, or in concert with others, engaged in a pattern or practice of targeting single, elderly females to engage in unfair loan practices. The plaintiffs further alleged that the defendants knew or should have known that the elderly women had insufficient income to service the amount of debt borrowed under the mortgage and that the "common



Compiled from *id.* Although *income* is lower for households headed by persons older than 64 years old, Federal Reserve Board figures show median family *net worth* of elderly households as either higher than (for household heads age 65-74) or nearly equal to (for household heads age 75+) younger households. Arthur B. Kennickell et al., *Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances*, 86 FED. RES. BULL. tbl. 3, at 7 (Jan. 2000). Thus, statistics suggest that often some elderly might be asset-rich, but income poor.

64. For a brochure discussing the susceptibility of the elderly to telemarketing fraud, *see* NATIONAL CONSUMER LEAGUE, THEY CAN'T HANG UP, http://www.fraud.org/elderfraud/elderbroch.htm.

65. Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly,* 10 B.U. PUB. INT. L.J. 1 (2000); Anne-Marie Motto, Note, *Skirting the Law: How Predatory Mortgage Lenders Are Destroying the American Dream,* 18 GA. ST. U. L. REV. 859 (2002) (containing a comprehensive discussion of predatory lending and of proposals for protecting elderly victims); *see also* Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503 (2002) (discussing predatory practices, generally, with an emphasis on elderly victims).

66. Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 WM. MITCHELL L. REV. 911 (2001). Financial abuse may be actionable under a state's elder abuse statute, but those statutes often require some type of fiduciary relationship between the victim and the abuser. *See, e.g.*, OR. REV. STAT. § 124.110(1)(a) (2001) (requiring a "position of trust"). In arm's length commercial transactions that relationship may be lacking under current contract law. In a recent California Superior Court decision, the court found that claims brought under the state's elder abuse statute were unwaivable by private agreement and found an agreement to arbitrate unconscionable as a matter of law. Ugarte v. Wash. Mutual Bank, No. 01AS06203 (Cal. App. Dep't Super. Ct. 2002).

67. 185 F. Supp. 2d 874 (S.D. Ohio 2002).

68. *Id.* at 887-81. The plaintiffs ranged in age from 62 years to 82 years, and all had Social Security benefits as their primary source of income, with some having modest additional sources of income. *See id.* at 879 (actual monthly incomes of (a) $713 in social security benefits, (b) $2300 in social security and pensions benefits, (c) $1000 in social security benefits and babysitting wages, and (d) $650 in social security benefits).

motivation" for the loans was raw profit.[69] The claim of wrongful motivation was supported by evidence suggesting that the plaintiffs' mortgage applications were altered by the inclusion of phony employment and monthly income data.[70] The plaintiffs also argued that misrepresentations were made to them regarding the loan terms,[71] the documentation at signing,[72] and the underlying transactions related to the execution of the mortgages.[73] Although numerous mortgage entities were involved in the cases, the plaintiffs alleged that all the mortgage companies had close associations with each other and often acted in concert with one another.[74]

The trial court found that the complaint supported elements of numerous causes of action, and denied the mortgage companies' motion to dismiss in most respects. The court found that the plaintiffs had stated timely claims[75] under the federal Fair Housing Act and a similar state statute,[76] the Equal Credit Opportunity Act (the ECOA),[77] the Truth in Lending Act (the TILA),[78] the state tort of civil conspiracy,[79] state common law

---

69. *Id.* at 881. The alleged practice is known as "equity stripping." If the borrower defaults, and most likely she will, then the owner's equity in the residence/collateral will be used to satisfy the debt and related fees. *See, e.g.*, Eggert, *supra* note 65, at 515 (discussing equity stripping). The mortgagee in *Matthews* in several instances had threatened or instituted foreclosure proceedings against the plaintiffs. *Matthews*, 185 F. Supp. 2d at 878, 880.

70. *Matthews*, 185 F. Supp. 2d at 877-81. Two plaintiffs were listed on their applications as "quilt-makers," another as the owner of "Crafts and Stuff," and the last as the owner of "Marie's In-Home Child Care." All plaintiffs denied ever being involved in such employment. False business cards were included in some cases and monthly incomes also were inflated.

71. Plaintiffs claimed that the defendants represented that they would have lower monthly bill payments under the loans, when they in fact paid very high rates and fees for the loans. *Id.* at 880. Other allegations suggested deception regarding critical loan terms such as interest rates, (plaintiffs thought the loan would be fixed rate), repayment terms, (monthly payments nearly doubled several years into loan), and principal amount, (plaintiff thought loan amount was for $17,325 when in fact it was $49,000). *Id.* at 878-79, 881.

72. Plaintiffs claimed that they never received any documentation for the loans, either at the closing or prior to closing, and that, at least in some cases, they were not apprised of federal rights to rescind the mortgages. *See id.* at 877-81. The plaintiffs therefore had no ability to review any documentation either prior to or after signing the mortgages.

73. In one case, the mortgage was for a home improvement project, and the plaintiff alleged that the repairs were never done. *Id.* at 878.

74. *Matthews*, 185 F. Supp. 2d at 889-90.

75. The mortgage companies argued, as an initial matter, that many of the plaintiffs' federal law claims were barred by the statute of limitations. *Id.* at 882. In most, but not all respects, the court found the claims were not time-barred. *Id.* at 882-85 (denying the defendants' motion regarding all of the statutes of limitations claims other than one claim brought under the Fair Housing Act).

76. The court found that the plaintiffs stated a claim under Section 805 of the Fair Housing Act, which makes it unlawful in residential real estate related transactions "to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of" sex or familial status. Fair Housing Act § 805, 42 U.S.C. § 3605 (2000). Plaintiffs claimed that the mortgagee granted them loans containing grossly unfavorable terms based on the fact that they were elderly, unmarried women and that this constituted "reverse redlining" in violation of the Fair Housing Act. *Matthews*, 185 F. Supp. 2d at 886-87.

77. The allegations that plaintiffs were granted highly unfavorable terms based on their sex (all female), marital status (all single), and age (all senior citizens), established a claim under the ECOA, which prohibits discrimination against any applicant, with respect to any aspect of a credit transaction, on the basis of sex, marital status, or age. *Matthews*, 185 F. Supp. 2d at 887-88 (citing 15 U.S.C. § 1691(a)(1) (2000)).

78. Plaintiffs alleged that they were not given notice of their right to rescind the transaction within three business days, required by section 125 of the TILA, codified at 15 U.S.C. § 1635(a) (2000). *Id.* at 888.

79. Under Ohio tort law, "a civil conspiracy is malicious combination of two or more persons to injure

fraud,[80] the state corrupt activities statute,[81] and unconscionability.[82] With respect to the unconscionability claim, the court relied on the commonly employed two-part test, which requires both procedural and substantive unconscionability.[83] The court found a successful plea for unconscionability by taking into account the one-sided terms of the transactions, the "greater bargaining power, business acumen, and experience" of the brokers, and the fact that the brokers had drafted the contracts, which the plaintiffs were not even allowed to read.[84]

It is important to observe that the *Matthews* court is not alone in its aggressive stance of protecting the elderly from predatory practices, even at the risk of acting paternalistic.[85] *Matthews* and other cases demonstrate that core contract doctrines buttressed by state and federal statutes are, to a certain extent, acting to protect vulnerable elderly consumers from abuse and predation. However, consider the case of *McCarthy v. Providential Corp.*,[86] which suggests a perspective opposite that of *Matthews*. In *McCarthy*, the plaintiffs were elderly homeowners who entered into reverse mortgages[87] with defendant Providential. The plaintiffs filed a class action in the Federal

---

another in person or property, in a way not competent for one alone" that results in actual damages. *Id.* at 889-90. The court found that the plaintiffs' allegations that agents of the mortgage company had close connections with at least one mortgage broker, coupled with the practice of using a "pitchman" to steer the elderly borrower to the lender, stated a claim for civil conspiracy. *Id.*

80. The alleged fraud included the representations regarding the plaintiffs' income and employment status, and the assertion that the lenders targeted the plaintiffs ultimately to defraud them of money or property (the equity in their homes). *Id.* at 890-91.

81. The state Corrupt Activities Act, patterned after the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, requires pleading of the same elements. *Matthews,* 185 F. Supp. 2d at 891-92.

82. *Id.* at 892-93.

83. *Id.* at 893.

84. *Id.*

85. *See, e.g.*, Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376 (Cal. Ct. App. 2001) (refusing to enforce an arbitration clause in a reverse mortgage agreement); Jones v. Adams Fin. Servs., 84 Cal. Rptr. 2d 151 (Cal. Ct. App. 1999) (refusing to compel arbitration of a claim of a blind, elderly woman against provider of reverse mortgage); Bell v. Congress Mortgage Co., 30 Cal. Rptr. 2d 205 (Cal. Ct. App. 1994) (refusing to enforce an arbitration clause in an elderly borrower's loan agreement on grounds of unconscionability); Assoc. Home Equity Servs. v. Troup, 778 A.2d 529 (N.J. Super. Ct. App. Div. 2001) (allowing trial on unconscionability in a predatory lending case brought by elderly plaintiffs); Williams v. Aetna Fin. Co., 700 N.E.2d 859 (Ohio 1998) (refusing to enforce arbitration clause), *cert. denied*, 526 U.S. 1051 (1999); Bennett v. Bailey, 597 S.W.2d 532 (Tex. App. 1980) (affirming finding of unconscionability in contract between elderly widow and dance studio); Arnold v. United Cos. Lending Corp., 511 S.E.2d 854 (W. Va. 1998) (refusing to enforce arbitration clause).

86. 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 525 U.S. 921 (1998).

87. A reverse mortgage is a relatively new financial device designed to provide senior citizens with added income. The homeowner receives monthly advances under the loan, which is secured by the equity in the borrower's house. Repayment of principal and interest is deferred for as long as the borrower continues to live in the home, but often the lender receives an equity interest in the property. *See generally*, FTC et al., REVERSE MORTGAGES (1993), *at* http://www.ftc.gov/bcp/conline/pubs/homes/rms.htm (last visited Oct. 2, 2002). Increases in the property values in the rising real estate markets characteristic of the last decade means that the lender's profits from equity can be quite substantial. Despite the obvious benefits resulting from a reverse mortgage, it can become a device under which elderly consumers might be defrauded by unscrupulous lenders seeking to cash in on the popularity of the device and exploiting the needs of senior citizens for income. *E.g.*, Michael Licamele, *Consumer Alert: Reverse Mortgage Scams*, MORTGAGE ALMANAC (1997), *at* http://mortgagealmanac.com/articles/97-consalrevmtgescams.html (last visited Oct. 2, 2002).

District Court for the Northern District of California alleging, as in *Matthews,* lender violations of the TILA and additional state law claims.[88] However, in *McCarthy* the mortgage contracts contained an arbitration clause, which raised questions regarding enforceability of these clauses under the Federal Arbitration Act (the FAA) and related case law.[89] After discussing the federal policy that favors arbitration, the court turned to the plaintiffs' arguments that the clause should not be enforced because of a duty to disclose and because the clause was unconscionable.[90] In response to the plaintiffs' claim that based on California State law the lender had a duty to disclose to senior citizens the arbitration provision and its consequences, the court said

> [I]t does not take a "clairvoyant" to understand the meaning of the clause. Regrettably, plaintiffs' assumption of loans without understanding all of the terms of the contract may represent the norm and not the exception. This failure to inquire, however, will not shield them from obligations clearly and explicitly contained in the agreement.[91]

With respect to the plaintiffs' claim that the clause ought not be enforced because it was unconscionable, the court found no substantive unconscionability, since, in its view, the clause standing alone was not unfair.[92] Applying federal law to determine the validity of these equitable claims,[93] the district court enforced the arbitration clause. Finally, the court concluded that it could not compel arbitration on a class-wide basis, absent an agreement to such effect in the clause at issue.[94] Thus, any and all federal and state rights to a class action in court were, in effect, waived by the plaintiffs under the arbitration clause, which even if read, most likely was not understood.

The Ninth Circuit dismissed the plaintiffs' appeal on the grounds that it had no jurisdiction to review the court's order.[95] Beyond briefly mentioning the plaintiffs' status

---

88. McCarthy v. Providential Corp., 1994 WL 387852, at *1 (N.D. Cal. July 19, 1994).

89. For a brief, but exhaustive account of the history of mandatory consumer arbitration in the United States, see generally Jean R. Sternlight, *Is the United States Out on A Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to the Rest of the World*, U. MIAMI L. REV. (forthcoming 2002); *see also* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1267 (2001) (arguing that "[c]oerced pre-dispute mandatory arbitration . . . simply serves to thwart legitimate use of the legal system" and proposing amendments to FAA).

90. In *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Supreme Court found that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements" without running afoul of the FAA. Thus, attention shifted back to these state law theories in determining the validity of arbitration clauses in contracts. Consumers have had varying degrees of success using these theories to invalidate arbitration clauses. *See* Sternlight, *supra* note 89.

91. *McCarthy*, 1994 WL 387852, at *5.

92. *Id.* at *6.

93. This foray into a new federal common law of contracts—*Swift v. Tyson* redux—was fortunately brief. The precedent relied upon by the district court, *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988), was recently overruled by the 9th Circuit in *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 941-42 (9th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 1075 (2002). Thus, state law principles regarding adhesion contracts now can be raised in the 9th Circuit and are to be applied by federal courts. *Ticknor*, 265 F.3d at 942. One wonders, nonetheless, given the district court's harsh indifference, whether the district court would have changed its decision even if mandated to apply state law.

94. *McCarthy*, 1994 WL 387852, at *7-8.

95. McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997). The jurisdiction issue was reversed by the Supreme Court in *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). *See also* Interactive

and circumstances, and while "acknowledg[ing] and agree[ing] with the dissent's concerns about the potential harshness of the arbitration requirement,"[96] the appellate court seemed indifferent to any potential injustice that might result from referring the matter to arbitration. By contrast, the dissenting opinion in the appellate decision addresses the equitable matters in the case—matters that had been shrugged off (or hushed up) by all other judges until this end point of the litigation. The dissenting judge noted:

> [T]hat the majority's new jurisdictional rule effectively deprives the senior citizens of any hope for review of their claims that Providential effectively cheated them out of their home equity. As stated above, TILA provides for class actions in federal court . . . .
>
> Instead, the senior citizens have been denied their day in federal court and have been told to turn to arbitration. Because we have held that the Federal Arbitration Act does not permit consolidation of separate arbitration claims absent express language in the arbitration clause that allows such consolidation, the senior citizens will be forced to separately arbitrate each individual claim in a proceeding that may be prohibitively expensive. In support of its motion to compel arbitration, Providential submitted the 1993 Commercial Arbitration Rules of the American Arbitration Association. Based on the rates found within these rules, and assuming a multi-arbitrator panel sitting for five days, average minimum damages of $50,000, and a class-wide total of 1500 members, the senior citizens in the proposed class would have to pay over $3.75 million to even gain access to the arbitral system. *Each* senior citizen would be forced to pay $2,500 of out-of-pocket expenses to proceed to arbitration. This represents a tremendous sum for an elderly person who relies on income from a reverse mortgage. Hence the majority's new jurisdictional rule may do more than close the door on federal court proceedings; it effectively sounds a death knell for the entire action.[97]

In the clash among the *McCarthy* judges, one can see the formal rules of jurisdiction and tenets of market rationality and efficiency come head-to-head with a basic sense of ethics, decency, and fair play. The case demonstrates the tenuous protections that contract law can provide to American citizens. Throwing our elderly out of court in the name of caseload management—through implementation of concepts of rationality and presumed bargaining strength that bear little resemblance to any actual consumers much less the ones at issue in these cases—is ethically dubious. It is hard to argue that exploitation and abuse of the elderly, as in the alleged predatory lending practices in *Matthews* and *McCarthy*, is consistent with any deeply held American values about justice or fair play. It is even harder to argue that courts should turn their backs on the elderly seeking to vindicate their rights for justice and fair play. Hopefully, respecting the elderly should be a basic value beyond dispute. Unfortunately, the Ninth Circuit's individualist, antipaternalist, approach in *McCarthy* is not an isolated occurrence in

---

Flight Techs., Inc. v. Swissair Swiss Air Transp. Co., 249 F.3d 1177 (9th Cir. 2001) (recognizing that the *McCarthy* jurisdiction rule was overruled by *Green Tree*).

96. *McCarthy*, 122 F.3d at 1245.

97. *Id.* at 1249 (Pregerson, J., dissenting) (internal citations omitted).

American case law, even in contracts involving the elderly.[98]

C. Case Law in Light of the Guidelines

How does the domestic doctrine laid out in the previous sections fare in light of the *Expanded Guidelines* and current international norms? The conclusion is a mixed one, for *Matthews* and *McCarthy* suggest two emerging and competing trends in recent contract case law, the former as demonstrably equitable as the latter is rigid. It is important to observe that *McCarthy*'s formalism represents a position in American contract law that has been accepted for many years. Results such as those seen in *McCarthy* are thus in harmony with abundant precedent and leave little room for consideration of the circumstances of the elderly. Yet, given that the elderly are a segment of American society deserving of protection from abuse and victimization, risking paternalism seems eminently warranted, if not entirely just. Thus, the approach seen in *Matthews* exemplifies the correct position. While current case law fortunately appears largely to follow *Matthews*, reliance upon an ad hoc case-by-case method that appeals to the moral sense of the judiciary to protect senior citizens exposes already vulnerable plaintiffs—the defrauded, the poor, the elderly—to more abuse by *McCarthy*-like legal process.

Unlike *Matthews*, the *McCarthy* approach is hard to reconcile with the principles set out in the *U.N. Guidelines*. The contracts in both *Matthews* and *McCarthy* are of the sort clearly contemplated by paragraph 21 of the *1999 Expanded Guidelines*—one-sided standardized credit contracts with unconscionable conditions—which the *Guidelines* suggest contravene basic principles of fairness to which consumers are entitled.[99] The refusal of the *McCarthy* courts to permit a class action, and the summary dismissal of the case by both the trial and appellate courts raises another significant question concerning whether basic due process has been given to plaintiffs forced to arbitrate their claims, calling into question the adequacy of redress available to abused consumers in the United States.[100] Finally, the *McCarthy* courts' rigidity seems blind to the "gender perspectives and the special concerns of older people" suggested as valid concerns by the United Nations.[101] In terms of fairness, adequacy of redress, and sensitivity to context, *McCarthy* comes up woefully short when measured against international standards. Internationally, the *McCarthy* decision is inadequate, though it is consistent with some of the prevailing domestic contract law perspectives on unconscionability.

It is also important to observe that cases such as *McCarthy*, and the market-based anti-interventionist stance of American contract law policy, not only go against U.N. policy, but also occupy a position opposite from approaches found in other parts of the world. For example, the European Union (EU), without much controversial debate on the

98. *See, e.g.*, Williams v. First Govt. Mortgage & Investors Corp., 974 F. Supp. 17 (D.D.C. 1997) (refusing to find the contract of an elderly party unconscionable in its entirety), *rev'd*, 225 F.3d 738 (D.C. Cir. 2000); Williams v. Aetna Fin. Co., 700 N.E.2d 859 (Ohio 1998) (Cook, J., concurring in part and dissenting in part) (finding no unconscionability in a loan agreement between a lender and elderly borrower, even in the face of fraud), *cert. denied*, 526 U.S. 1051 (1999); *see also* Eggert, *supra* note 65, at 596-98, 597 n.479 (describing an account of a predatory lender's strategic use of arbitration in contracts with the elderly).

99. *See supra* text accompanying notes 53-54.

100. *See supra* text accompanying note 55.

101. *See supra* note 52 and accompanying text.

fairness issue, has taken an approach to regulating unfair contract terms dissimilar to the United States case-by-case method.[102] In the EU, under the Unfair Terms in Consumer Contracts Directive (UTCC Directive), "unfair terms" in standard boilerplate consumer contracts are invalid, and a detailed gray-list of terms provides specific terms that contravene principles of fairness.[103] Under the UTCC Directive, arbitration clauses such as seen in *McCarthy* would be nonbinding.[104] The United States' liberal enforcement of arbitration clauses in consumer contracts is, in fact, quite idiosyncratic. Disparities in the treatment of contract fairness issues may arise also because of legal history and culture. For example, with their Roman law origins, civil law countries have a perspective on the meaning of good faith and fairness that is often much broader than that seen in common law jurisdictions such as the United States.[105] Nordic countries, with a system of social contract law, will also treat issues of fairness in consumer contracts in a manner that proceeds from presuppositions substantially different from the free-market principles from which American contract law is derived.[106]

This juxtaposition of *Matthews*, *McCarthy*, the *U.N. Expanded Guidelines*, and other jurisdictions' approaches demonstrates how basic notions of contract fairness prevalent in other areas of the world diverge significantly from American approaches. In other words, the centuries-long effort in the United States to enhance freedom of choice as the bedrock principle of contract law and to limit paternalism is beginning to run squarely into opposite viewpoints emerging from the international community. Conflicts such as these most likely are going to increase in upcoming years, which raises the question of what the response should be in the United States where such disparity exists. It could be argued that international norms have little or no relevance when questions of local contract law and policy are raised. Because resolution of these questions hinges on the impact that globalization may have on domestic law, this Article turns to the globalization debate.

IV. AMERICAN CONTRACT LAW IN THE NEW AGE

What should be the local response when core doctrines are challenged by international standards? International actions such as the *Expanded Guidelines* highlight the uneasy tension that can exist between international approaches and United States law and theory and call into question current domestic attitudes toward fairness in contract

102. *See generally* Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95). While Council Directives do not have an immediately binding effect, under the Treaty of Amsterdam, member states are required to transpose into their national laws Directives issued by the European Council. *See* TREATY OF AMSTERDAM AMENDING THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) art. 249 (1997).

103. Council Directive 93/13/EEC Annex. An unfair term is one that "contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer." *Id.* art. 3(1)

104. *Id.* Annex ¶ (q) (gray-listing mandatory arbitration clauses). For a comparison of the United States approach to mandatory arbitration with that of the rest of the world, see Sternlight, *supra* note 89.

105. *See generally* GOOD FAITH IN EUROPEAN CONTRACT LAW (2000) (Reinhard Zimmermann & Simon Whittaker eds., 2000) (comprehensive series of essays on the history and application of the doctrine of good faith in Europe).

106. *See* THOMAS WILHELMSSON, SOCIAL CONTRACT LAW AND EUROPEAN INTEGRATION 7-11 (1995).

law. Moreover, the *Expanded Guidelines*' instruction to developed countries to consider the global impact of local policies rests on an emerging international perspective that the global and local are significantly linked. Unfortunately, American lawmakers, policy analysts, and scholars have quite limited options in response to disconnection that might exist between local practice and international norms.

One simplistic response to the question posed at the beginning of this Part might be simply to continue the practice of avoidance. In other words, American contract law can, and should, proceed without serious attention to global issues. Under this approach, which often seems to be the ascendant strategy, the United States would continue with its domestic views. Issues discussed in the previous Part—the exploitation and abuse of citizens such as the elderly, and denial of access to our courts through broad enforcement of arbitration clauses–would be deemed local domestic matters under this view and not international concerns. In other words, the question of the congruity of local law with international perspectives such as the *Expanded Guidelines* simply would be ignored, as would be the impact of United States policies on the world.

One has to wonder how realistic a practice of avoidance would be. The interdependence of countries associated with globalization suggests that international perspectives on issues can be germane to domestic debates. It is quite possible, as the *Expanded Guidelines* suggest, for local policies to have international impact. Moreover, the development of international business and consumer markets creates needs for uniformity and predictability of law that is undermined when national law diverges from international standards. Thus, avoidance no longer seems to be a tenable proposition. Global perspectives on contract law simply cannot be excluded as completely irrelevant to the questions of domestic law reforms.

What alternative strategies exist? The answer requires an understanding of the phenomenon of globalization, a debate that is carried on, initially, far away from the domain of contract law. However, globalization of markets during the last decades ratchets the geopolitical debate back into commercial areas. After a brief account of that debate, this Article argues that the predominant views on globalization suggest two different routes for the United States: one of dominance or one of engagement.

A. The West in an Era of Globalization

In political discourse, two competing theories on global politics have dominated the globalization debate during the last decade. The collapse of Eastern Europe and the Soviet Union in the late 1980s and early 1990s resulted in a rethinking of views of how international relations and development would proceed in the new era. The opposing perspectives are represented in the positions taken by Francis Fukuyama[107] and by Samuel P. Huntington[108].

In 1992, Francis Fukuyama[109] argued that, from the ashes of the Cold War, nations

107. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

108. SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

109. Professor Fukuyama's 1992 book emerged from a 1989 article in *The National Interest* in which he first "argued that a remarkable consensus concerning the legitimacy of liberal democracy as a system of government had emerged throughout the world." FUKUYAMA, *supra* note 107, at xi (discussing the background

would move continuously toward the Western model of liberal democracy. Although the rate of advancement might vary,[110] the current era would involve "one journey" to the "one destination" of democracy.[111] Assuming that a global progression toward liberal democracy was inevitable, Fukuyama claimed that history, traditionally understood, might be considered dead.[112] Thus, for Fukuyama, the Cold War represented the ultimate victory—politically, economically, and culturally—of the West over the world. As Guyora Binder has stated, "Fukuyama read[] the collapse of communism as the millenarian triumph of liberalism and the end of meaningful struggle over values in international politics."[113]

A few years after Fukuyama's *The End of History*, Samuel Huntington presented a position on the aftermath of the Cold War quite distinct from Fukuyama's. Huntington argued that the post-Cold War era would see a conflict between civilizations and a reconfiguration of global politics along the lines of culture rather than the lines of ideology laid down after World War II.[114] Instead of an inevitable, and indeed inexorable, push toward the West posited by Fukuyama, Huntington predicted that the upcoming era would bring a realignment of world order focused on multiple civilizations (rather than upon the West alone). The principle source of tension in a multicivilization international regime would be clashes between cultures.[115] Conflict, rather than the harmony and peace suggested by Fukuyama, would define the post-Cold War era.[116]

---

of *The End of History and the Last Man*). During this rough time period, the Berlin Wall fell and the Soviet Union collapsed.

110. *E.g.*, *id.* at 39-51, 338-39 (describing the progressive growth in numbers of liberal democracies in modern history and arguing that the journey toward that goal may take different paths).

111. *Id.* at 339.

112. *Id.* at 51 ("[I]f we are now at a point where we cannot imagine a world substantially different from our own, in which there is no apparent or obvious way in which the future will represent a fundamental improvement over our current order, then we must also take into consideration the possibility that History itself might be at an end.").

113. Guyora Binder, *Post-Totalitarian Politics*, 91 MICH. L. REV. 1491, 1492 (1993) (reviewing *The End of History and the Last Man* and critiquing Fukuyama's interpretation of Hegel).

114. HUNTINGTON, *supra* note 108, at 13 (predicting the development of inter-civilization conflict) *Id.* at 125 (discussing geopolitical reconfiguration). Professor Huntington's prediction of the clash of civilizations first appeared as a 1993 article in *Foreign Affairs*. *See id.* at 13. His book extensively develops and elaborates the argument initially raised in the article.

115. *The Clash of Civilizations* ends as follows:

> The futures of both peace and Civilization depend upon understanding and cooperation among the political, spiritual, and intellectual leaders of the world's major civilizations. In the clash of civilizations, Europe and America will hang together or hang separately. In the greater clash, the global "*real clash*" between Civilization and barbarism, the world's great civilizations, with their rich accomplishments in religion, art, literature, philosophy, science, technology, morality, and compassion, will all hang together or hang separately. In the emerging era, clashes of civilizations are the greatest threat to world peace, and an international order based on civilizations is the surest safeguard against world war.

Id. at 321.

116. *Id.* at 31-32 (discussing the "illusion" of harmony brought forth by the end of Cold War). In a subsequent book, Professor Fukuyama detailed the key difference between his views and Professor Huntington's as one of whether a "clash" was inevitable. FUKUYAMA, *supra* note 8, at 5-6. Unlike Huntington, Fukuyama does not see cultural difference as necessarily leading to conflict:

> Huntington is clearly correct that cultural differences will loom larger from now on and that all

The broadest parameters of the Fukuyama-Huntington debate focus on global relations between states in the post-Cold War era and on the role that core Western values of democracy and liberty play in nation building. In addition, Western capitalism and markets have a prominent place in both Fukuyama and Huntington's paradigms. Along with liberal democracy, capitalism is a goal toward which all societies aspire in the progression predicted by Fukuyama. Sometimes effusive about Western capitalist culture, Fukuyama paints the West, even in facets beyond political organization and basic freedoms, as bearing attributes much emulated and admired by undeveloped and developing countries. With regard to American consumer culture and Western materialism, Fukuyama is often hyperbolic and uncritical. Modern consumerism in its Western garb is posited as a "universal economic nexus," which links all branches of mankind (other than, perhaps, Indian tribes in the most remote portions of the world).[117] For Fukuyama, such linkages are positive developments wherever they occur.[118] Traditional cultures in other countries, by contrast, can be potential obstacles to development.[119] Thus, Fukuyama seems to accept as ends for any society not only capitalism, but also the American consumer society and materialist values. He argues these values are not only largely positive domestic attributes, but are laudable goals to which other countries aspire.

Huntington's views on capitalism and American consumerism are more complex than Fukuyama's views on the same. Like Fukuyama, Huntington recognizes that cultural differences or similarities can impede or advance economic development along Western lines within a given community.[120] However, Huntington does not equate Western culture and civilization with Western markets and consumerism in the manner that Fukuyama often so strongly does. Huntington believes the cultural values that establish the foundation of civilization are quite distinct from market and consumer values. Western civilization, for Huntington, therefore is grounded in core beliefs and institutions such as democracy and liberty, rather than the accoutrements of consumerism in American life.[121] With respect to non-Western civilizations, Huntington's position is

---

> societies will have to pay more attention to culture as they deal not only with internal problems but with the outside world. Where Huntington's argument is less convincing, however, is that cultural differences will necessarily be the source of conflict. On the contrary, the rivalry arising from the interaction of different cultures can frequently lead to creation change, and there are numerous cases of such cultural cross-stimulation.

Id.

117. FUKUYAMA, *supra* note 107, at 126.

118. *Id.* ("While not every country is capable of becoming a consumer society in the near future, there is hardly a society in the world that does not embrace the goal itself."). The fact that consumer desires are culturally determined is recognized by Fukuyama, nonetheless. *See id.* at 63 (discussing how consumer desires might vary depending on culture and its development).

119. *E.g.*, *id.* at 215 ("Culture—in the form of resistance to the transformation of certain traditional values to those of democracy—thus can constitute an obstacle to democratization.").

120. *E.g.*, HUNTINGTON, *supra* note 108, at 134-35; Samuel P. Huntington, *Cultures Count*, *in* CULTURE MATTERS xiii-xiv (2000) (discussing culture as variable in economic development); *see also* FUKUYAMA, *supra* note 8 (providing a detailed account of intersection of economic and cultural life). Professors Fukuyama and Huntington do not appear to differ widely in their view that economic development is a goal of civil society.

121. HUNTINGTON, *supra* note 108, at 58 ("The argument now that the spread of pop culture and consumer goods around the world represents the triumph of Western civilization trivializes Western culture. The essence of Western civilization is the Magna Carta, not the Magna Mac. The fact that non-Westerners may bite into the

that one cannot argue from acceptance of Western consumption patterns anything deeper with respect to acceptance of these deeper and critical core components of Western culture.[122]

Recent events in the United States and abroad have caused many to speculate as to whether Fukuyama or Huntington has accurately set forth the appropriate paradigm for viewing the post-Cold War era.[123] As just discussed, the debate brings with it not only broader issues regarding international politics, but also issues regarding the role that Western capitalism, consumer culture, and materialism play in the post-Cold War era. With the latter set of issues comes the connection between globalization and the domain of domestic contract law.

Law, including contract law, is a significant force that has aided in the creation of the Western consumer society and that advances Western capitalism.[124] Domestic commercialism does have a cultural dimension, a point that both Fukuyama and Huntington recognize, and sterile assumptions that markets are not impacted by culture simply are not sustainable. Domestic contract law, in other words, is as much an expression of American culture and economic beliefs as it is an expression of ostensibly neutral, universal market principles.

With its cultural grounding, capitalism and the American consumer culture also are potentially sources of conflict and of dispute, not only domestically, but also internationally. American capitalism is integrally based upon consumerism, with consumer debt constituting a significant segment of all American debt.[125] The culture of consumption and debt has deep roots in American history.[126] Yet, with consumerism has come a declining net savings rate[127] and rapidly escalating amounts of consumer installment debt.[128] The increasing amounts of debt to fuel American consumption not surprisingly has contributed to an increased number of bankruptcy filings.[129] A culture

---

latter has no implications for their accepting the former.").

122. *Id.* at 58-59.

123. Editorial, *The Start of the 21st Century,* ASIAN WALL ST. J., Jan. 2, 2002, at 5 (advancing Fukuyama hypothesis in light of changing events); Joel Achenbach, *The Clash*, WASH. POST, Dec. 16, 2001, at W17 (extensive discussion of the debate between Fukuyama and Huntington); Francis Fukuyama, *Islam's Clash with Modernization,* STRAIGHTS TIMES, Nov. 27, 2001 (rejecting the Huntington thesis); Francis Fukuyama, *History is Still Going Our Way*, WALL ST. J., Oct. 5, 2001, at A14 ("I believe that in the end I remain right."); Edward W. Said, *The Clash of Ignorance*, THE NATION, Oct. 22, 2001, at 11 (critiquing Huntington).

124. *Cf.* ROBERT D. MANNING, CREDIT CARD NATION 31-65 (2000) (analyzing the causes of the American debtor society). For example, to the extent that laws encourage or facilitate the assumption of consumer debt, then more debt will be assumed and vice versa. If laws provide incentives for increased consumer savings, then the savings rate will increase.

125. *See id.* at 34 fig. 2.1 (2000) (quoting Federal Reserve Board statistics). Consumer and household debt constitute the largest piece of the American debt pie, totaling $6.5 trillion in 2000, followed by federal debt ($5.8 trillion), then by corporate debt ($4.3 trillion). *Id.*

126. *See, e.g.*, LENDOL CALDER, FINANCING THE AMERICAN DREAM: THE CULTURAL HISTORY OF CONSUMER CREDIT (1999) (comprehensive history of consumer credit in the United States); MANNING, *supra* note 124, at 35-45.

127. MANNING, *supra* note 124, at 41 tbl. 2.2.

128. *Id.* at 65 (quoting Federal Reserve statistics on installment debt).

129. *See* THERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS 3 (2000) ("Since World War II the increase in bankruptcy filings in the United States has been relentless, and recently spectacular."). In this comprehensive demographic study of persons filing for bankruptcy in 1991, the authors identify a complex mix of factors that may have contributed to the documented explosion in filings. These factors include increases in

of perceived excessive materialism has caused some critics to comment on the negative impacts that such a consumer-driven society has on the quality of modern life.[130] Thus, behind the sheer power wielded by consumers in the American economy lie subtle domestic policy concerns regarding the intersection of American consumerism with American class society and noncommercial cultural and social values.

The globalization debate adds a complex layer of issues regarding the impact of American culture around the world. American commercial culture also has ramifications globally, raising a debate that ranges from issues as mundane and seemingly trivial as the global reach of Western media and popular culture to issues regarding the most sophisticated nuances of international finance.[131] In the former vein, and often tracking Huntington's careful distinction between culture and consumerism, Benjamin R. Barber has comprehensively described the new era as a conflict between the realms of "Jihad" and "McWorld," with Western free-market institutions, media, materialism, and consumer society comprising the core of the latter sphere.[132] Barber sees the expansion of Western popular culture through globalization of markets (and, importantly, with the absence of globalizing democracy) as having given birth to McWorld.[133] While Huntington views Western materialism and consumerism as superficial to the real question of what is American culture, Barber's point is somewhat different. For Barber, American materialism and consumerism, combined with globalization of markets, is the DNA of McWorld.[134] But, similar to Huntington, Barber rejects the view that Western materialism and markets are coextensive with Western democracy and civil society properly understood.[135] Barber calls for a return to democratic institutions that would mediate the conflict between the rawest forms of Jihad and McWorld now ascendant.[136]

Thus, in contemporary political theory, two theories have emerged regarding the current era, each starting from opposite perspectives on how global relations will play out in the post-Cold War era. On the one hand, Fukuyama predicts a progressive—albeit painful—move to the West will be and is occurring. On the other hand, Huntington argues that there will be, and is, a reordering of the world along civilization lines, with a clash between emerging and established civilizations. In either case, Western capitalism, markets, and consumerism play a significant role. Under the former paradigm, the Western market economy and consumerism are a goal toward which all countries aspire. Under the latter paradigm, they can be a source of civilization conflict. Contract law and

---

the amount of consumer debt taken on by American consumers, threats to traditional "safety nets" of American life that ordinarily would ensure financial stability such as marriage and stable employment, and general changes in consumer attitudes towards debt acquisition. *Id.* at 24-26 (summarizing findings).

130. *See, e.g.*, JOHN DE GRAAF, ET AL., AFFLUENZA (2001) (equating excessive consumerism to a disease); ROBERT H. FRANK, LUXURY FEVER (1999) (commenting on the luxury-driven consumption in the United States and proposing alteration of domestic consumption incentives).

131. *E.g.*, SOROS, *supra* note 7 (discussing shortcomings of WTD, IMF, and World Bank in global finance); STIGLITZ, *supra* note 10 (discussing the role of IMF in globalization).

132. BENJAMIN R. BARBER, JIHAD VS. MCWORLD (1995)

133. *Id.* at 6-7.

134. *Id.* at 17 ("McWorld is a product of popular culture driven by expansionist commerce. Its template is American, its form style").

135. *Id.* at 298 ("McWorld has virtues, then, but they scarcely warrant permitting the market to become sovereign over politics, culture, and civil society.").

136. *Id.* at 293-300.

consumer culture, while certainly not at the center of this debate, do play supporting roles. In that light, the foregoing discussion suggests two routes along which contract law might proceed in an era of globalization.

B. Routes of Dominance and Engagement

First, the Fukuyama hypothesis suggests a strategy of dominance as one route. A dominance strategy in response to globalization, at an essential point, tracks the Fukuyama thesis regarding the post-Cold War era. A dominance strategy would claim that current Western approaches, such as unfairness in contracts, are not only normatively desirable, as a matter of domestic policy, but also are positions that should be adopted internationally.

However, one wonders whether such a dominance strategy, at least an uncritical one, is an appropriate or realistic response. The *Expanded Guidelines* discussed in this Article indicate that the dominance strategy often seems to rely upon a mistaken characterization of the current position of the West in the global community. The *Expanded Guidelines* suggest that many countries do not devise their contract law policies from a template of how the West does things. Nor do the *Expanded Guidelines* suggest any necessary desire on the part of non-Western communities to make their cultures mirror that of the United States, as Fukuyama implicitly suggests is occurring. In fact, the *Expanded Guidelines* support the opposite conclusion—that domestic commercial culture has as much propensity to be part of the clash posited by Huntington as do other cultural attributes. Thus, as recognized by Huntington, disparate attitudes in contract law and policy can be a potential source of conflict in global relations.

Even assuming that American law should play a dominant role on the international stage, a domination strategy in a post-colonial era requires delivery of a palatable product. Yet, with respect to fairness issues in contract law, often the United States marginalizes itself from the rest of the world. If the United States wants to play a leading role in international law reform through a strategy of dominance, an assessment of whether what we propose is acceptable to other areas of the world is necessary. However, the contrast between American and international approaches to contract fairness suggests that sometimes our existing standards might not be acceptable.

The alternative route, one of engagement, tracks the Huntington thesis on globalization. Under this perspective, future law reform efforts in the United States should take into consideration potential conflicts between local norms and international standards. Subtle weighing and balancing problems are, of course, raised in such an inquiry. Simply because American law diverges from some—or even all—of the world is not a sufficient reason to change a domestic law, any law.[137] Nevertheless, a perspective that proceeds from engagement requires domestic consideration of the validity of other countries' approaches to identical or similar issues. An engagement perspective would require us to consider what values are promoted internally by the existing position, and the power that those values hold in American political and commercial culture. Turning outwards to the world, an engagement strategy requires local legal professionals to

137. *Cf.* Sternlight, *supra* note 89, at 528. Difference inevitably will exist across cultures. The question rather is one of whether a domestic position so far marginalizes the United States from the rest of the world that the position cannot be defensibly held given its uniqueness.

consider the cultural impact of the legal products they propose to disseminate internationally.

An engagement strategy may be an inherent consequence of globalization, albeit a consequence that is not entirely a welcome addition to domestic law reform questions. Given that engagement requires local law reformers to give consideration to international concerns, this route may be one many Americans will find difficult to accept. Acceptance may also be impeded because an engagement strategy calls into question the idea of efficiency as the core guiding principle of contract law. An engagement strategy's international reach requires a reformulation of human desires and motivations that has validity across commercial cultures. Engagement brings back to the table the basic issues of fairness and justice ignored by some courts and theorists in the last few decades. It suggests that paternalism may be a theoretically acceptable justification for intervention. In other words, engagement completely undercuts the cultural and economic universalism now prevailing in some corners of American jurisprudence.

If a strategy of avoidance is no longer realistic, dominance inadvisable, and engagement the only viable route to the future, how should the international perspective on consumer contract fairness contained in the *U.N. Expanded Guidelines* be reconciled with the American approach that can often diverge from the *Guidelines*? One could argue that the contrast in approaches strongly indicates that a widespread blindness, in the name of the market, often exists to the injustice that routinely takes place in our own backyard. It is untenable, if not hypocritical to, on the one hand, extol due process as a fundamental American and Western precept—one to be emulated globally—while on the other hand routinely deny consumers access to the courts as occurred in *McCarthy*. The tenuous ability of American contract law to accommodate moral and ethical principles of fairness and to ensure access to justice, recognized as a core by the *Expanded Guidelines*, advances few deeply held and core American political values. Often local fairness approaches diverge from much of the world, including other developed and industrialized countries. When all these factors are balanced, the engagement theory suggests that, consistent with the *Expanded Guidelines*, domestic legislatures and courts need to reevaluate the historic antipathy toward regulating fairness in consumer contracts, ensure that adequate checks exist protecting consumers (particularly elderly consumers) from abuse and predation, and rigorously defend consumers' access to justice.

V. CONCLUSION

American contract law and scholarship have been carefully shielded from the impact of globalization during the last decades. However, as has been argued, globalization has pushed contract law into a new era. It is an era that will bring with it issues of sustainable consumption, Western dominance, discerning basic values capable of being accepted internationally, and the impact of international policies on domestic policies. The *United Nations Expanded Guidelines* provide an example of how local perspectives can be challenged by the international community.

Some predictions are in order. In the next decades, the debate in legal scholarship will shift away from dry assessments of the market and rational utility maximization—assessments that are removed from culture and context—to the continuing vitality of

Western perspectives on contract law in the global economy. The role of the scholar in the new age will not be to address local concepts of efficiency with scientific precision or to devise a new slant on mandatory default rules. Rather, the challenge in the upcoming years will be to address the complex issues of the role of American law in the global community and its vitality and vulnerability in the face of the challenges from abroad. While leave taking always brings with it a bit of sadness, moving on is not without its excitement. No doubt there will be many interesting things for Contract to see, in the age of sustainable consumption.