OFFERS YOU CAN'T REFUSE: POST-HIRE NONCOMPETE AGREEMENT INSERTIONS AND PROCEDURAL UNCONSCIONABILITY DOCTRINE

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America's 21st Century offers, among other things, troublesome conditions for employees. Globalization and its accompanying race to the bottom; right-to-work laws and the de-unionization of workplaces; technological innovations that replace human capital overnight—these have all resulted in a highly competitive environment that is fraught with uncertainty, powerlessness, pressure, and ambiguity. Among these compounding factors weighing on the American worker is the noncompete agreement, especially the one that employees have no real choice but to endorse. Justice Brandeis famously quipped that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Accordingly, first and foremost, this Article sheds light on a common practice among American employers involving an offer to an existing employee for an employment contract modification under conditions that the employee has no real choice but to accept. Second, in line with suggestions provided by leading contracts scholar Melvin Aron Eisenberg, this Article offers a legally viable solution to the identified problem using the unconscionability paradigm—specifically designed to be implemented in Wisconsin. It develops these suggestions into a model based on observations from Chief Justice Shirley Abrahamson in the landmark case, *Runzheimer International, Ltd. v. Friedlen*. While based on this Wisconsin case, this model can be implemented beyond Wisconsin's borders. It is the author's hope that as a result of publication, greater visibility of the problem will result in progress toward greater reform.

INTRODUCTION

> *The essence of the Wisconsin idea has been looking forward, not backward, in the art of democratic living.*
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> —Justice Wiley Rutledge[1]

Make an offer he can't refuse.[2] This famous wordplay is well understood to mean that an offer one can't refuse—taken literally—is no offer at all. Less well understood is that this famous phrase could be likened to the legal concept of procedural unconscionability—which broadly represents an "absence of meaningful choice" in contractual bargaining due to positional disparities between contracting parties, whereas substantive unconscionability refers to contract terms that are themselves unreasonable.[3] While substantive unconscionability has been

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 University of Wisconsin Law School, J.D. Class of 2021. I am especially grateful to Steph Tai and to David S. Schwartz, each for invaluable feedback, commentary, and encouragement—thank you both. Thank you also to Skylar Croy, Anya Gersoff, Peter Konz, Donnie Malchow, Kim Peterson, and Olivia Radics for helpful input; to the *Wisconsin Law Review* for insightful edits; and to Joel Rogers for inspiring lectures. This Article is dedicated to Chief Justice Shirley Abrahamson—for her service to all the people of Wisconsin, and for her demonstrated commitment to justice and equality.

1. Wiley Rutledge, *Two Centuries of the Wisconsin Idea*, 1949 WIS. L. REV. 7, 7.

2. *See* THE GODFATHER (Paramount Pictures 1972) (the twentieth century's pinnacle film).

3. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (landmark case setting forth unconscionability doctrine); Arthur Allen Leff, *Unconscionability and the Code--The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (coining "procedural unconscionability," "bargaining naughtiness," and "substantive unconscionability" as the "evils in the resulting contract"); Michael Littlewood, *Freedom from Contract: Economic Duress and Unconscionability*, 5 AUCKLAND U. L. REV. 164, 178 (1985) (noting that when determining the presence of procedural unconscionability in contract, doctrines such as duress and undue influence

inherently incorporated into Wisconsin appellate courts' legal analysis of the enforceability of restrictive employment covenants barring competition, procedural unconscionability remains to be assimilated.[4] Notwithstanding, Wisconsin appellate courts' legal analysis for the presence of unconscionability in contracts continues to require ascertainment of both procedural and substantive unconscionability.[5] Nevertheless, a comprehensive search did not yield any Wisconsin appellate court case that includes both the standard analysis for the enforceability of a restrictive employment covenant, where five requirements are contemplated, in addition to a complete legal analysis for unconscionability.[6]

In light of the Wisconsin Supreme Court's 2015 holding in *Runzheimer International, Ltd. v. Friedlen*,[7] this Article uncovers an emergent issue relating to the presence of procedural unconscionability in noncompete agreements.[8] Taking note of sentiment expressed by leading contracts scholar, Melvin Eisenberg—who contends that the unconscionability paradigm mandates the judicial development of a more explicit doctrine addressing the exploitation of weaker parties—it advocates for the incorporation of procedural unconscionability doctrine into the legal analysis of the enforceability of noncompete agreements endorsed after an employee has already contracted for employment with an organization.[9] Moreover, in light of the increasing prevalence of

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are illustrative of the broader precept that one should not take undue advantage of another).

4. *See Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wis. 2009); *see also infra* Section III.B.

5. *Compare Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 165 (Wis. 2006) (noting that for a contract to be rendered unenforceable due to unconscionability, there must be a mixture of both procedural and substantive unconscionability), *with Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (1988) (noting that substantive unconscionability alone may be sufficient to render a contract's terms unenforceable); *see also infra* Part III.

6. *See Dal Pra*, 767 N.W.2d at 905; *see also Outsource Int'l, Inc. v. Barton*, 192 F.3d 662, 670 (7th Cir. 1999) (Posner, J., dissenting) ("I can see no reason in today's America for judicial hostility to covenants not to compete. It is possible to imagine situations in which the device might be abused, but the doctrines of fraud, duress, and *unconscionability* are available to deal with such situations." (emphasis added) (citation omitted)); *infra* Part IV (addressing why adding an unconscionability analysis to the current analysis for the legal enforceability of noncompete agreements would not adequately address problems of procedural unconscionability in noncompete agreements entered into post hire-date).

7. *See Runzheimer Int'l, Ltd. v. Friedlen*, 862 N.W.2d 879 (Wis. 2015).

8. *Id.* at 882 ("We hold that an employer's forbearance in exercising its right to terminate an at-will employee constitutes lawful consideration for signing a restrictive covenant.").

9. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212 (1995) ("[T]he . . . principle of unconscionability has given courts a warrant to develop more specific doctrines for review of contracting

noncompete agreements and related litigation, this Article seeks to serve as a potential resource for employment law litigators working under the purview of Wisconsin law.[10] Finally, this Article seeks to lay potential groundwork for future analyses pertaining to the presence of procedural unconscionability in arbitration agreements entered into by employees post hire-date.[11]

Accordingly, in Part I, this Article identifies a problem with noncompete agreements entered into after the employment contract's formation related to unequal bargaining power and illustrates how the unconscionability paradigm is uniquely fit to address it. In Parts II and III, it summarizes the doctrine so far used by Wisconsin courts to assess both the legal enforceability of noncompete agreements and unconscionability in contract, describing how the two analyses partially intersect. Finally, in Part IV, it proposes a solution to address the identified problem with noncompete agreements by infusing the procedural unconscionability doctrine into the legal analysis of the enforceability of noncompete agreements entered into post hire-date—and illustrates how the solution's relevance could extend beyond Wisconsin.

I. THE PROBLEM: A POTENTIAL FOR POST-*FRIEDLEN* PROCEDURAL UNCONSCIONABILITY IN NONCOMPETE AGREEMENTS

The apparent pragmatism of procedural unconscionability analysis in noncompete agreements, endorsed after an employee has already

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behavior that involves some kind of unfair exploitation of one party by the other . . . ."); *see also* Eisenberg, *infra* note 25, at 799–800.

10. *See, e.g.*, Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1164–65 (2001) (noting that the increase in workforce mobility has contributed to a more widespread use of noncompete agreements); Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 484 n.2 (1990) (finding that appellate decisions concerning noncompete agreements more than doubled between 1966 and 1988); Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 48 (2015) (finding an increase in the prevalence of noncompete clauses among CEO employment contracts over time); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 577–78 (2001) (noting that the volume of litigation surrounding noncompete agreements has "mushroomed" in recent years).

11. *See generally Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); Kelsey J. Dolven, *David Versus Two Goliaths: Why the Wisconsin State Legislature Needs to Update the Wisconsin Consumer Act by Placing Restrictions on Mandatory Arbitration*, 2014 WIS. L. REV. 139; Rob Ferrett, *What the Supreme Court's Arbitration Ruling Means for Businesses and Workers*, WIS. PUB. RADIO (May 22, 2018, 3:00 PM), https://www.wpr.org/what-supreme-courts-arbitration-ruling-means-businesses-and-workers [https://perma.cc/L7QE-4M5L].

contracted for employment with an organization, became evident on the heels of the Wisconsin Supreme Court's holding in *Friedlen*.[12] In *Friedlen*, the court held that an existing employee is legally bound to the terms of a restrictive employment covenant signed under conditions involving threat of imminent termination and exclusion from an incentive program.[13] In such a case, the court deemed that the employer's forbearance of termination is valid consideration, hereby rendering the post-hire modification of the employment contract legally binding.[14] The contract terms themselves may have been reasonable in *Friedlen*; but, they were not, in fact, evaluated.[15] Most concerning were the conditions under which the contract was signed—conditions that, quite literally, illustrate the hornbook definition of procedural unconscionability: absence of meaningful choice on the part of one of the parties.[16]

The *Friedlen* holding has come to represent conventional American jurisprudence: it in fact reflects the majority rule, with a little over half of the states finding continued employment to be lawful consideration in such cases.[17] The Wisconsin Supreme Court's holding in *Friedlen* is broader in scope than the purview of this Article, though; while the court's holding applies to restrictive covenants generally (including noncompete agreements), this Article centers only on noncompete agreements entered into after the formation of the employment contract.[18]

In the *Friedlen* opinion, the Wisconsin Supreme Court outlined and dismissed an important issue that could potentially arise in a case where an existing employee endorses a restrictive covenant. Namely, that an employee could be terminated shortly after endorsing the agreement—but

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12. *See Friedlen*, 862 N.W.2d at 883; *see also Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 943 (7th Cir. 1994) (examining a noncompete agreement presented shortly after employment contract's formation); *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 31 (Tenn. 1984) (same); *Midwest Sports Mktg. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 259 (Minn. Ct. App. 1996) (same).

13. *Friedlen*, 862 N.W.2d at 882–83.

14. *Id.* at 882.

15. *Id.* at 892.

16. *See, e.g.*, Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 255 (2002); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17–18 (1993).

17. *See, e.g.*, Stacy A. Alexejun, Andrea J. Fowler & Brandon M. Krajewski, *Continued Employment: Lawful Consideration in Non-Competes?*, 22 BUS. TORTS & UNFAIR COMPETITION 15, 17–21 (2015); *see also* Stone, *supra* note 10, at 581.

18. *See Friedlen*, 862 N.W.2d at 882; *see also* Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-Compete . . .": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 2 (2002) (noting that restrictive covenants applying to employees generally fit into the categories of "general non-competition," "customer (or client) non-solicitation," "employee non-solicitation," and "non-disclosure").

still be held to its provisions.[19] Post-*Friedlen*, for example, the following sequence of events certainly seems plausible: A Wisconsin employer (1) hires an employee; (2) conditions continued employment upon that employee's signing of a noncompete agreement; (3) terminates the employee not long after the agreement's endorsement, for a legitimate reason or perhaps no reason at all; and then (4) receives an injunction barring the former employee from competing with their former employer.[20] The *Friedlen* court dismissed the issue in its majority opinion, stating that "the employee would then be protected by other contract formation principles such as fraudulent inducement or good faith and fair dealing so that the restrictive covenant could not be enforced."[21] Crucially, however, Chief Justice Abrahamson wrote in her concurrence that "Friedlen's claims of fraudulent inducement and good faith and fair dealing are doomed to failure if Runzheimer promised to forbear only from immediately firing Friedlen."[22] Her conclusion rests on the sound premise that under such a scenario, Runzheimer would actually be abiding by its promise, so, therefore, Friedlen would not have a valid legal claim under either fraudulent inducement[23] or good faith and fair dealing.[24]

This Article, taking note of the sentiment expressed by Chief Justice Abrahamson, as well as leading contracts scholar, Melvin Eisenberg, contends that the contract formation protections mentioned by the Wisconsin Supreme Court should be extended into the realm of procedural unconscionability—specifically for noncompete agreements entered into post hire-date.[25] It works within the parameters of existing

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19. *See Friedlen*, 862 N.W.2d at 882.

20. *See* Staidl, *infra* note 79, at 117–18.

21. *Friedlen*, 862 N.W.2d at 882.

22. *Id.* at 896 (Abrahamson, C.J., concurring).

23. *Id.* at 895 (Abrahamson, C.J., concurring) ("[T]o show that Runzheimer fraudulently induced Friedlen to sign the covenant not to compete, Friedlen would be required to demonstrate that Runzheimer made a false statement. If all Runzheimer promised was to forbear from terminating Friedlen's at-will employment at that time, what false statement did Runzheimer make? The answer seems to be none.").

24. *Id.* at 896 (Abrahamson, C.J., concurring) ("[T]o show that Runzheimer breached the implied covenant of good faith and fair dealing, Friedlen cannot complain of acts specifically authorized by his agreement with Runzheimer. If all Runzheimer promised was to forbear from immediately terminating Friedlen's at-will employment, on what basis could Friedlen assert a breach of the covenant of good faith and fair dealing had Runzheimer fired Friedlen shortly after he signed the covenant not to compete? The answer seems to be none.").

25. *See* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 799–800 (1982) ("Over the past thirty years . . . a new paradigmatic principle—unconscionability—has emerged. This principle explains and justifies the limits that should be placed upon the bargain principle on the basis of the quality of a bargain. Looking backward, the new paradigm enables us to reconstruct prior theory and phenomena by providing a general explanation for a wide variety of contract concepts

Wisconsin law to advance the unconscionability paradigm in this context,[26] as opposed to advocating the creation of new legal doctrine.[27] Moreover, it is predicated upon the assumption that many existing employees presented with the binary option of either endorsing a noncompete agreement or being imminently terminated are uniquely exposed to an inherent risk of a high degree of procedural unconscionability.[28] To that end, many employees presented with these two alternatives would likely have no real choice but to accept the offer, whether they truthfully consent to its terms or not.[29] For instance, in 2017, 41% of Americans had insufficient funds to afford an unexpected $400 emergency expense.[30] If one of these 41% of Americans were presented with such an agreement, would they endorse it? Almost certainly.[31] If they did not, they would likely be at a loss for income and

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that heretofore seemed distinct. So, for example, duress may now be seen as simply a special case of the exploitation of distress; undue influence may now be seen as simply a special case of unfair persuasion; and the prohibition against exploiting palpable unilateral mistake may now be seen as a specific norm of unconscionability. Similarly, the apparent anomaly of review for fairness in courts of equity and admiralty can be explained by the new paradigm, while guidelines can now be set for that review; and the doctrine of general incapacity" (when the mistake of one party makes contract voidable) "might be reformulated to apply only when exploitation is present. *Looking forward, the paradigm must be articulated and extended through the development of more specific norms to guide the resolution of specific cases, provide affirmative relief to exploited parties, and channel the discretion of administrators and legislators.*" (emphasis added) (footnote omitted)); *see also* Eisenberg, *supra* note 9, at 212.

26. *See, e.g.*, Arnow-Richman, *supra* note 10, at 1234 (suggesting a formation-based analysis for noncompete agreement enforceability analogous to the one already used in premarital agreements).

27. *See infra* note 195 and accompanying text.

28. To what extent are such modern employment contracts "instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals?" Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

29. *See* James A. Harley, *Economic Duress and Unconscionability: How Fair Must the Government Be?*, 18 PUB. CONT. L.J. 76, 80 (1988) (observing that consent is the foundation of contract law); Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 63–64 (2003) (contending that procedural unconscionability undermines the very integrity of the legal system governing contract enforcement and illustrating how the tort, Consequential Procedural Unconscionability, could be used to hold contract manipulators accountable for the consequences of their actions).

30. *See Report on the Economic Well-Being of U.S. Households in 2017,* BD. OF GOVERNORS OF THE FED. RES. SYS. (May 2018), https://www.federalreserve.gov/publications/2018-economic-well-being-of-us-households-in-2017-dealing-with-unexpected-expenses.htm [https://perma.cc/D3X3-NLXG].

31. *See, e.g.*, *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 704 (Ohio Ct. Com. Pl. 1952) ("The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and

ineligible for unemployment benefits. Expenses like rent, food, and healthcare would suddenly become emergency expenses—except they would exceed $400.[32]

True, in Wisconsin's current analysis of the legal enforceability of restrictive employment covenants, those agreements the court deems to be unduly harsh or oppressive to an employee are not legally enforceable.[33] And this does serve as a good proxy for capturing substantive unconscionability.[34] However, not only are the contract provisions themselves relevant to the legal analysis of whether a restrictive employment covenant should be enforced, but so are the conditions under which those contract provisions were agreed to.[35] In the realm of noncompete agreements endorsed post hire-date—not just in Wisconsin, but in many states—there appears to be a need for the judiciary to do more to protect employees.[36]

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in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer.").

32. *See generally Wurtz v. Fleischman*, 293 N.W.2d 155 (Wis. 1980) (under Wisconsin law, economic duress requires a wrongful act; threatening an action within one's legal right to perform does not constitute duress).

33. *See Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wis. 2009).

34. *See, e.g.*, *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 171 (Wis. 2006); Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 769 (2014) ("A contract may be substantively unconscionable if it includes harsh, one-sided, or oppressive terms.").

35. *See, e.g.*, *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593, 596 (La. 1974) ("A strong public policy reason . . . for holding unenforceable an agreement exacted by an employer of an employee not to compete after the latter leaves his employment, is the disparity in bargaining power, under which an employee, fearful of losing his means of livelihood, cannot readily refuse to sign an agreement which, if enforceable, amounts to his contracting away his liberty to earn his livelihood in the field of his experience except by continuing in the employment of his present employer." (quoting *Nat'l Motor Club of La., Inc. v. Conque*, 173 So. 2d 238, 241 (La. Ct. App. 1965))); *see also Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971) ("[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?" "These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other . . . ." (quoting *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting))).

36. *See* Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 955 (1974) (noting that "[p]enal provisions in labor contracts . . . have only redistributional consequences . . . .").

And while the doctrines of good faith and fair dealing, as well as fraudulent inducement, are perhaps adequate in some cases to protect the interests of the weaker contracting party, Chief Justice Abrahamson raises a strong argument that these doctrines are indeed inadequate.[37] Moreover, intent is inherently difficult to prove or substantiate; inherent power disparities are more readily discernable.[38] Not to mention, one of American contract law's fundamental concerns is protecting the private orderings of legal affairs—the freedom for parties to voluntarily enter into contracts that each party believes at the time to be beneficial to his or her own interests, notwithstanding that which is determined in hindsight to be actually reasonable.[39] Finally, noncompete agreements that allow for injunctions against former employees working for new employers pose unique issues that involve the right to work in one's profession,[40] as well as a person's ability to provide for themselves financially in a specialized economy.[41] For these reasons, incorporation

37. *See supra* notes 23, 24.

38. *See* Arnow-Richman, *supra* note 10, at 1167 (expressing doubt that employees knowingly assume the risks associated with entering into noncompete agreements with employers); *see also* STEWART MACAULAY, WILLIAM WHITFORD, KATHRYN HENDLEY & JONATHON LIPSON, CONTRACTS: LAW IN ACTION, VOLUME II: THE ADVANCED COURSE 10–11 (4th ed. 2017) (citing Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000)).

39. *See, e.g.*, STEVEN J. BURTON & CHRISTOPHER R. DRAHOZAL, PRINCIPLES OF CONTRACT LAW 1–9 (5th ed. 2018); 17A AM. JUR. 2D *Contracts* § 29 (2020); *First Fed. Fin. Serv., Inc. v. Derrington's Chevron, Inc.*, 602 N.W.2d 144, 145 (Wis. Ct. App. 1999) (noting that all contracts require "a meeting of the minds in the formation of the agreement").

40. *See, e.g.*, *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 536 (1922) ("[F]reedom in the making of contracts of personal employment . . . is an elementary part of the rights of personal liberty and private property . . . consistent[] with the due process of law guaranteed by the Fourteenth Amendment . . . ."); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) ("The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."); *Slaughter-House Cases*, 83 U.S. 36, 116 (1872) (Bradley, J., dissenting) ("This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right."); David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287 (2016), https://www.yalelawjournal.org/forum/the-due-process-right-to-pursue-a-lawful-occupation-a-brighter-future-ahead [https://perma.cc/ABM5-EXUR].

41. *See, e.g.*, George A. Richards, *Drafting and Enforcing Restrictive Covenants Not to Compete*, 55 MARQ. L. REV. 241, 241 (1972); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 343–44 (2006).

of Wisconsin's procedural unconscionability doctrine is apt in appellate courts' legal analysis of noncompete agreements entered into after an employee has already contracted with an organization.[42] After all, its other half, substantive unconscionability, has already been subsumed into the legal analysis.[43]

The unpublished Wisconsin Court of Appeals case, *Engedal v. Menard, Inc.*,[44] puts the framework of this Article into a practical perspective and provides an example of a case that would most likely turn out differently if the proposed solution were implemented and the facts slightly changed.[45] The *Engedal* case provides an illustration of the contours of the problem addressed by this Article in a different context—namely, where substantive unconscionability, rather than procedural unconscionability, was excluded from the legal analysis and where an arbitration agreement, rather than a noncompete agreement, was under the court's review for enforceability.[46]

In *Engedal*, the Wisconsin Court of Appeals reversed an Eau Claire County Circuit Court decision in favor of a Menards hardware merchandise manager on the basis that the arbitration agreement binding the employee was both procedurally and substantively unconscionable.[47] Engedal had been employed by the company for some twenty-five years before he was terminated.[48] Approximately eight months prior to his termination date—and while he was still bound to a previous noncompete agreement—Engedal was required to sign a new restrictive covenant that contained both a noncompete clause and an arbitration provision.[49] The noncompete clause stipulated that Engedal would not:

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42. *See supra* note 9 and accompanying text.

43. *See infra* Part III.

44. 2013 WI App 13U, 345 Wis. 2d 847, 826 N.W.2d 123.

45. *See infra* Part IV.

46. *See Engedal*, 2013 WI App 13U. Although the employee in *Engedal* was bound to a noncompete agreement, the crux of the *Engedal* case centered on an unconscionability analysis in an arbitration agreement that was ultimately deemed enforceable. *Id.* at ¶ 19. Because the arbitration agreement was first deemed valid, the court's authority to assess the legal validity of the noncompete agreement was preempted. *Id.* Moreover, because the Wisconsin Court of Appeals determined that there was no procedural unconscionability in the arbitration agreement, it declined to address whether there was substantive unconscionability in the arbitration agreement (Wisconsin case law indicates that there probably was). *Id.* at ¶¶ 9, 10. Were the proposed solution in this Article used to assess either (a) the legal validity of the arbitration agreement in *Engedal* or (b) the legal validity of a noncompete agreement that shared similar characteristics to the arbitration agreement in *Engedal*, the case would likely have come out differently. *See infra* Parts II, III.

47. *Engedal*, 2013 WI App 13U, ¶ 19.

48. *Id.* ¶ 2.

49. *Id.* ¶¶ 3, 7 n.1.

> (1) accept employment with any of Menards' direct competitors "in the same or similar capacity for which [he was] employed by Menards[;]" or (2) accept employment in any capacity with any of Menards' direct or indirect competitors within a 100-mile radius of the Menards location where he was last employed.[50]

The agreement further stipulated that if Engedal violated the noncompete agreement, Menards retained the right to obtain injunctive relief against him.[51]

After Menards terminated him eight months later, Engedal filed a lawsuit alleging wrongful discharge as well as breach of contract for Menards' failure to remunerate him for a bonus that he was set to receive had he not been terminated.[52] Engedal also sought declaratory relief holding both the noncompete agreement and arbitration provision unenforceable.[53] Menards, in turn, filed a motion to compel arbitration and stay the proceedings.[54] The Eau Claire County Circuit Court denied Menards' motion, holding that the arbitration clause was both procedurally and substantively unconscionable.[55]

The circuit court held that the arbitration agreement was procedurally unconscionable for two reasons.[56] First, it noted that there was a significant disparity in bargaining power between Menards and Engedal that resulted from Menards' power to restrict Engedal from working in his chosen field for two years at the time of the agreement's formation.[57] Second, it noted that the agreement was presented largely on a take-it-or-leave-it basis.[58] Moreover, it found that the terms were substantively unconscionable because they allowed Menards to pursue injunctive relief in a court of law while simultaneously denying Engedal a comparable right of access.[59]

In an unpublished decision, the Wisconsin Court of Appeals reversed the Eau Claire County Circuit Court's finding that the

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50. *Id.* ¶ 3 (alteration in original).
51. *Id.* ¶ 4.
52. *Id.* ¶¶ 2, 5, 7 n.1.
53. *Id.* ¶ 5.
54. *Id.* ¶ 6.
55. *Id.*
56. *See id.* ¶ 7.
57. *Id.*; *see also Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 169 (Wis. 2006) (discussing disparity in bargaining power between lender and impoverished borrower).
58. *See Engedal*, 2013 WI App 13U, ¶ 7; *see also Jones,* 714 N.W.2d at 171 (discussing unequal bargaining power inherent in contracts of adhesion).
59. *Engedal*, 2013 WI App 13U, ¶ 7; *see also Jones*, 714 N.W.2d at 173.

arbitration agreement was unconscionable.[60] It noted first that both procedural and substantive unconscionability must be present in Wisconsin for a contract to be rendered legally unenforceable,[61] and that "if we determine the contract was not procedurally unconscionable, we may uphold the contract without addressing substantive unconscionability."[62] Finding first that the agreement was not procedurally unconscionable, the court subsequently declined to assess whether the agreement was substantively unconscionable.[63]

II. THE LEGAL ANALYSIS OF THE VALIDITY OF NONCOMPETE AGREEMENTS IN WISCONSIN: THE UNCONSCIONABILITY DOCTRINE'S REACH

Noncompete agreements are a restrictive employment covenant involving a promise from an employee to an employer that he or she will not engage in the same kind of business as the employer in the employer's market for a certain amount of time.[64] Noncompete agreements are not a new phenomenon: they first appeared in fifteenth-century England, where they were deemed void restraints of trade by the common law courts.[65] Over time, however, courts and legislatures have warmed up to them.[66] For example, in the United States, noncompete agreements are enforceable in every state barring California, North Dakota, and Oklahoma.[67] In Wisconsin, the legal enforceability of restrictive employment covenants is governed by both statutory and common law.[68] Wisconsin is one of three states adhering to the "red pencil" rule—which renders an entire noncompete agreement void and unmitigable to the

60. *Engedal*, 2013 WI App 13U, ¶ 19.

61. *Id.* ¶ 9 (citing *Aul v. Golden Rules Ins. Co.*, 737 N.W.2d 24, 32 (Wis. Ct. App. 2007)).

62. *Id.* ¶ 9.

63. *See id.* ¶ 19.

64. Greta Mattison Megna, Comment, *The Doctor Will See You Now—From 100 Miles Away: Navigating Physician Non-Compete Agreements in the Age of Telemedicine*, 2017 WIS. L. REV. 1007, 1013.

65. *See, e.g.*, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 631–32 (1960).

66. *See* Stone, *supra* note 10, at 579.

67. BECK REED RIDEN LLP, EMPLOYEE NONCOMPETES: A STATE BY STATE SURVEY (June 27, 2019), https://www.beckreedriden.com/wpcontent/uploads/2019/04/Noncompetes-50-State-Survey-Chart-20190427.pdf [https://perma.cc/Z46Z-W5YD].

68. *See* Ralph Anzivino, *Drafting Restrictive Covenants in Employment Contracts*, 94 MARQ. L. REV. 499, 501–02 (2010); *see also NBZ, Inc. v. Pilarski*, 520 N.W.2d 93, 96 (Wis. Ct. App. 1994) (holding that noncompete agreements are subject to both common law contract principles and statutory requirements).

extent that any of its provisions is unreasonable.[69] The Wisconsin Supreme Court has espoused several canons of construction that must be taken into account by courts when analyzing the legality of restrictive employment covenants: namely, restrictive employment covenants are "*prima facie* suspect; they must withstand close scrutiny to pass legal muster as being reasonable; they will not be construed to extend beyond their proper import or further than the language of the contract absolutely requires; they are to be construed in favor of the employee."[70] The purpose of a restrictive employment covenant cited by the court is "to prevent for a time the competitive use of information or contacts gained as a result of the departing agent's association with the principal."[71] An employer bears the burden of proving that a noncompete agreement is reasonable.[72] Ultimately, whether a restrictive employment covenant is reasonable, and thus enforceable, is a question of law based on the totality of the circumstances.[73] Consequently, Wisconsin appellate courts review legal conclusions regarding a restrictive employment covenant's reasonableness de novo.[74]

Like most contracts, restrictive employment covenants in Wisconsin must have valid consideration to be legally enforceable.[75] Again, in 2015, the Wisconsin Supreme Court held in *Friedlen* that an employer who forebears terminating an employee, if but for a moment, has offered valid

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69. In effect, this Article proposes that Wisconsin utilize procedural unconscionability as a means to sharpen its red pencil for noncompete agreements entered into post hire-date. *See* BECK REED RIDEN LLP, *supra* note 67 (Wisconsin, Nebraska, and Virginia abide by "red pencil" doctrine); *see also* Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1962 (2012) (describing "blue pencil" doctrine and the judicial modification approach); Miranda B. Nelson, Comment, *Sharpening South Carolina's Blue Pencil: An Argument for Codifying a Strict Interpretation of the Blue-Pencil Doctrine*, 70 S.C. L. REV. 917, 923 (2019).

70. *Streiff v. Am. Fam. Mut. Ins. Co.*, 348 N.W.2d 505, 510 (Wis. 1984); *see also Heyde Cos. v. Dove Healthcare, L.L.C.*, 654 N.W.2d 830, 835 (Wis. 2002) (espousing same canons of construction); *Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki*, 627 N.W.2d 444, 447–48 (Wis. 2001) (same); *H & R Block E. Enters., Inc. v. Swenson*, 745 N.W.2d 421, 426 (Wis. Ct. App. 2007) (same).

71. *Pollack v. Calimag*, 458 N.W.2d 591, 599 (Wis. Ct. App. 1990) (citing *Chuck Wagon Catering, Inc. v. Raduege*, 277 N.W.2d 787, 792 (Wis. 1979)); *see also* Philip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (offering that the most appropriate agency and unfair competition doctrines to be applied to noncompete agreements render most noncompete agreements unenforceable).

72. *Techworks, L.L.C. v. Wille*, 770 N.W.2d 727, 732 (Wis. Ct. App. 2009).

73. *See Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 304 N.W.2d 752, 757 (Wis. 1981).

74. *See Wille*, 770 N.W.2d at 731–32.

75. *See, e.g.*, *NBZ, Inc. v. Pilarski*, 520 N.W.2d 93, 94–95 (Wis. Ct. App. 1994); *Runzheimer Int'l, Ltd. v. Friedlen*, 862 N.W.2d 879, 882 (Wis. 2015).

consideration to that employee.[76] Significantly, whether the employer or the employee terminated the employment relationship bears no consequence upon the subsequent enforceability of the restrictive employment covenant.[77] Furthermore, employees who are discharged upon refusing to sign a restrictive covenant are barred from bringing a wrongful termination lawsuit.[78] These dynamics combine to disempower employees and create an environment where employees are vulnerable to the whims of their employers and the legal system.[79] To that end, a skilled, specialized employee appears to have several limited options when faced with a carefully constructed noncompete agreement: (a) endorse the agreement and almost certainly be bound to its provisions (which oftentimes bar employment by competitors and any kind of similar employment);[80] (b) attempt to renegotiate what is likely a contract of adhesion; or (c) resign—and, without income—begin searching for similar employment in his or her specialized field.[81]

Historically, Wisconsin courts granted injunctive equitable relief to employers seeking to enforce covenants not to compete on their former employees if the restrictions were deemed to be: (1) reasonably necessary for the protection of the employer; (2) neither harsh nor oppressive to the employee; and (3) not detrimental to the general public.[82] In 1957,

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76. *See Friedlen*, 862 N.W.2d at 893 (Abrahamson, C.J., concurring).

77. *See* Anzivino, *supra* note 68, at 501; *see also* Vanko, *supra* note 18, at 9–27 (describing the three approaches typically taken by courts when assessing the enforceability of noncompete agreements governing discharged employees).

78. *See Tatge v. Chambers & Owen, Inc.,* 579 N.W.2d 217, 227 (Wis. 1998) (Abrahamson, C.J., dissenting) ("Under the majority opinion, Wisconsin employers are now free to present the following ultimatum to their at-will employees: sign a nondisclosure agreement (regardless of its legality), or you're fired. I conclude that the court should recognize the right of an employee-at-will who claims that a nondisclosure agreement is void under Wis. Stat. § 103.465 to sue for wrongful discharge.").

79. *See* Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 EMP. RTS. & EMP. POL'Y J. 95, 117–21 (1998) (contending that, absent just cause, employers should be barred from terminating at-will employees subject to restrictive covenants).

80. *See, e.g.*, *Engedal v. Menard, Inc.*, 2013 WI App 13U, ¶ 3, 345 Wis. 2d 847, 826 N.W.2d 123 (per curiam); *Pollack v. Calimag*, 458 N.W.2d 591, 599 (Wis. Ct. App. 1990); *Oudenhoven v. Nishioka*, 190 N.W.2d 920, 921–22 (Wis. 1971).

81. *See* Arnow-Richman, *supra* note 10, at 1167 n.12; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 58.

82. *See, e.g.*, *Eureka Laundry Co. v. Long*, 131 N.W. 412, 413 (Wis. 1911) (former employer of laundry wagon driver granted injunction barring former employee from working in the laundry industry in any capacity within a set geographical region); *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 418–19 (Wis. 1959) (former employer of gasoline salesman granted injunction barring salesman from working in the oil industry in any capacity within prescribed geographical region).

the Wisconsin Legislature enacted Section 103.465[83] in response to the Wisconsin Supreme Court's holding in *Fullerton Lumber Co. v. Torborg*[84] that allowed for the legal enforcement of legally invalid restrictive employment covenants to the extent that the courts deemed their provisions to be reasonable.[85] The bill was introduced by a legislator who was critical of the court's decision in *Torborg*.[86] Importantly, the legislator cited reasons for the bill that appear to support prevention of both procedural and substantive unconscionability in restrictive employment covenants, respectively:

> The objection to the "Torberg" [sic] practice . . . is that it tends to encourage employers possessing *bargaining power superior to that of the employees* [procedural unconscionability] to insist upon *unreasonable and excessive restrictions* [substantive unconscionability], secure in the knowledge that the promise will be upheld in part, if not in full.[87]

Still good law, Wisconsin courts continue to assess the legal enforceability of restrictive employment covenants primarily through their interpretation of a statute—Section 103.465[88]—whose origins are predicated upon a strategic legislative departure from the judiciary.[89] It reads:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer

83. *See* WIS. STAT. § 103.465 (2017–18); *Streiff v. Am. Fam. Mut. Ins. Co.*, 348 N.W.2d 505, 509 (Wis. 1984).

84. 80 N.W.2d 461 (Wis. 1957).

85. *See Heyde Cos. v. Dove Healthcare, L.L.C.*, 654 N.W.2d 830, 833 (Wis. 2002) (referring to the Wisconsin Supreme Court's holding in *Torborg*, 80 N.W.2d at 466); *Streiff*, 348 N.W.2d at 509 (same).

86. *See Streiff*, 348 N.W.2d at 509.

87. *Id.* (emphasis added); *see also* Eisenberg, *supra* note 25, at 800 (advocating for an extension of the unconscionability paradigm to channel the intent of legislators and address disparate cases); *Heyde Cos.*, 654 N.W.2d at 834 ("[T]he explicit purpose of § 103.465, as plainly stated in the statute, is to invalidate covenants that impose unreasonable restraints on employees."); Closius & Schaffer, *supra* note 71, at 540 (noting that courts oftentimes perceive noncompete agreements as inherently unfair due to the employer's superior bargaining power over the employee).

88. WIS. STAT. § 103.465.

89. Wisconsin is among a minority of states with a statute governing noncompete agreements. *See* Arnow-Richman, *supra* note 10, at 1183 n.55.

> or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.[90]

Covering contracts that impact an employee's right to compete both in substance and in form,[91] Wisconsin courts have interpreted Section 103.465 to set forth five basic requirements that must be met for a restrictive employment covenant to be enforceable.[92] Specifically, restrictive covenants must be: (1) necessary for the employer's protection; (2) reasonable in terms of time limit; (3) reasonable in terms of territorial limit; (4) neither harsh nor oppressive to the employee; and (5) not contrary to public policy.[93] For purposes of this Article, what follows is a brief exposition of requirements one and four—the two requirements where Wisconsin's substantive unconscionability doctrine has been most practically subsumed.[94]

A. Requirement One: Necessary for the Employer's Protection

Wisconsin's substantive unconscionability doctrine has been subsumed in the requirement that a restrictive employment covenant is necessary for the employer's protection because substantive unconscionability is assessed "in the light of the general commercial

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90. WIS. STAT. § 103.465.

91. *See Holsen v. Marshall & Ilsley Bank*, 190 N.W.2d 189, 191–92 (Wis. 1971).

92. *See Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wis. 2009); *Manitowoc Co. v. Lanning*, 906 N.W.2d 130, 140–41 (Wis. 2018).

93. *Dal Pra*, 767 N.W.2d at 905; *see also* Vanko, *supra* note 18, at 3 (noting that most states use a three-pronged test based on Section 187 of the Restatement (Second) of Contracts to assess the validity of a noncompete agreement); Arnow-Richman, *supra* note 10, at 1173–74; RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. L. INST. 1981).

94. Only requirements one and four are included because Wisconsin's substantive unconscionability doctrine is not as relevant to the legal analysis for requirements two, three, and five. Two primary rationales support this conclusion. First, requirement four is sufficient for meeting requirements two and three, while requirements two and three are necessary for meeting requirement four. That is, if a restrictive employment covenant is neither harsh nor oppressive to the employee, it will not be unreasonable in terms of time and territorial limit; but just because a restrictive employment covenant is reasonable in terms of time and territorial limit does not mean that it is neither harsh nor oppressive to the employee. Second, for the fifth requirement that a restrictive employment covenant not be contrary to public policy, the legal analysis in Wisconsin usually centers on third parties to the agreement that are outside the scope of a substantive unconscionability analysis. *See* Anzivino, *supra* note 68, at 508–38; *see also infra* Section II.B.

background and the *commercial needs*."[95] Moreover, "[t]he analysis of substantive unconscionability requires looking at the contract terms and determining whether the terms are 'commercially reasonable,' that is, whether the terms lie outside the limits of what is reasonable or acceptable."[96]

For a restrictive employment covenant to be necessary for the employer's protection, the employer must have some protectable interest justifying the imposition of restrictions on the employee's activity.[97] In practice, a protectable interest would likely not be difficult for an employer to identify. This is because protectable interests cover a wide range of disparate categories, including past customers, current customers, referral contacts, trade secrets, customer lists, confidential information, an employee's enhanced reputation from working for the employer, and an employee's skills acquired from the employer.[98] Wisconsin law delineates the parameters and reaches of these categories of protectable interests.[99] For instance, a Wisconsin court may regard an employer entitled to restrict a former employee from employing knowledge and skills learned on the job if the services are determined to be "of a unique character."[100] If a restriction extends beyond that which is necessary for the employer's protection, however, the restrictive employment covenant is legally unenforceable.[101] And notably, "an employer is not entitled to be protected against legitimate and ordinary competition of the type that a stranger could give."[102] Rather, for a restrictive employment covenant to be enforceable, "the employee must

95. *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 166 (Wis. 2006) (emphasis added) (quoting 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18.8, at 57 (4th ed. 2010)); *see also infra* note 165 and accompanying text.

96. *Jones*, 714 N.W.2d at 166 (footnote omitted) (quoting *Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co.*, 345 N.W.2d 417, 425 (Wis. 1984)).

97. *Lanning*, 906 N.W.2d at 140; *see also* Arnow-Richman, *supra* note 10, at 1166 (contending that the requirement that an employer have a protectable interest is predicated on an inoperable distinction between the employee and the work product).

98. Anzivino, *supra* note 68, at 509–23.

99. *See id.*

100. *See Behnke v. Hertz Corp.*, 235 N.W.2d 690, 693 (Wis. 1975) (quoting RESTATEMENT OF CONTRACTS § 516(f) cmt. h (AM. L. INST. 1932)). *But see Gary Van Zeeland Talent, Inc. v. Sandas*, 267 N.W.2d 242, 248 (Wis. 1978) ("[S]o long as a departing employee takes with him no more than his experience and intellectual development that has ensued while being trained by another, and no trade secrets or processes are wrongfully appropriated, the law affords no recourse.").

101. *See, e.g.*, *Wis. Ice & Coal Co. v. Lueth*, 250 N.W. 819, 820–21 (Wis. 1933); *Milwaukee Linen Supply Co. v. Ring*, 246 N.W. 567, 568–69 (Wis. 1933).

102. *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 419 (Wis. 1959).

present a substantial risk either to the employer's relationships with his customers or with respect to confidential business information."[103]

The legal requirement that a restrictive employment covenant is necessary for the employer's protection is demonstrated in the following two cases. In the first case, *Fields Foundation, Ltd. v. Christensen*,[104] a Wisconsin appellate court ascertained that a noncompete agreement was necessary for an employer's protection due to the former employee's access to customer lists and an enhanced reputation as a result of working for the employer.[105] The second case, *Manitowoc Co. v. Lanning*,[106] illustrates a recent landmark decision where the Wisconsin Supreme Court held that an employee nonsolicitation agreement was unenforceable because it exceeded the bounds of the employer's protectable interest.[107]

1. *CHRISTENSEN*: WITHIN THE REALM OF PROTECTABLE EMPLOYER INTEREST

From 1977 to 1979, Dr. Dennis Christensen, a Minnesota-trained Obstetrician and Gynecologist, was the medical director of a Fields Foundation abortion clinic in Madison, the Midwest Medical Center.[108] When Dr. Christensen left the clinic in 1979, the Fields Foundation sought to enforce a restrictive employment covenant that (a) barred him from performing first-trimester abortions within a fifty-mile radius of Madison and (b) assessed a $2,000/day liquidated damages provision for each day of noncompliance with the provision.[109] The Wisconsin Court of Appeals estimated that the restrictive covenant was reasonably necessary for the protection of the employer because Dr. Christensen's name had become associated with the Midwest Medical Center's goodwill and because Dr. Christensen had access to customer lists.[110] Furthermore, the court held that the liquidated damages portion of the restrictive covenant was an unenforceable penalty[111] and addressed the ostensibly on-point language of the Wisconsin statute governing the agreement[112] in its determination that the liquidated damages provision of

103. *Fields Found., Ltd. v. Christensen*, 309 N.W.2d 125, 129 (Wis. Ct. App. 1981) (quoting Blake, *supra* note 65, at 653).

104. 309 N.W.2d 125.

105. *See id.* at 130.

106. 906 N.W.2d 130 (Wis. 2018).

107. *Id.* at 145.

108. *Christensen*, 309 N.W.2d at 128.

109. *See id.* at 128, 130, 133.

110. *Id.* at 130.

111. *Id.* at 128, 131.

112. WIS. STAT. § 103.465 (2017–18) ("Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.").

the covenant did not itself serve as a restraint.[113] As for the covenant being unduly harsh or oppressive to the former employee, the court said:

> The covenant, according to its express terms, does not affect Christensen's right to practice obstetrics and gynecology anywhere and anytime. Because the Center's business is limited to first trimester abortions, the trial court did not enjoin Christensen from performing second trimester abortions. He may establish a clinic immediately outside the fifty-mile radius and there perform first trimester abortions for patients residing in the fifty-mile radius.[114]

As a result of this holding, instead of establishing a clinic outside the fifty-mile radius, Dr. Christensen may have instead availed another state's citizens and economy of his specialized skill set and purchasing power.[115]

2. *LANNING*: OUTSIDE THE SCOPE OF PROTECTABLE EMPLOYER INTEREST

In *Lanning*, The Manitowoc Company, a crane manufacturer, sought to enforce a nonsolicitation agreement against one of its former engineers who had been employed at the company for some twenty-five years.[116] The nonsolicitation agreement required that during employment and for a period of two years following employment, current and former employees of Manitowoc could not "solicit, induce or encourage any employee(s) to terminate their employment with Manitowoc or to accept

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113. *Christensen*, 309 N.W.2d at 131.

114. *Id.* at 133 (footnote omitted).

115. Beyond the scope of this Article, an assessment of the impact of restrictive employment covenants on economic growth in Wisconsin—and the 46 other states that permit them, *see supra* note 67 and accompanying text—may be of value. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578–79, 602–09 (1999); Edward M. Schulman, *An Economic Analysis of Employee Noncompetition Agreements*, 69 DENV. U. L. REV. 97, 119–20 (1992); *see also* Blake, *supra* note 65, at 627 ("[P]ostemployment restraints reduce both the economic mobility of employees and their personal freedom to follow their own interests. These restraints also diminish competition by intimidating potential competitors and by slowing down the dissemination of ideas, processes, and methods. They unfairly weaken the individual employee's bargaining position vis-à-vis his employer and, from the social point of view, clog the market's channeling of manpower to employments in which its productivity is greatest."); *see also* Kate Zernike, *An Abortion Doctor's View*, N.Y. TIMES (Jan. 20, 2003), https://www.nytimes.com/2003/01/20/us/an-abortion-doctor-s-view.html [https://perma.cc/SPW5-Z3CJ] (describing Dr. Christensen's clinic at Midwest Medical Center in Wisconsin).

116. *Manitowoc Co. v. Lanning*, 906 N.W.2d 130, 134–35 (Wis. 2018).

employment with any competitor, supplier or customer of Manitowoc."[117] Less than two years after leaving Manitowoc, Lanning began working as an engineer for one of Manitowoc's competitors and actively solicited Manitowoc's employees to join forces with the competitor.[118] In an opinion indicating a potential transformation in the way restrictive employment covenants are assessed, the Wisconsin Supreme Court first held that the nonsolicitation agreement, despite its potentially misleading title, *was* within the purview of Section 103.465 due to the *impact* the agreement had on employees and competition.[119] To that end, the agreement hampered competition[120] and disrupted employee mobility,[121] contrary to "the ordinary sort of competition attendant to a free market"[122] and "the fundamental right of a person to make choices about his or her own employment."[123] Second, the nonsolicitation agreement was not necessary for the employer's protection[124] because Manitowoc did not have "a protectable interest in maintaining its *entire* workforce."[125] Adhering to the maxim "the law 'does not protect against the raiding of a competitor's employees,'"[126] the court held that the agreement was overbroad in its application to all of Manitowoc's employees, which rendered it entirely unenforceable pursuant to the same language in Section 103.465 that was deemed not to apply to the liquidated damages provision in *Christensen*.[127]

B. Requirement Four: Neither Harsh nor Oppressive to the Employee

Wisconsin's substantive unconscionability doctrine has been subsumed in the requirement that a restrictive employment covenant is neither harsh nor oppressive to the employee because "[s]ubstantive unconscionability focuses on the one-sidedness, unfairness, unreasonableness, harshness, overreaching, or oppressiveness of the

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117. *Id.* at 136.

118. *Id.* at 134–35.

119. *Id.* at 137–39.

120. *Id.* at 139.

121. *Id.*

122. *Id.* at 140 (quoting *Manitowoc Co. v. Lanning*, 885 N.W.2d 798, 804 (Wis. Ct. App. 2016)).

123. *Id.* at 139 (quoting *Heyde Cos. v. Dove Healthcare, L.L.C.*, 654 N.W.2d 830, 836 (Wis. 2002)); *see also supra* note 40 and accompanying text (discussing the right to work in one's profession); Richards, *supra* note 41, at 241 (explaining that the law disfavors restrictive covenants because they hinder a person's ability to work).

124. *Lanning*, 906 N.W.2d at 145.

125. *Id.* at 142 (emphasis added).

126. *Id.* at 142 (quoting *Mut. Serv. Cas. Ins. Co. v. Brass*, 625 N.W.2d 648, 655 (Wis. Ct. App. 2001)).

127. *Id.* at 145.

provision at issue."[128] When determining if a restrictive employment covenant is unduly harsh or oppressive to an employee, Wisconsin courts engage in a balancing test, weighing the interests of the employer and the employee against one another.[129] If the restriction's harm to the employee is greater than the harm of not having the restriction would be to the employer, the restriction will be deemed invalid.[130] To illustrate: the interest an employee has in working in his or her chosen field usually outweighs any interest an employer has in enforcing the covenant.[131] Similarly, covenants that are overbroad will be deemed unreasonable and, thus, unenforceable.[132] Because each situation is unique, what is reasonable will depend on the totality of the circumstances.[133]

III. UNCONSCIONABILITY DOCTRINE IN WISCONSIN: PARTIALLY INTEGRATED INTO THE LEGAL ANALYSIS OF THE ENFORCEABILITY OF NONCOMPETE AGREEMENTS

To delineate how Wisconsin's procedural unconscionability doctrine could be infused into the legal analysis of restrictive employment covenants entered into after an employment contract's formation, it is necessary first to explicate how unconscionability doctrine currently operates in Wisconsin. Unconscionability doctrine in Wisconsin—to the extent that federal law does not preempt it—is governed by Wisconsin

128. *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 171 (Wis. 2006); *see also Nichols v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 509 F. Supp. 2d 752 (W.D. Wis. 2007); *Anderson v. Select Portfolio Servicing, Inc.*, No. 18-CV-706, 2019 WL 1487584, at *2 (W.D. Wis. Apr. 4, 2019); *Coady v. Cross Country Bank*, 729 N.W.2d 732 (Wis. Ct. App. 2007); *Schultz v. Epic Sys. Corp.*, 376 F. Supp. 3d 927, 938 (W.D. Wis. 2019); *Greer v. N.A.B.S.A. Benefit Servs.*, No. 09-C-580, 2009 WL 10710786 (E.D. Wis. Dec. 4, 2009); *see also infra* note 165 and accompanying text.

129. *See* Anzivino, *supra* note 68, at 534; *see also Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 419 (Wis. 1959); *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 923–25 (Wis. 2009) (Abrahamson, C.J., dissenting).

130. *See* Anzivino, *supra* note 68, at 534.

131. *See id.* at 534–35.

132. *Id.* at 535.

133. *See Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 304 N.W.2d 752, 757 (Wis. 1981) ("As to whether the restraint is unreasonable to the employee, we do not see how such a determination could be made without considering additionally the extent to which the restraint on competition actually inhibits the employee's ability to pursue a livelihood in that enterprise, as well as the particular skills, abilities, and experience of the employee sought to be restrained."); *Slutsky*, 98 N.W.2d at 421 ("In determining the harshness of a restrictive covenant on an employee this court can take judicial notice of present prevailing conditions of employment and the special training of the defendant for the specific occupation.").

statutory and common law.[134] In terms of statutory law, there are several Wisconsin statutes tailored to specific kinds of contracts that provide courts with factors to weigh when determining the presence of unconscionability in contracts.[135] For instance, for commercial goods, Wisconsin has statutorily adopted the broad language provided by the Uniform Commercial Code and references its common law for further sophistication.[136]

Unconscionability is oftentimes referred to as "an amorphous concept that evades precise definition."[137] It is assessed on a case-by-case basis and occurs where there is (a) "an absence of meaningful choice on the part of one party" (procedural unconscionability); together with (b) "contract terms that are unreasonably favorable to the other party" (substantive unconscionability).[138] A question of law, Wisconsin appellate courts review unconscionability independently from trial court

134. *See generally Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129 (2004).

135. *See, e.g.*, WIS. STAT. § 707.06 (2017–18) (eight factors provided for Courts to weigh when considering unconscionability in time-share contracts); WIS. STAT. § 425.107 (2017–18) (nine factors provided for Courts to weigh when considering unconscionability in consumer credit transactions: "(a) That the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers; (b) That those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved; (c) That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value; (d) That the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors; (e) That the terms of the transaction require customers to waive legal rights; (f) That the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction; (g) That the natural effect of the practice would reasonably cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties thereunder; (h) That the writing purporting to evidence the obligation of the customer in the transaction contains terms or provisions or authorizes practices prohibited by law; and (i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies.").

136. *See* WIS. STAT. § 402.302 (2017–18) ("(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.").

137. *See, e.g.*, *Jones*, 714 N.W.2d at 164.

138. *See id.* at 165; *Deminsky v. Arlington Plastics Mach.*, 657 N.W.2d 411, 422 (Wis. 2003); *see also* Craswell, *supra* note 16, at 17.

findings.[139] It has deep roots in law and equity but was primarily developed in equity.[140] The underlying principle behind unconscionability in Wisconsin is to prevent unfair surprise or oppression rather than to prevent a disturbance of risk allocation due to superior bargaining power.[141] To that end, disparity in bargaining power or substantively unreasonable terms alone is insufficient to render a contract unconscionable.[142] Instead, for a Wisconsin court to render a contract or clause unconscionable and thus, unenforceable, both procedural and substantive unconscionability must exist in tandem.[143] Specifically, each must exist at a level that sums to a certain quantum: "The more substantive unconscionability present, the less procedural unconscionability is required, and vice versa."[144]

An examination for procedural unconscionability involves an assessment of whether there was a "real and voluntary meeting of the minds" during the formation of the contract.[145] Wisconsin courts deliberate procedural unconscionability by analyzing a set of factors that influenced the formation of the contract.[146] No single factor is necessary to support a finding of procedural unconscionability.[147] The factors Wisconsin courts typically look to when assessing procedural unconscionability include: the relative bargaining power of the contracting parties; which party drafted the contract; whether the party who drafted the contract would allow alterations in the contract's terms; whether the contract's terms were described to the weaker party; whether there were other providers of the contract's subject matter; and the age, intelligence, education, experience, and business acumen of the parties.[148] A survey of case law applying unconscionability doctrine revealed that Wisconsin appellate courts are much more likely to conduct an unconscionability analysis in business-to-consumer and business-to-business contracts than they are in employer-to-employee contracts, perhaps due to the statutes addressing unconscionability in specific types

139. *Kohler Co. v. Wixen*, 555 N.W.2d 640, 645 (Wis. Ct. App. 1996).

140. *Jones*, 714 N.W.2d at 164.

141. *Id.* at 165.

142. *See, e.g.*, *Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co.*, 345 N.W.2d 417, 424 (Wis. 1984); *Jones*, 714 N.W.2d at 165–66.

143. *See Jones*, 714 N.W.2d at 165; *see also* 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18.13, at 142 (4th ed. 2010).

144. *Jones*, 714 N.W.2d at 165.

145. *See Disc. Fabric House of Racine, Inc.*, 345 N.W.2d at 425 (quoting *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976)).

146. *See Jones*, 714 N.W.2d at 165.

147. *Id.* at 171.

148. *Id.* at 165–66.

of contracts.[149] This finding provides additional support for incorporating procedural unconscionability doctrine into the legal analysis of noncompete agreements entered into after the contract's formation.[150]

What follows is an illustration of Wisconsin's unconscionability doctrine in a pervasively cited case. *Wisconsin Auto Title Loans, Inc. v. Jones* is a prime example of a case where the court deemed that both substantive and procedural unconscionability existed at levels summing to a total amount of unconscionability sufficient to render the contract clause unenforceable.[151]

A. Jones*: Textbook Procedural and Substantive Unconscionability*

In *Jones*, a short-term consumer loan company, Wisconsin Auto Title Loans, brought an action in replevin in the Milwaukee County Circuit Court to recover its security interest in Jones's car when Jones failed to repay a high-interest loan by its due date.[152] Jones counterclaimed, alleging that "Wisconsin Auto Title Loans willfully and knowingly conceal[ed] consumer loan transaction costs to its customers, impose[d] loan interest and other finance charges without proper disclosures, engage[d] in collection practices without properly advising its customers of their rights and obligations, and impose[d] unconscionably exorbitant loan rates and charges."[153] In response to the counterclaim, Wisconsin Auto Title Loans sought to enforce an arbitration clause that had been signed during the contract's formation.[154]

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149. *See, e.g.*, *Coady v. Cross Country Bank*, 729 N.W.2d 732, 745 (Wis. Ct. App. 2007) (holding the business-to-consumer credit card arbitration clause unconscionable); *Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 586 (Wis. Ct. App. 1992) (finding the business-to-business lease forum selection clause unconscionable); *First Fed. Fin. Serv., Inc. v. Derrington's Chevron, Inc.*, 602 N.W.2d 144, 148 (Wis. Ct. App. 1999) (same); *Foursquare Props. Joint Venture I v. Johnny's Loaf & Stein, Ltd.*, 343 N.W.2d 126, 127 (Wis. Ct. App. 1983) (affirming the trial court's determination that the business-to-business tax clause was unconscionable); *Trinkle v. Schumacher Co.*, 301 N.W.2d 255, 259 (Wis. Ct. App. 1980) (finding the business-to-business commercial goods contract unconscionable).

150. *See, e.g.*, *Coady*, 729 N.W.2d at 745 (holding the business-to-consumer credit card arbitration clause unconscionable); *Leasefirst*, 483 N.W.2d at 586 (finding the business-to-business lease forum selection clause unconscionable); *First Fed. Fin. Serv., Inc.*, 602 N.W.2d at 148 (same); *Foursquare Props. Joint Venture I*, 343 N.W.2d at 127 (affirming the trial court's determination that the business-to-business tax clause was unconscionable); *Trinkle*, 301 N.W.2d at 259 (finding the business-to-business commercial goods contract unconscionable).

151. *Jones*, 714 N.W.2d at 179.

152. *Id.* at 160–62.

153. *Id.* at 162.

154. *Id.*

The circuit court found the arbitration clause unconscionable and denied Wisconsin Auto Title Loans' motion to compel arbitration.[155]

The Wisconsin Supreme Court found that Wisconsin Auto Title Loans' arbitration clause contained enough substantive and procedural unconscionability to render it legally invalid.[156] It reasoned that the arbitration provision was substantively unconscionable primarily because it allowed Wisconsin Auto Title Loans to enforce its legal rights in court while denying Jones the same.[157]

Similarly, the court concluded that the contract was procedurally unconscionable: it "was a product of the parties' unequal bargaining power and did not reflect a real and voluntary meeting of the minds of the contracting parties."[158] Procedural unconscionability existed for four primary reasons.[159] First, because Jones was impoverished and in financial need, he was in a much weaker bargaining position than Wisconsin Auto Title Loans.[160] Second, Wisconsin Auto Title Loans had drafted a standard form contract of adhesion and presented it to Jones on a take-it-or-leave-it basis without any room for substantive modification or negotiation.[161] Third, relative to Jones, Wisconsin Auto Title Loans was commercially sophisticated and had significant experience drafting loan agreements.[162] Fourth, Jones lacked the immediate means to obtain similar financing with more favorable rates from other service providers.[163]

B. Substantive Unconscionability in Wisconsin: Inherently Incorporated in Appellate Courts' Legal Analysis of the Enforceability of Noncompete Agreements

Substantive unconscionability doctrine in Wisconsin is inherently incorporated into the legal analysis of the enforceability of noncompete agreements. Under Wisconsin law, substantive unconscionability exists when a contract's terms unreasonably favor the more powerful party to

155. *Id.* at 163.

156. *Id.* at 171, 174.

157. *Id.* at 173; *see also Engedal*, 2013 WI App 13U, ¶ 7, 345 Wis. 2d 847, 826 N.W.2d 123 (determining a forced arbitration clause was substantively unconscionable when applied unequally among parties).

158. *Jones*, 714 N.W.2d at 171; *see also Engedal*, 2013 WI App 13U, ¶ 7 (discussing the trial court's finding that unequal bargaining power between parties rendered the agreement unconscionable).

159. *Jones*, 714 N.W.2d at 168–70.

160. *Id.* at 169; *see also Engedal*, 2013 WI App 13U, ¶ 7.

161. *Jones*, 714 N.W.2d at 171; *see also Engedal*, 2013 WI App 13U, ¶ 7.

162. *Jones*, 714 N.W.2d at 168.

163. *Id.* at 170.

the contract.[164] An analysis for substantive unconscionability requires contemplation of the commercial reasonableness of the terms with respect to commercial needs and general commercial background.[165] Terms that are one-sided, unreasonable, harsh, unfair, oppressive, or overreaching indicate substantive unconscionability.[166]

Wisconsin's statute governing restrictive employment covenants parallels substantive unconscionability's assessment for commercial reasonableness by mandating that restrictive employment covenants only be enforced if they are reasonably necessary for the employer's protection.[167] It likewise considers substantive unconscionability's requirement that terms not be harsh or oppressive with the language: "Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."[168] Moreover, the Wisconsin Supreme Court appeared to contemplate substantive unconscionability when laying down the fourth of the five requirements that must be met for a restrictive employment covenant to be enforceable in Wisconsin—namely, that a restrictive employment covenant must "not be harsh or oppressive as to the employee."[169] Finally, as mentioned in Part II, the legislator behind the 1957 bill that ultimately became Wisconsin's modern statute governing restrictive employment covenants appeared to deliberate both substantive and procedural unconscionability as reasons for the law's necessity.

> [T]he objection to the "Torberg" [sic] practice . . . is that it tends to encourage employers possessing *bargaining power superior to that of the employees* [procedural unconscionability] to insist upon *unreasonable and excessive restrictions* [substantive unconscionability], secure in the knowledge that the promise will be upheld in part, if not in full.[170]

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164. *Id.* at 165.

165. *Id.* at 166; *see also Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 421 (Wis. 1959) (finding that a restrictive employment covenant was enforceable in part because it was "not unduly harsh or oppressive" to the employee "in relation to the relatively greater harm to the employer if the covenant is not enforced").

166. *Jones*, 714 N.W.2d at 171 ("Substantive unconscionability focuses on the one-sidedness, unfairness, unreasonableness, harshness, overreaching, or oppressiveness of the provision at issue.").

167. *See* WIS. STAT. § 103.465 (2017–18); *see also Jones*, 714 N.W.2d at 166 (discussing the analysis of substantive unconscionability requires determining whether contractual terms are commercially reasonable).

168. *See* § 103.465.

169. *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wis. 2009).

170. *Streiff v. Am. Fam. Mut. Ins. Co.*, 348 N.W.2d 505, 509 (Wis. 1984) (emphasis added); *see also* Eisenberg, *supra* note 25, at 800 (advocating for an extension

IV. THE SOLUTION: INFUSING WISCONSIN'S PROCEDURAL UNCONSCIONABILITY DOCTRINE INTO THE LEGAL ANALYSIS

This Article proposes that Wisconsin's existing procedural unconscionability doctrine be infused into the legal analysis for the validity of noncompete agreements entered into post hire-date to address problems related to bargaining power disparity, consent, and meaningful choice in such contracts.[171] Under current Wisconsin law, procedural unconscionability in such contracts cannot be sufficiently addressed for three primary reasons. First, unconscionability doctrine is insufficient to render such contracts legally unenforceable because, under the current analysis for unconscionability, contracts with high degrees of procedural unconscionability and either moderate, low, or no substantive unconscionability would almost certainly pass the overall test for unconscionability.[172] Second, the current analysis for the enforceability of restrictive employment covenants—while addressing substantive unconscionability—does not address procedural unconscionability.[173]

Third, even an unconscionability analysis, combined with the current legal analysis for the enforceability of restrictive employment covenants, is insufficient to render such contracts legally unenforceable.[174] This is because the unconscionability analysis may show that the agreement is procedurally unconscionable but not significantly substantively unconscionable—thus rendering the agreement enforceable under Wisconsin's unconscionability doctrine.[175] Furthermore, if the agreement were not deemed significantly substantively unconscionable, it is highly unlikely that it would be deemed harsh or oppressive to the employee under the fourth requirement.[176] As a result, assuming that the other four requirements were met, the agreement would similarly be enforceable under the legal analysis for the enforceability of restrictive employment covenants.[177]

However, if a requirement that the agreement must not be procedurally unconscionable were included in the current five requirements for noncompete agreements entered into post hire-date,

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of the unconscionability paradigm to channel the intent of legislators and address disparate cases).

171. *See supra* Part I.

172. *See supra* Part III.

173. *See supra* Part II; *see also Dal Pra*, 767 N.W.2d at 913 (outlining the methods of interpreting restrictive covenants).

174. *See supra* Parts II, III.

175. *See supra* Part III; *see also Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 165 (Wis. 2006).

176. *See supra* Part II; *see also Dal Pra*, 767 N.W.2d at 905.

177. *See supra* Part II; *see also Dal Pra*, 767 N.W.2d at 905.

both procedural and substantive unconscionability would be addressed by the existing model.[178]

A. The Proposed Solution

In light of simplifying the current model without sacrificing its efficacy,[179] one way to incorporate procedural unconscionability doctrine into the legal analysis of restrictive employment covenants entered into post hire-date would be to require that they must be: (1) necessary for the employer's protection; (2) not substantively unconscionable; (3) not procedurally unconscionable; and (4) not contrary to public policy.[180] An additional way might be to infuse a procedural unconscionability analysis into the requirement that restrictive employment covenants must not be contrary to public policy and then simply require that restrictive employment covenants must be: (a) necessary for the employer's protection; (b) not substantively unconscionable; and (c) not contrary to public policy.[181]

To least upset existing legal doctrine, however, the best way to infuse Wisconsin's procedural unconscionability doctrine into the legal analysis for the validity of noncompete agreements entered into post hire-date would be to include an analysis for procedural unconscionability as part of the fifth requirement that the agreement not be contrary to public policy.[182] Then, if the agreement were deemed procedurally unconscionable, it would fail to meet the fifth requirement, and thus fail to be legally enforceable.[183] Including a procedural unconscionability analysis into the existing public policy category is synchronous with the Wisconsin Supreme Court's holding in *Heyde Cos. v. Dove Healthcare, L.L.C.*[184] that restrictive employment covenants entered into without employees' consent are contrary to public policy in violation of Section 103.465.[185] Moreover, this solution is apt in that its relevance could

178. *See supra* Part II; *see also Dal Pra*, 767 N.W.2d at 905.

179. Albert Einstein, *On the Method of Theoretical Physics*, 1 PHIL. OF SCI. 163, 165 (1934) ("It can scarcely be denied that the supreme goal of all theory is to make the irreducible basic elements as simple and as few as possible without having to surrender the adequate representation of a single datum of experience.").

180. *See supra* note 94.

181. *Id.*

182. *Dal Pra*, 767 N.W.2d at 905 (holding that restrictive covenants must be: (1) necessary for the employer's protection; (2) reasonable in terms of time limit; (3) reasonable in terms of territorial limit; (4) neither harsh nor oppressive to the employee; and (5) not contrary to public policy).

183. *See supra* Part II; *see also Dal Pra*, 767 N.W.2d at 905.

184. 654 N.W.2d 830, 837 (Wis. 2002).

185. *See id.* at 836–37 ("At the very least, § 103.465 requires that employees know that they are subject to a restrictive covenant and that they consent to such a restriction. Accordingly, the no-hire provision, which restricts Greenbriar's employees

extend to other states apart from Wisconsin that similarly abide by the "red pencil" doctrine and who likewise mandate that noncompete agreements not be contrary to public policy.[186]

In addition to the standard factors used to assess procedural unconscionability,[187] additional factors relevant to bargaining power disparity, consent, and meaningful choice in the context of the employer-employee relationship should be included in the analysis.[188] These include but are not limited to: (a) how much time the employee was given to contemplate signing the agreement; (b) whether the employee would have been terminated or suffered other negative repercussions at the hand of the employer had he or she not endorsed the agreement; (c) the amount of liquid assets the employee could use to cover emergency expenses at the time the agreement was presented; (d) how feasible it would have been for the employee to transfer to a similar job at the time the agreement was presented; and (e) whether the employee was aware at the time of signing the agreement that it might be upheld in court even if the employer terminated the employee shortly after the agreement's endorsement.[189]

B. A Wisconsin Idea: Relevance to Nebraska and Virginia

This Article proposes that Wisconsin utilize procedural unconscionability as a means to sharpen its red pencil doctrine for noncompete agreements entered into post hire-date.[190] Because (1) the red pencil doctrine innately bears sharp legal teeth rendering a noncompete agreement entirely unenforceable if any of its provisions are unreasonable,[191] and (2) noncompete agreements that are entered into post hire-date typically have an inherent degree of procedural unconscionability,[192] infusing procedural unconscionability doctrine into the legal analysis would be an effective[193] way to reapportion some sorely needed power back into the hands of employees.[194] And, it is one that would do so without abrogating or reinventing existing legal doctrine.[195]

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without their knowledge and consent, is harsh and oppressive to the employees and is contrary to public policy, in violation of § 103.465.").

186. *See infra* Section IV.B.

187. *See supra* Part III.

188. *See supra* note 35 and accompanying text.

189. *See supra* Part I.

190. *See supra* note 69 and accompanying text.

191. *See* Nelson, *supra* note 69, at 922.

192. *See supra* Part I.

193. *See supra* note 25 and accompanying text.

194. *See supra* notes 31–32 and accompanying text.

195. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 770 (1997) (Souter, J., concurring) ("[T]he usual thinking of the common law is suspicious of the all-or-

While specifically designed to be implemented in Wisconsin, this idea's relevance is not limited to Wisconsin's borders.[196] In order for the Wisconsin-customized solution to be an apt fit for another state's jurisprudence, though, several characteristics should ideally be shared with Wisconsin. First, the state's jurisprudence should adhere to the red pencil doctrine, for, as mentioned above, the red pencil doctrine has a particularly powerful impact on noncompete agreements that contain any unreasonable provision.[197] Second, the state's law should recognize continued employment to be valid consideration for noncompete agreement formation due to the inherent potential procedural unconscionability problem posed by this scenario.[198] Third, unconscionability doctrine should be partially subsumed into the state's legal analysis for noncompete agreement enforceability, which provides for a more natural and logical assumption of procedural unconscionability.[199] Fourth, and finally, the state's legal analysis should include a requirement that the agreement not be contrary to public policy.[200] Apart from Wisconsin, the only states that meet these four

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nothing analysis that tends to produce legal petrification instead of an *evolving boundary between the domains of old principles*. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The 'tradition is a living thing,' albeit one that moves by moderate steps carefully taken. 'The decision of an apparently novel claim *must depend on grounds which follow closely on well-accepted principles and criteria.* The new decision *must take its place in relation to what went before and further [cut] a channel for what is to come*.'" (alteration in original) (emphasis added) (citation omitted) (quoting *Poe v. Ullman*, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting))).

196. *See, e.g.*, Wiley Rutledge, *Two Centuries of the Wisconsin Idea*, 1949 WIS. L. REV. 7, 7 ("The essence of the Wisconsin idea has been looking forward, not backward, in the art of democratic living. For this quality Wisconsin has been pre-eminent."); Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297, 299 (1997) ("The new academic profession, especially the legal academy, expected to play a large role in fashioning our earthly paradise. The model for this role was cast in the most heroic bronze at the University of Wisconsin. . . . The state was also the scene of the most vigorous Progressive politics. Accordingly, it was the best venue for the formation of an academic subprofession devoted to social and economic reform. Indeed, the idea of progressive political reform as an academic mission came for a time to be known as the Wisconsin-Idea.").

197. *See* Nelson, *supra* note 69, at 922.

198. *See supra* Part I.

199. *See supra* Part IV.

200. *See supra* Part IV.

criteria are Nebraska[201] and Virginia.[202] Consequently, Nebraska and Virginia appear to stand in a position to benefit most from the Wisconsin model's implementation.

In both Nebraska and Virginia, common law alone dictates the parameters and scope of noncompete agreement enforceability.[203] In Nebraska, a noncompete agreement will be enforced only if it is "(1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee."[204] In Virginia, a noncompete agreement will be enforced only if it "is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy."[205] Thus, both Nebraska's and Virginia's cited requirements for the enforceability of noncompete agreements largely mirror those of Wisconsin[206]—as Wisconsin's additional two requirements have been incorporated into Nebraska's three

201. *See, e.g.*, *Vlasin v. Len Johnson & Co.*, 455 N.W.2d 772, 776–77 (Neb. 1990) (red pencil doctrine); *id.* at 775–76 (unconscionability incorporation and public policy exception); *Sec. Acceptance Corp. v. Brown*, 106 N.W.2d 456, 462–63 (Neb. 1960) (finding continued employment as valid consideration); *see C & L Indus., Inc. v. Kiviranta*, 698 N.W.2d 240, 244 (2005) (same). *But see Aon Consulting, Inc. v. Midlands Fin. Benefits, Inc.*, 748 N.W.2d 626, 638 (Neb. 2008) (declining to address whether continued employment alone constitutes adequate consideration for nonsolicitation agreements).

202. *See, e.g.*, *Parikh v. Fam. Care Ctr., Inc.*, 641 S.E.2d 98, 100 (Va. 2007) (discussing the red pencil doctrine); *Lasership, Inc. v. Watson*, No. CL-2009-1219, 2009 Va. Cir. LEXIS 64, at *205, *210 (Va. Cir. Ct. August 12, 2009) (same); *Home Paramount Pest Control Cos. v. Shaffer*, 718 S.E.2d 762, 763–64 (Va. 2011) (discussing unconscionability incorporation and public policy exception); *Phoenix Renovation Corp. v. Rodriguez*, 461 F. Supp. 2d 411, 425 (E.D. Va. 2006) (finding continued employment a valid consideration).

203. *See, e.g.*, ROGER J. MILLER, STATE Q&A: NON-COMPETE LAWS: NEBRASKA (2019), WestlawNext Practical Law Labor & Employment 9-521-3025; GEORGE B. BREEN & FRANK C. MORRIS, JR., STATE Q&A: NON-COMPETE LAWS: VIRGINIA (2019), WestlawNext Practical Law Labor & Employment 2-507-0930.

204. *Gaver v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121, 127 (Neb. 2014) (quoting *Aon Consulting*, 748 N.W.2d at 638).

205. *Shaffer*, 718 S.E.2d at 763–64 (quoting *Omniplex World Servs. Corp. v. U.S. Investigations Servs.*, 618 S.E.2d 340, 342 (Va. 2005)).

206. *Compare Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wis. 2009) ("A restrictive covenant must: (1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy."), *with Gaver*, 856 N.W.2d at 127, *and Shaffer*, 718 S.E.2d at 763–64.

requirements,[207] as well as into Virginia's.[208] Moreover, like Wisconsin, Nebraska and Virginia: adhere to the red pencil doctrine; recognize continued employment to be valid consideration for noncompete agreement formation; and partially subsume unconscionability principles into the legal analysis for noncompete agreement enforceability.[209] Likewise, in Nebraska and Virginia, a noncompete agreement's enforceability presents a question of law for the courts,[210] where the legal burden rests on the employer,[211] and where the contract's terms will be "construed in favor of the employee."[212] Additionally, in the past, both Nebraska and Virginia courts have similarly been tasked with evaluating the enforceability of a noncompete agreement that was entered into post hire-date.[213] These factors combine to make Nebraska and Virginia appropriate jurisdictions for the suggestions developed in this Article.

Nebraska's unconscionability doctrine largely mirrors that of Wisconsin's,[214] although it is unclear whether, under Nebraska law, procedural unconscionability is needed in addition to substantive unconscionability to strike down a contract outside of a commercial

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207. *See, e.g.*, *Unlimited Opportunity, Inc. v. Waadah*, 861 N.W.2d 437, 443–44 (Neb. 2015) (geographic scope restriction incorporated into requirement that noncompete agreement be no greater than reasonably necessary to protect the employer in some legitimate interest); *Sec. Acceptance Corp. v. Brown*, 106 N.W.2d 456, 466 (Neb. 1960) ("In connection with the question of whether or not the restriction is reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate interest and reasonable in the sense that it was not unduly harsh and oppressive on the employee the question of time and space is involved. A contract in restraint of trade, which is neither limited in time nor space, is against public policy and void.").

208. *See, e.g.*, *Simmons v. Miller*, 544 S.E.2d 666, 678 (Va. 2001) (quoting *Advanced Marine Enters., Inc. v. PRC Inc.*, 501 S.E.2d 148, 155 (Va. 1998).

209. *See supra* notes 201, 202 and accompanying text.

210. *Compare Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 304 N.W.2d 752, 757 (Wis. 1981) (deciding the question as a matter of law), *with Waadah*, 861 N.W.2d at 441 (Nebraska), *and Omniplex World Servs. Corp.*, 618 S.E.2d at 342 (Virginia).

211. *Compare Techworks, L.L.C. v. Wille*, 770 N.W.2d 727, 732 (Wis. Ct. App. 2009) (placing the legal burden on employer), *with Brown*, 106 N.W.2d at 464 (Nebraska), *and Motion Control Sys., Inc. v. East*, 546 S.E.2d 424, 425 (Va. 2001) (Virginia).

212. *Compare Streiff v. Am. Fam. Mut. Ins. Co.*, 348 N.W.2d 505, 510 (Wis. 1984), *with Gaver v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121, 131 (Neb. 2014), *and Richardson v. Paxton Co.*, 127 S.E.2d 113, 117 (Va. 1962).

213. *See*, *e.g.*, *C & L Indus., Inc. v. Kiviranta*, 698 N.W.2d 240, 245 (Neb. Ct. App. 2005); *MeadWestvaco Corp. v. Bates*, 91 Va. Cir. 509, 510 (2013) (discussing confidentiality agreements).

214. *Compare Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 799 (Neb. 2006) (unconscionability is a question of law; unconscionability exhibits unfairness; unconscionability considers bargaining power disparity), *with Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 163–66 (Wis. 2006) (same).

setting.[215] Relative to Wisconsin's unconscionability doctrine, Nebraska's unconscionability doctrine remains underutilized, appearing in a paucity of appellate court cases[216]—which presents its courts with precedent-setting opportunities for further development. Notwithstanding, Nebraska not only inherently incorporates substantive unconscionability doctrine into its legal doctrine governing the enforceability of noncompete agreements,[217] but also partially incorporates *procedural* unconscionability doctrine into the analysis.[218] For this reason, a more complete incorporation of procedural unconscionability doctrine into the legal analysis of the enforcement of noncompete agreements[219]—under either its requirement that noncompete agreements not be "injurious to the public"[220] or its requirement that noncompete agreements not be "unduly harsh or oppressive on employees"[221]—would be a natural and logical progression.[222]

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215. *Compare Myers*, 724 N.W.2d at 799 ("In a commercial setting . . . substantive unconscionability alone is usually insufficient to void a contract or clause."), *with Jones*, 714 N.W.2d at 165 ("A determination of unconscionability requires a mixture of both procedural and substantive unconscionability that is analyzed on a case-by-case basis.").

216. *Compare supra* Part III, *with* Landrum, *supra* note 34, at 782 n.134 (Nebraska appellate courts have considered unconscionability doctrine in only five cases as of 2014).

217. *Compare Myers*, 724 N.W.2d 776, 799 ("[T]he term 'unconscionable' means manifestly unfair or inequitable. A contract is not substantively unconscionable unless the terms are *grossly unfair* under the circumstances that existed when the parties entered into the contract." (emphasis added) (citation omitted)), *with Gaver*, 856 N.W.2d at 127 (stating that a noncompete agreement will be enforced only if it is "not *unduly harsh and oppressive* on the employee" (emphasis added)).

218. *Compare Myers*, 724 N.W.2d at 799 ("A court must also consider whether the contract formation was procedurally unconscionable. An essential fact in determining unconscionability is the *disparity in respective bargaining positions* of parties to a contract." (emphasis added) (citation omitted)), *with Am. Sec. Servs. v. Vodra*, 385 N.W.2d 73, 80 (Neb. 1986) ("[T]his court recognized a 'balancing test' to be applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable. The factors or considerations involved in such balancing test . . . are 'the *degree of inequality in bargaining power*; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.'" (emphasis added) (quoting *Philip G. Johnson & Co. v. Salmen*, 317 N.W.2d 900, 904 (1982))).

219. *See supra* Section IV.A.

220. *Gaver*, 856 N.W.2d at 127.

221. *Id.*

222. *See supra* Part III (discussing how Wisconsin courts have already inherently added an analysis of substantive unconscionability).

Relative to Nebraska, a survey of Virginia's case law applying unconscionability doctrine yielded more cases (a finding that parallels Wisconsin)[223] in addition to more doctrinal variation among its courts.[224] In Virginia's appellate courts, for example, an unconscionable contract is oftentimes referred to as "one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other"[225]—with no mention of either procedural or substantive unconscionability.[226] In several unpublished dispositions regarding contracts in Virginia's circuit courts, however, both procedural and substantive unconscionability are discussed.[227] Furthermore, bargaining power disparity—a fundamental aspect of procedural unconscionability[228]—has been mentioned as relevant to the analysis of the enforceability of noncompete agreements in several unpublished Virginia circuit court cases.[229] These findings similarly support a more complete incorporation of procedural unconscionability doctrine into the legal analysis of the enforcement of noncompete agreements in Virginia.

CONCLUSION

In light of the Wisconsin Supreme Court's *Friedlen* holding, this Article identifies a potential problem related to bargaining power disparity, consent, and meaningful choice in restrictive employment covenants entered into post hire-date. Reflecting on Chief Justice Abrahamson's sentiment in her concurring opinion in *Friedlen*, it

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223. *See supra* note 216.

224. *See infra* notes 225, 227–29 and accompanying text.

225. *See e.g.*, *Mgmt. Enters. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992) (quoting *Smyth Bros.-McCleary-McClellan Co. v. Beresford*, 104 S.E. 371, 382 (Va. 1920)).

226. *See Mgmt. Enters.*, 416 S.E.2d at 231.

227. *See, e.g.*, *McIntosh v. Flint Hill Sch.*, 100 Va. Cir. 32, 41 (2018) ("[P]rocedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract [while] [s]ubstantive unconscionability involves unfairness in the terms of the contract itself . . . ." (quoting *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012))); *Sanders v. Certified Car Ctr., Inc.*, 93 Va. Cir. 404, 406 (2016) (same).

228. *See supra* note 3 and accompanying text.

229. *See, e.g.*, *Devnew v. Flagship Grp.*, 75 Va. Cir. 436, 449 (2006) ("Given that Devnew had substantial bargaining power with Brown & Brown and the fact that he possesses plentiful occupational avenues within his licensure and experience, the Court holds that Devnew's employment agreement does not unduly restrict his professional employment."); *Jones v. Dent Wizard Int'l Corp.*, No. CL02-386, 2002 WL 32254731, at *2 (Va. Cir. Ct. May 6, 2002); *Glob. One Commc'ns, L.L.C. v. Ansaldi*, No. C165948, 2000 WL 1210511, at *2 (Va. Cir. Ct. May 5, 2000); *see also Paul Bus. Sys. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990) (weighing unequal bargaining power against the enforceability of a contract).

contends that contract formation protections should be extended into the realm of procedural unconscionability for noncompete agreements entered into post hire-date. Carrying the torch forward, and working within the parameters of existing law, it advocates for an advancement of the unconscionability paradigm to solve the identified problem.