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Contracts in Context and Contracts as Context

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CONTRACT IN CONTEXT AND CONTRACT AS CONTEXT

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[L]aw generally, and contract law specifically, have too many rooms to unlock with one key.[1]

Is my understanding only blindness to my own lack of understanding?[2]

INTRODUCTION

The annual Business Law Symposium of the Wake Forest Law Review has a distinguished legacy of noteworthy programs that shed light on seminal issues affecting contemporary business in the United States. This edition builds on that tradition of excellence with a focus on the ubiquitous phenomenon of contracts and bargaining behavior. Contract law appears as a set of policies and rules that provide order for those who transact bargains. Indeed, contract law and the rules that it engenders seemingly facilitate an efficient system of transactional conduct that, on its face, appears objective.[3]

Theoretical premises for the formation of contracts support this view. The genesis of a legally enforceable agreement centers on assent[4] and the requirement of a bargained-for exchange of value.[5]

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1. Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1109 (1984).

2. LUDWIG WITTGENSTEIN, ON CERTAINTY 54e (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Blackwell 1975) (1969).

3. *See* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 890–91 (1997).

4. *See* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.1, at 200 (3d

The seeming simplicity of this formula presumably ensures certainty and predictability.[6] Economic principles also provide justification for the objectivity of contract rules.[7] Conventional wisdom suggests that contract law functions empirically, objectively enforcing the idiosyncratic preferences of those who enter into enforceable agreements.

Mundane bargaining transactions support the appearance of objectivity. Individuals regularly and routinely enter into enforceable contracts for the payments of mortgages or rent; the purchase of supplies, materials, and chattels; or the lease or purchase of a motor vehicle.[8] The frequency of these successful transactions suggests that contract rules operate seamlessly and objectively, thereby facilitating the efficient operation of the contemporary marketplace.

The apparent "empiricism of contract may be little more than an egalitarian facade."[9] Contracts, which are borne of human behavior, reflect the context in which they are formed. A contextual approach to contract presumes that preferences are not entirely preformed, but are influenced and altered by the contractual context and the supposedly neutral set of contract law rules that apply to that particular context. Context not only shapes the substance of

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ed. 2004) ("The first requirement [for a valid contract], that of assent, follows from the premise that contractual liability is consensual."); *see also* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 29, at 59 (4th ed., LexisNexis 2001) ("A basic question of contract law is whether two or more parties arrived at an agreement, i.e., whether the parties have manifested their mutual assent concerning their future conduct.").

5. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); *see also* SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 4.1, at 322 (Richard A. Lord ed., 4th ed. 2007) ("[M]utual assent must be manifested by one party to the other, and except as so manifested, is unimportant.").

6. *See* Morant, *supra* note 3, at 903–05. The Uniform Commercial Code ("UCC") provides a probative definition of contract, meaning "the total legal obligation that results from the parties' agreement as determined by [the UCC] as supplemented by any other applicable law." U.C.C. § 1-201(b)(12) (2004); *see also* Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 95 (1998) [hereinafter Morant, *Teachings*] (noting that contract rules, as codified in the UCC, "were designed to maintain the efficient operation of society's marketplace" and "provide[] state recognition of private bargaining rights").

7. *See* Morant, *Teachings*, *supra* note 6, at 68, 69 & n.28.

8. *See* Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 203 (1966) (citing H.R. REP. NO. 81-1453, at 25 (1949) (Conf. Rep.) to aid in defining the types of transactions that may qualify as consumer sales); *see also* 112 CONG. REC. 11,003–04 (1966) (acknowledging that the sundry consumer transactions that are commonplace in the market include transactions at grocery stores, hardware stores, coal dealers, automobile dealers, clothiers, dry goods merchants, department stores, etc.).

9. Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 5 (1998) (discussing the pseudoempiricism of contract law).

the bargain, but also provides an analytical template required to interpret the terms of the bargain. The rules of contract seemingly eschew contextual realities that affect bargaining.[10] As a result, one might logically assume that contextual factors are irrelevant in the resolution of contract disputes. Moreover, decision makers—who themselves are influenced by contextual realities such as their beliefs, thoughts, and judgments—further challenge the notion that contract law is purely objective and empirical.

To interpret contractual terms or decide disputes *without* consideration of the context that framed the bargain is a disingenuous analysis at best. Any meaningful and judicious review of contractual matters requires the application of contract rules within an analytical framework that includes the context in which contracts are formed.[11]

A recent exhibition entitled *Art, Media and Material Witness* posed a series of questions which, with the transposition of the phrase "contract law" for the words "art" or "media," nicely illuminates the meaning of *contract in context*.[12] What is the relationship between contract law and the historical, political, and social changes of the time? Do lawyers and legal scholars act as witnesses to changes in that relationship? If so, is their "testimony" as to the interpretation of contract law relevant to the understanding of the relationship of law and change, and the resolution of social-legal dissonance? What form does this legal testimony take? What is the significance of contract law in societal discourse? Can contract law change the manner in which transacting parties interact in the world of business? This Symposium provides a series of articles that innovatively address these mostly rhetorical questions and emphasize the importance of context as an important analytical tool.

The fundamental questions inspired by *Art, Media and Material Witness* are central given the evidence of rampant one-sidedness in contracts related to the recent financial crises.[13] The overreaching

10. *See* FARNSWORTH, *supra* note 4, § 3.6, at 192–94 (comparing theories of assent and concluding that the objective theory of contract, which does not take subjective intent into account, is universally accepted among courts today).

11. Morant, *supra* note 3, at 891–92.

12. *See* Press Release, Samuel P. Harn Museum of Art, Contemporary Art Exhibition at the Harn Museum Explores Artists as Witnesses (Aug. 25, 2009), *available at* http://www.harn.ufl.edu/press/e78.php; *see also* D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 40 (2009) (noting that "institutional theory highlights the extent to which contracts communicate legitimacy to a broader set of stakeholders," and that "organizational theories . . . reveal the diverse purposes of contracts and the various roles that lawyers play when drafting contracts").

13. *See generally* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008) (describing deficiencies in consumer credit regulation that have contributed to large-scale economic problems). The quick passage of a federal law to restrict credit card companies' freedom of contract

represented by the granting of subprime loans, wholesale misrepresentation of financial instruments and their ratings, and the profound asymmetrical information and moral hazard problems associated with the appropriation and selling of risk have often characterized bargaining in the corporate landscape.[14] In the world of home loan decision making, some have observed that "[d]ifferent borrowers . . . falling along socioeconomic lines, make the home loan decision in different contexts, contexts that influence which cognitive and emotional processes will come into play."[15] The fact that emotion and biases affect decision making requires contract law to play a role in effecting rational and fair bargaining. Contract law requires more than the broad modeling of a market actor who could be susceptible to cognitive errors and biases. This over-inclusive approach does not adequately address the influences of such sociological factors as race, gender, class, and culture.[16] In such contracting contexts, mandatory disclosure rules may not be enough to overcome cognitive errors and discriminatory influences. These errors and influences are often manipulated by the stronger or more sophisticated party.[17] Instead, "choice guidance rules" are needed in certain contexts to ensure a threshold of freedom of contract.

Facilitative (freedom of contract)[18] and context-driven regulatory[19] functions of contract law remain central to most debates

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was a response to that industry's abuse of power in the changing of rolling contracts. Among other things, the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009) does the following: (1) bans rate increases on existing balances due to "any time, any reason" or "universal default" provisions, and severely restricts retroactive rate increases due to late payment; (2) requires that contract terms be clearly spelled out and remain stable for the entirety of the first year; and (3) bars unfair terms, including late fee traps and unfair subprime fees.

14. Bar-Gill & Warren, *supra* note 13, at 3–5.

15. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 760 (2006); *see also* Brian M. McCall, *Learning from Our History: Evaluating the Modern Housing Finance Market in Light of Ancient Principles of Justice*, 60 S.C. L. REV. 707, 712 (2009) (arguing that the current financial crisis is primarily a failure of commutative justice).

16. *See* Willis, *supra* note 15, at 760.

17. For example, Willis notes that a large percentage of subprime borrowers actually qualified for lower interest rates than the ones they received. *Id.* at 730.

18. In its classical form, legal formalism is the belief that in "any legal question, there was the possibility that, properly analyzed, the correct answer could be arrived at by applying basic principles that were both derived from and reflected in case law." Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 106 (2000) (emphasis omitted).

19. Contextualism is often attached to the work of the legal realists who saw the "attempt to explain all of contract doctrine on the basis of a few general principles [as] chimerical and destructive." *Contracts and the Market*, *in* AMERICAN LEGAL REALISM 79 (William W. Fisher III et al. eds., 1993).

on the proper role of contract law in a complex, modern economy.[20] Despite epoch-related characterizations of contract law as more or less formalistic in nature, the tensions between formal and contextual, internal and external,[21] and deduction and induction are constant. Contract law as a rules-based order requires formal application, but context is needed to apply contract rules to evolving transaction types that redefine bargaining relationships. Contract law formulation, in the words of Martha Minow, is part of a process in which law is attached "to the social contexts in which norms can be generated and given meaning."[22] It is these social-contractual contexts that influence contract law's choice between freedom of contract or status-based solutions.

In an increasingly complex economy, contract law's development moves from a general, freedom-of-contract-based body of law to contextual, status-based bodies of specialized law. Instead of a unilateral debate over the power of a unified, formalistic theory that explains contracts as mere abstractions, this introductory Article and others in this Symposium examine whether contract law is best understood as a group of specialized, context-driven bodies of law. This approach incorporates both descriptive and normative features. A descriptive query probes whether contract law can be better understood through the prism of context to reveal its true nature in practice. A view that contract law is influenced by status-based relationships suggests that the examination of context will, at times, more effectively regulate freedom of contract.[23] A prescriptive view

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20. Gregory Klass poses a compound theory of contract law in which opposing theories of contract law can be divided into those that see contract law as power-conferring and those that see it as duty-imposing. *See* Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1726 (2008) ("The dual function of compound rules provides empirical support for pluralist justifications of contract law.").

21. Duncan Kennedy critically characterizes the internal perspective as a "legal consciousness" aimed at masking law's internal contradictions, as well as the influence of externally masked influences: "It is a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest." DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 2 (2006).

22. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861 (1987).

23. Eighty-some years ago, Nathan Isaacs posed a cycle theory of common law development. He rejected Sir Henry Maine's proposition that law evolved from a status-based system to one of freedom of contract. Instead, Isaacs asserted that the common law oscillated between periods of status-based, standardized relationships and freedom-of-contract-based relationships. *See generally* Nathan Isaacs, *"The Law" and the Law of Change: A Tentative Study in Comparative Jurisprudence*, 65 U. PA. L. REV. 665 (1917); Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Larry A. DiMatteo & Samuel Flaks, *Beyond Rules*, 47 HOUS. L. REV. 297 (2010) (analyzing the conservative legal realism movement through the life and works of Nathan

requires that certain contextual factors be more fully and overtly embraced in contract law application.[24] The recognition of the role of such external factors as race, gender, ethnicity, language, information, and power asymmetries suggests that contract law can gain greater salience if such factors are incorporated within its interpretation and policing functions.

Part II of this introductory Article briefly examines the most popular, unitary theories of law. It questions any one theory's explanatory power over the breadth of contract issues and types of contracts. It supports the idea that each theory of contract can be used to explain certain contract rules, but not contract law as a whole. This Symposium buttresses this idea with the collective view that contract law can best be described and guided through a context-driven inquiry. A contextual theory of contract law recognizes the need for flexible rules for different contractual contexts and the elastic application of those rules across contexts. A contextual theory of contract law also recognizes a number of phenomena. First, contract interpretation, through the lens of context, should be used to regulate influences that question the purity of the freedom of contract upon which most agreements are based. Second, the construct of contract has been creatively applied to areas that are not immediately envisioned within the body of contract law.

Part III then examines the different uses of context that illustrate the relationship between contract law and society. It notes that "contract in context," for the purposes of the Symposium, is broadly defined. This Part provides a taxonomy of contract law in context that includes internal and external perspectives. Part III recognizes that societal context frames contract law, but also observes that contract law can frame the private ordering of society. This two-way flow of context, between the greater socioeconomic-cultural sphere and contract as context, analyzes the relationship of contract types and the contextual interpretation of contracts. It concludes by examining the relationship of context to paternalism and consent. Part IV then notes the role of power and identity in the formation and interpretation of contracts, and contract law's shortcomings in recognizing such influences in the search for contractual justice. Finally, Part V introduces the works presented at the Symposium.

I. UNITARY THEORIES AND MANY CONTEXTS

Contract law serves a number of purposes, including respect for private autonomy and consent-based obligations, enforcement of the moral obligation of promise, protection of reasonable expectations of

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Isaacs).

24. *See* Morant, *supra* note 3, at 896–97.

the promise-receiving party, enhancement of social utility, and the general preservation of contractual relationships.[25] These numerous purposes have supplied the means for legal scholars to frame unified theories that explain contract law. The theory based on the preservation of promises centers on the moral imperative to honor one's promises. A prominent vocal proponent of this theory is Professor Shiffrin, who emphasizes the interrelationship between the morality of promise and contract law.[26] She rejects expectation damages as a surrogate for the binding nature of contracts.[27] Instead, she argues that the commitment to perform, unless provided otherwise expressly in the contract, is a legally binding and moral commitment to perform one's duty and not a commitment to either perform or pay damages.[28] The civil law system actualizes Professor Shiffrin's argument. Section 241 of the *German Civil Code* succinctly states that "[b]y virtue of an obligation," the promisee "is entitled to demand performance from the [promisor]."[29] Thus, the underlying morality of promise explains civil law's recognition of specific performance as an ordinary remedy. Professor Oman expands on this point in his article, *Bargaining in the Shadow of God's Law: Islamic* Mahr *Contracts and the Perils of Legal Specialization*,[30] in which he explores the intersection between morality, religion, and contract law. He questions the harm produced by shunting general principles of law in favor of specialized bodies of rules in certain areas. In his article, Oman notes that the application of specialized rules—namely, the law of divorce or equitable distribution—to Islamic *mahr* contracts is a misapplication and a misreading of such contracts.[31] Oman concludes that such contracts are best dealt with by the general law of contracts.

Another commonly recognized theory of contract law asserts that its sole purpose is the promotion of private autonomy.[32] Freedom of contract is the theory's central focus. Closely aligned with private autonomy are the efficiency norms, which explain contracts as expressions of party preferences and the use of

25. *See* Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer*, 18 HASTINGS COMM. & ENT. L.J. 453, 455 (1996).

26. *See* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 749–53 (2007).

27. Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1563–67 (2009).

28. *Id.* at 1567–68.

29. Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Bundesgesetzblatt, Teil I [BGBl. I] 53, as amended, § 241, ¶ 1, sentence 1.

30. Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic* Mahr *Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579 (2010).

31. *See id.* at 580–81.

32. *See* Kennedy, *supra* note 18, at 160–63.

hypothetical intent to reveal those preferences. The private-autonomy principle is reflected in the will theory of contracts. Will theory as a guiding principle is reflected in a purely objective interpretation of contracts in which courts strictly enforce contracts as promulgated.[33] Strict interpretation can be problematic given the fact that the will of the parties is rarely fully specified. Contract law must therefore provide rules that fill gaps in the parties' agreement. Another development that undermines the functionality of will theory is the prevalent use of standard form contracting in which freedom of contract may conflict with the reality of private autonomy when the bargaining relationship is one sided.

According to Professors Schwartz and Scott, the autonomy principle readily applies to firm-to-firm contracts, in which bargaining relationships have some degree of parity.[34] They argue for a return to classical contract law's formalism in the interpretation of such contracts. Contract law for these bargaining firms should "be narrower and more deferential to contracting parties than the contract law we now have."[35] The normative grounding for this argument is that firms would likely choose the certainty of narrowly interpreted contracts over a doctrine that permits interpretation based upon fairness norms applied post hoc. They further posit that firm-to-firm contracting is "conditioned on few states of the world, and maximizes joint gains in a wide variety of contexts."[36] The isolation of firm-to-firm contracts as a special species of contract confirms that context-dependent rules are indispensible in the law of contracts. Moreover, the feasibility of this theory rests on the assumption that firm-to-firm contracts are immune from the contextual influences discussed in this Symposium. This assumption becomes suspect, however, given the power disparities present among different firms in the context of particular industries. Professor Barnhizer, in his article, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, explores the role of power in the formulation and application of contract law.[37] He presents a theory of contract law in which contracts are primarily exercises in power and argues that power structures are often transformed into contract law.[38]

While Schwartz and Scott's interfirm model of legal formalism remains a plausible goal, its validity remains rooted in the context

33. *Id.* at 115–16.

34. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544–48 (2003).

35. *Id.* at 618.

36. *Id.* They further assert that a "normative theory of contract law that takes party sovereignty seriously shows that much of the expansion of contract law over the last fifty years has been ill-advised." *Id.* at 619.

37. Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 WAKE FOREST L. REV. 607 (2010).

38. *See id.* at 608–10.

in which firms bargain with other firms.[39] Relational contract theory, which is contextual in nature, questions a unitary view of firm-to-firm contracts.[40] A strict interpretative model, as suggested by Schwartz and Scott, becomes difficult to apply given that many contracts are embedded in long-term, evolving relationships. These resulting contracts become part of a social-normative structure.

In light of the contextual realities that affect most bargaining relationships, modern contract law loosens the requirement of definiteness with the search for the hypothetical intent or bargain of the parties.[41] A determination of what the parties would have agreed to, based upon party characteristics and the context of the bargain, is used to fill in gaps in contracts. In the standard form scenario, the problem of intent has been at least partially solved by Llewellyn's bifurcation of intent between the specific intent to be bound by dickered terms and a blanket assent to all "reasonable" nondickered terms.[42] The specific intent concept acknowledges that the promise, will, and consent bases of contract law center on the promisor's perspective in determining contractual obligation. Blanket assent and reliance theory focuses upon the promisee's reasonable expectations as generated by the promise-giver.[43]

Modern contract law presently recognizes numerous context-driven distinctions. These distinctions include merchant-consumer,[44] sophisticated-unsophisticated,[45] and individual-firm.[46] While fundamentally valid in purpose, these distinctions often truncate the contextual inquiry. Once parties are labeled as a merchant, a sophisticated bargainer, or as a firm, contract law establishes the presumption that such parties understood and consented to all the terms of the contract and were not per se the victim of opportunism or overreaching.[47] Such distinctions are indeed superficial. A richer contextual inquiry would study the asymmetrical information or power disparities in place of the

39. Schwartz & Scott, *supra* note 34, at 544; *see also* Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 535–36 (2009) (noting that courts need to "take a contextual . . . approach to determining whether formalist principles apply").

40. *See* Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881 (2000) (outlining the "core propositions" of relational contract theory).

41. *See* Eisenberg, *supra* note 1, at 1116–17.

42. KARL LLEWELLYN, THE COMMON LAW TRADITION 370 (1960).

43. *Id.*; *see also* Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COM. L.J. 17, 62 (2006).

44. *See* U.C.C. § 2-104(1) (2004) (defining "merchant"); *id.* § 2-205 (2004) (imposing the "firm offer rule" on merchant sellers, but not on consumer sellers).

45. *See* Miller, *supra* note 39, at 493–96.

46. *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet To Be Met*, 45 AM. BUS. L.J. 723, 723–27 (2008).

47. Miller, *supra* note 39, at 495–96.

labeling of transactions based upon preconceived distinctions.[48] Contract law's present distinctions are part of the context of a transaction, but should be viewed as initial steps in the contextual inquiry.

The various theories provide only a partial explanation of contract law.[49] This partiality, which may appear limiting, forms the basis for what Robert Hillman calls the *richness* of contract law.[50] This richness denotes that contractual rules and principles have meaning only if viewed and applied in the context of the legal and sociocultural system in which bargains are formed.[51] Professor Kim explores the pervasive influence of sociocultural factors with her examination of contract law within the context of global transactions. In *Reasonable Expectations in Sociocultural Context*, Kim shows that cultural dissonance, which is a humanistic reality borne from the differences in cross-cultural views of identity and gender, requires an analysis of cultural context in order to protect the reasonable expectations of the parties.[52]

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48. Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 296–97 (2005) (stating that "merchant versus consumer" is a false dichotomy "because small businesses do not fall cleanly" into either category); *see generally* Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233 (2003) (analyzing the bargaining difficulties faced by small businesses).

49. Dennis Patterson has taken issue with the notion of "correct" contract theory: "Two thousand years of philosophy has failed to yield anything like a plausible account of what it would mean to provide a 'correct' account of the 'thing' called contract." Dennis M. Patterson, *The Philosophical Origins of Modern Contract Doctrine: An Open Letter to Professor James Gordley*, 1991 WIS. L. REV. 1432, 1436; *see also The Relevance of Contract Theory: A Symposium*, 1967 WIS. L. REV. 803.

50. *See* ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW 6 (1998). John Finnis explains that the task of contract law is to provide "a fair method of relating benefits to burdens, and persons to persons, over an immensely wide, complex, and lasting, *though shifting*, set of persons and transactions." John M. Finnis, *Law as Co-ordination*, 2 RATIO JURIS 97, 102 (1989) (emphasis added). Marc Galanter argues that neoclassical legal theory continues to see law as a purely conceptual order and that such a "portrayal . . . strips away the richness of context—and with it the indeterminacy and wildness that is entwined with the stability and routine of legal life." Marc Galanter, *Conceptualizing Legal Change and Its Effects: A Comment on George Priest's "Measuring Legal Change,"* 3 J.L. ECON. & ORG. 235, 240 (1987).

51. Again, Professor Patterson asserts that "it is better to think of contract law not as a thing but more akin to an ongoing, self-transforming cultural activity." Patterson, *supra* note 49, at 1436. The problem of a purely context-dependent contract law is suggested in Professor Geis's comment that "[u]nfortunately, selecting a level of granularity in contract law is a byzantine problem. Into how many groups should we splinter our society?" George S. Geis, Review, *Economics as Context for Contract Law*, 75 U. CHI. L. REV. 569, 593 (2008).

52. Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 WAKE FOREST L. REV. 641 (2010).

The history of contract law since the later nineteenth century includes the development of contextual rules.[53] The most obvious manifestation of this phenomenon has been the development of specialized rules for different transaction types, such as the sale of goods, leasing, government contracting, employment, secured transactions, and others. Professor Hillman examines the evolving uniqueness of software contracts and concludes that these agreements do not fit squarely within the rubric of Article 2 of the Uniform Commercial Code ("UCC").[54] He discusses the uniqueness such contracts present and the need for specialized rules. As Hillman's work—including as Reporter for the American Law Institute's *Principles of the Law of Software Contracts*[55]—demonstrates, contract law's richness allows for the adoption of different rules for new transaction types or, at least, the need for a more contextual application of established, transactional rules.[56]

II. CONTRACT IN CONTEXT

Contract law serves to order individual preferences. Freedom of contract rests on the premise that preferences are personal and preexisting, and contracts provide the means for individuals to satisfy those preferences rationally.[57] In reality, preferences are contingent, parties often act irrationally, and freedom to and from contract varies depending on the characteristics of the parties and the context of the bargain. This Part examines the role of context as it relates to the development of contract law, the interpretation of contracts, and the role of contract law in framing the ordering of preferences. This latter function of context sees law itself as context, along with other social practices, in the formation of preferences.[58] Contract as context reflects contract law's normative functions that facilitate and influence the private ordering of individual preferences. The various topics included in this Symposium demonstrate the facilitative aspect of context. As a

53. *See* Ronald J. Mann, *Contracts—Only with Consent,* 152 U. PA. L. REV. 1873, 1902 (2004) (noting that contract law has evolved over many years into a system of contextual rules that target specific types of transactions and industries).

54. Robert A. Hillman, *Contract Law in Context: The Case of Software Contracts*, 45 WAKE FOREST L. REV. 669 (2010).

55. Robert A. Hillman & Maureen A. O'Rourke, *Principles of the Law of Software Contracts: Some Highlights*, 84 TULANE L. REV. 1519 (2010).

56. Karl Llewellyn formulated this contextualized notion of contract law as follows: "very different types of situation, with very different types of need, already—though covertly—blessed with largely very different types of governing rule . . . ." K.N. Llewellyn, *The First Struggle To Unhorse Sales*, 52 HARV. L. REV. 873, 904 (1939).

57. *See* Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 659–60 (1990).

58. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1753–55 (1997).

precursor to the discussion by other contributors, this next Part explores the numerous applications of contract in context and contract as context.

A. *Internal and External Contexts*

The importance of context to contract law is similar to all linguistic enterprises involving reading and writing. Meaning is not external to context, but is constructed through the interpretation of the text and its context.[59] The internal context of contract law involves the placing of specific contract rules within the conceptual whole of the law. The external context is the placement of contract rules within the socio-cultural-economic reality of a bargain.

1. *Internal Context*

Internal context refers to the placement of a given rule, doctrine, or principle within the entire body of contract law.[60] This descriptive exercise focuses on the relationship of particular rules or principles to the grand rationales or meta-principles of contract law. Much of doctrinal analysis seeks to understand how the parts fit together. In this way contract law can be understood as a thick texture of rules and doctrines that form a hermeneutic circle—one that poses the paradox that the whole cannot be understood without understanding the parts and the parts cannot be understood without comprehension of the whole.[61] The theoretical approach of Ronald Dworkin demonstrates this analysis.[62] Dworkin notes that

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59. *See* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 156 (1999).

60. *See* Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. REV. 247, 338–40 (1996); James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 296 (1995).

61. DENNIS M. PATTERSON, GOOD FAITH AND LENDER LIABILITY: TOWARD A UNIFIED THEORY 34–35 (1990). A similar circle is evidenced by the "hub and spoke" concept once advanced in association with the revision of Article 2 of the UCC. Initially, the National Conference of Commissioners for Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") decided to proceed with a "hub and spoke" approach that would have reconfigured Article 2 into a central hub of general principles with parts or spokes devoted separately to the special incidents of sales of goods, leases of goods, and computer information transactions. For discussions of the hub and spoke idea, see Marion W. Benfield, Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405 (1994) and Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994).

62. *See* Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982) [hereinafter Dworkin, *Interpretation*]; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). Critical analysis argues that this fitting together is an illusion that masks the inherent contradictions in the law. *See generally* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997

the internal integrity of contract law allows for rule creation or adjustment in a given area guided by the need to harmonize the new rule with the entire body of contract law.[63]

2. External (Sociocultural) Context

Contract law is an institution informed by the society in which it operates. A contextual approach to bargaining behavior sees the fundamental role of contract law as the attribution of meaning to human transactions. Modern contract interpretation requires the placement of a bargain or specific contract term within the context in which the bargain is formed or performed. The disconnection of contract law from context (undue abstraction or undue theorizing) diminishes its functionality. Professor Bridgeman appreciates this point when he observes the disconnect between formal rules and norms and between formal rules and context.[64] In order to reestablish the norm-context essence of contractual rules, courts must reconnect the "norms in the rule[s]" and "refer to context in the rule."[65] Professor Minow highlights this requirement, stating that broadened contextual inquiry is needed to "break out of . . . formalist categories."[66] Unlike a unitary approach to contract law, the infusion of context avoids bracketed decision making and permits better assessment of acts of private autonomy and contractual consent. Contract law, which orders bargaining relationships and transactions, should always be tempered by the facts of particular contexts.[67] Failure to consider contextual impacts can become counterproductive. Professor Abril, in *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, examines the consequences when law becomes disconnected from norms and context.[68]

The meta-rationales that underscore different types of contracts may differentiate the needs of contracting parties. Beginning with the core rationale of freedom, different types of contracts are centered on different secondary rationales. Over time, contract law has developed contextual rules in response to these underlying rationales. Consumer sales law has evolved more along a consumer-

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(1985).

63. Dworkin, *Interpretation*, *supra* note 62, at 543–45; *see also* KENNEDY, *supra* note 21, at 94–96.

64. *See* Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1476 (2008).

65. *Id.*

66. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 89 (1987).

67. Minow provides the rationale for the relationship between concept and context: "Moving between specific contexts and general commitments, we can challenge unstated assumptions that might otherwise rule." *Id.* at 91.

68. Patricia Sánchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689 (2010).

protection rationale.[69] In commercial sales law, an expediency rationale best explains contract law application in this area. Here, the importance of dealing with unwanted or rejected goods in an expeditious manner is a core concern.

The domestic-international context of the commercial sale of goods justifies the different rules found in the UCC and the United Nations Convention on Contracts for the International Sale of Goods ("CISG").[70] The UCC provides a buyer-centered approach. Given the fungible nature of most goods and relatively inexpensive transport costs in domestic transactions, the UCC provides the buyer with an absolute right of rejection.[71] If the seller's ability to retrieve or resell is manageable, then the buyer's right to reject is a rational default rule. The UCC encourages the expeditious disposition of goods by requiring the buyer to preserve and possibly sell rejected goods.[72] The CISG, on the other hand, is pro-seller in this area. The buyer is viewed as the most efficient disposer of goods whether they are conforming or nonconforming. Buyers must buy the goods unless there is a provable fundamental breach.[73]

As we move from discrete to long-term or relational contracts, the importance of trust and loyalty becomes more pronounced.[74] The termination of relational contracts engenders closer scrutiny.[75] The duty to adjust or renegotiate, along with the norms of good faith and fair dealing, play more important roles, often non-legally induced. Contracts in the context of intellectual property licensing are best understood under a protection rationale.[76] Finally, government contract law, which provides a highly regulated body of rules to ensure competitive pricing and responsible performance, is understandable given the public-trust nature of government procurement.[77] The rationales of transparency and accessibility underlie this specialized body of contract law.

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69. *See* A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANSNAT'L L. 1219, 1227–35 (2001).

70. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, 19 I.L.M. 668 [hereinafter CISG].

71. *See* U.C.C. § 2-601(a) (2004).

72. *See id.* §§ 2-703, -706.

73. *See* CISG, *supra* note 70, arts. 46(2), 49(1)(a).

74. *See* Richard E. Spiedel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 264 ("Relational contracts, by necessity, are incomplete and dependent upon good faith adjustments after the time of formation.").

75. Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 317–19 (1999).

76. *See* Joseph Richard Falcon, Comment, *Managing Intellectual Property Rights: The Cost of Innovation*, 6 DUQ. BUS. L.J. 241, 241 (2004).

77. For a general primer on government contracts, see Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 952–54.

3. Contract Law as Context

Cass Sunstein asserts that the free market is a legal construct.[78] It is legal rules that make private property and the free exchange of that property possible.[79] As such, legal rules have a direct bearing on the economic system and society as a whole. Viewed through this systemic lens, contract law imposes a market order through the development of legal concepts and rules. At the same time, contract law responds to changes in market transactions. The a priori ordering of the market by law is short-lived because socioeconomic pressures require the development of new rules or the adjustment of existing ones. A contextual understanding of contract law shortens the lag between rule and reality. Because social practices are not homogeneous, contract law must be context dependent. Context-dependency, given an increasingly complex contracting environment, leads to the development of more specialized groups of rules.[80]

Contextual aspects of contract law also explain different social practices and other areas of law. One example of this point is the contract construct's application to the non-contract (non-legal) dimension of the employment relationship. In the human resource management area, the employment relationship implores a theory of psychological contract.[81] Within law, the contractual basis for limited liability companies ("LLCs") rests on the freedom of contract goals of entity formation.[82] The debate in this application of contract law focuses on whether the parties have the freedom to eliminate managerial fiduciary duties. In *Legal Realism, the LLC, and a Balanced Approach to the Implied Covenant of Good Faith and Fair Dealing*, Professor Miller argues that the "LLC as contract" approach must balance freedom of contract principles with statutory-based protections.[83]

4. Contextualism, Contract Types, and Unconscionability

Contextualism in its broadest sense is the incorporation of

78. CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 5 (1997).

79. *Id.*

80. *See* WOUTER DE BEEN, LEGAL REALISM REGAINED 101 (2008). Professor Willis states that "the heterogeneity of contexts in which people find themselves leads to heterogeneous behaviors." Willis, *supra* note 15, at 760.

81. *See generally* NEIL CONWAY & ROB B. BRINER, UNDERSTANDING PSYCHOLOGICAL CONTRACTS AT WORK (2005) (reviewing literature on the psychological contract theory of employment).

82. *See* Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 295 (Del. 1999) (interpreting the Delaware Limited Liability Company Act and observing that "the policy of the Act is to give the maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements").

83. Sandra K. Miller, *Legal Realism, the LLC, and a Balanced Approach to the Implied Covenant of Good Faith and Fair Dealing*, 45 WAKE FOREST L. REV. 729 (2010).

nontextual elements into the interpretive process. The interpretive process involves both the attribution of meaning to a private contract and the attribution of meaning to contract rules in their application to a particular contractual context.[84] Subjective contextualism focuses on the characteristics of the parties.[85] A number of the participants in this Symposium have written about the need to expand the use of context to understand the influences of bias, gender, race, culture, and power on the formation, interpretation, and enforcement of contracts.[86] An example of this line of inquiry is presented here by Professor Threedy in her article, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*.[87] In contrast, objective contextualism looks to trends or developments in society and business to uncover new types of contracts.[88] In this way, the law determines whether a differentiated body of rules is needed to respond appropriately to the new type of contract. Again, Professor Hillman looks at this phenomenon in the area of software contracts.[89]

Karl Llewellyn recognized in his seminal work the importance of context in the interpretation of contract terms and the application of contract law.[90] Utilizing Llewellyn's theory of contract interpretation, a court places the case at hand within the context of "transaction types." Taken from the social context of the contract, these types include "role types" and "group types." Transaction type relates to the subject matter of the contract (sale, lease, license, as well as whether it is long-term or discrete).[91] Characteristics of the parties—such as merchant, consumer, minor, or arms-length negotiator—define role types.[92] Group type focuses on the type of business, industry, or profession.[93]

In contrast to a contextual approach, legal formalism treats

84. *See* Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 402–03 (2004).

85. Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 576 (2005).

86. *See, e.g.*, Patricia S. Abril, *"Acoustic Segregation" and the Hispanic Small Business Owner*, 10 HARV. LATINO L. REV. 1 (2007); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006); Morant, *supra* note 3; Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247 (1999).

87. Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 (2010).

88. *See* DiMatteo, *supra* note 84, at 458–62.

89. *See generally* Hillman, *supra* note 54.

90. *See* LLEWELLYN, *supra* note 42, at 20.

91. DiMatteo, *supra* note 84, at 483.

92. *Id.* Through such a context-driven methodology, role types "are . . . constructed jointly by . . . law and . . . society." Todd D. Rakoff, *The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense,' in* GOOD FAITH AND FAULT IN CONTRACT LAW 191, 216 (Jack Beatson & Daniel Friedmann eds., 1995).

93. DiMatteo, *supra* note 84, at 483.

contracting parties as fungible, acontextual beings. The incorporation of contextual evidence challenges formalism's uniform characterizations.[94] While contract law's policing doctrines—such as duress, undue influence, misrepresentation, and unconscionability—permit greater use of context, they fail to provide the level of protection required to counter discriminatory behavior related to race, gender, and class. Some have argued for the contextual expansion of unconscionability to include the impact of such factors as race, gender, or lack of business sophistication.[95]

In applying the doctrine of unconscionability, the problem posed by inequalities in bargaining power and how it can be affected by a number of factors such as race, gender, and class has not been adequately analyzed. The use of such factors is often obscured by the formalistic definitions of procedural and substantive unconscionability.[96] Although it is likely that some courts use such factors in applying the doctrine, in general a greater recognition of such factors in determining procedural unconscionability would be both appropriate and congruous with the contextual examination of the parties' respective bargaining positions. At present, policing doctrines fail to recognize the more insidious nature of biased behavior. The very nature of policing doctrines presumes that abuse of freedom of contract is only found in exceptional instances. The examination of biased behavior in contract interpretation permits broader policing of contracts that are a product of such negative contextual influences.[97]

The insidious nature of bias is seen at the grass roots of contract interpretation. Some have argued that the reasonable person standard is not a gender- and race-neutral fabrication, but often reinforces patriarchy and privileges the understandings of white

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94. *See* DE BEEN, *supra* note 80, at 5–8.

95. *See, e.g.*, Morant, *supra* note 3, at 929–30 (contending that unconscionability review should allow proof of how stereotypes and negative perceptions of disadvantaged groups affected the resulting contract).

96. *See, e.g.*, Higgins v. Superior Court, 45 Cal. Rptr. 3d 293, 301 (Ct. App. 2006) (finding a mandatory arbitration agreement to be procedurally and substantively unconscionable based on formalistic definitions, but omitting any substantial discussion of contextual factors).

97. *See* Morant, *supra* note 3, at 893–94, 910 ("To ignore subjective issues of race, gender, or issues of disparity would be disingenuous when in fact such factors . . . impact both analysis of factual situations and outcome of disputes. . . . One factor the classicists fail to appreciate . . . is that consent is not formed in a sterile environment, protected from pejorative external influences. Human frailties such as prejudice, negative opportunism, avarice, and bias may work to skew the assent of either the offeror or offeree.") (footnotes omitted); *see also* Curtis Bridgeman, Allegheny College *Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 152 (2005) (supporting the use of contextual formalism to aid in the understanding of a charitable gift case).

men.[98] For example, the understandings of the reasonable person are premised upon a reasonable level of education and knowledge. Amy Kastely argues that factors such as the lack of education act as surrogates for race without focusing on the influences of race- or class-based biases on the incorporation of unreasonable contract terms.[99] Constructed thresholds of reasonableness insulate the reasonable person from the influences of lack of knowledge, discrimination, and bias. A hierarchy of reasonableness rationality mirrors the "hierarchies of race, class, and gender . . . ."[100] At the top of the interpretive hierarchy is a rational, reasonable white male. Reasonable-person rationality has become the product of the masculine, acontextual, and abstractly rational view of decision making.[101] A more contextual, less abstract theory of interpretation would expand the realm of unreasonableness not captured under the present reasonable person standard. In the end, Kastely concludes that the reasonable person is a practical tool that reduces transaction costs, but allocates much of the remaining costs to those who do not possess the characteristics and expectations to fit within the formalistic conception of the reasonable person.[102] Professor Threedy expands on this point as she analyzes similarly situated parties of different sexes in cases with nearly identical fact patterns.[103]

B. Paternalism Versus Consent in Context

If consent reinforces private autonomy, then a fuller appreciation of the dimensions of consent safeguards freedom of contract and avoids undue paternalism. The argument here is that most one-sided contracts and the influences of discrimination,

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98. *See, e.g.*, Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 51–57 (1995) (arguing that objectivity is a culture-relative fabrication and that contract doctrine needs to better reflect the multicultural makeup of society); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 293–94 (1994) ("By featuring the understandings and expectations of privileged white men as the standard for contract interpretation, the objective theory establishes and maintains a white, class-privileged, male norm as the governing law of contractual obligation.").

99. *See* Kastely, *supra* note 98, at 304–06.

100. *Id.* at 294.

101. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). Throughout her work, Gilligan argues that mainstream theories of moral development privilege the abstract, rational-thinking propensity of males and ignore the more nuanced, situational, contextual decision-making preferences of females. *Id.*; *see also* Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791, 800–07 (1991) (explaining the feminist theory of obligations and demonstrating the stark contrasts between feminist theory and legal formalism).

102. Kastely, *supra* note 98, at 295.

103. *See generally* Threedy, *supra* note 87.

irrationality, and inequality of bargaining power can be understood as failures of consent.[104] Professor Harrison has argued for a broader view of substantive unconscionability coupled with public notice of substantive unconscionability findings as a means to alleviate systemic class bias.[105] Harrison recognizes that consent is problematic in a system in which weaker parties have been conditioned to take less.[106] Substantive-fairness or distributive-justice issues aside, true consent provides a firewall against inefficient and unjust contracts. Harrison's "public notice" suggestion may enhance consent of the disadvantaged party in interclass contracting.[107] Unconscionability's procedural element, the analysis of which is often cursory in most cases, could become an effective means to balance freedom of contract and paternalistic norms.[108] The enhancement of consent for typically disadvantaged bargainers diminishes the likelihood of the creation of unfair contracts. This consent-based view of unfairness is congruous with the will theory and private autonomy precepts of common law contracts. Under this rationale, the potential unfairness of one-sided contracts is not so much related to the sheer one-sidedness of the bargain, but to a lack of meaningful consent. Such consent-focused inquiries are what Llewellyn viewed as the essence of a realist method—to look at the reality of daily life with its irrationality and power imbalances.[109]

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104. For evidence of the effect of gender bias, racial discrimination, and bargaining power inequality in the context of automotive sales, see generally Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

105. *See* Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 492–93 (1994).

106. Harrison states that "[t]hose who have less tend to agree to continue to take less." *Id.* at 501. In such a system, "terms like 'agree' and 'consent' have only the thinnest of meanings." *Id.*

107. *See id.* at 501. For an argument against the recognition of a duty of disclosure by sellers in mass-market transactions, see Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401 (2009). Fairfield argues that information-cost theory shows that the benefits of a disclosure to procure "informed consent" are outweighed by the benefits of enforcing standard terms in mass-market contracts. *Id.* at 1403–05.

108. *See* DiMatteo & Rich, *supra* note 86, at 1115–16 (concluding that empirical analysis shows that consent factors are the most predictive factors in courts' unconscionability decisions); Morant, *supra* note 77, at 936 ("Paternalism checks the legitimacy of consent . . . .").

109. Llewellyn notes: "What realism was, and is, is a method . . . ." LLEWELLYN, *supra* note 42, at 510. While studying the judicial system of the Cheyenne Indians, Llewellyn noted that the tribe's methods, which were not recorded as a set of formal rules, but rather were considered "law ways," were admirable in their recognition of context and their incorporation of the law into daily life. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 157–58 (1973).

C. *The Normative Function of Contract Law*

Traditional contract doctrine should provide incentives to enhance consent. To this end, contract interpretation should account for a broader scope of contextual factors, including the gender, race, power, and class of the bargaining parties. Federal government contract law which seeks to diminish bargaining disparities and thereby enhance consent provides a template for this broader contextual analysis.[110] Government contract law consists of "a complex matrix of positive laws" that are premised upon the importance of competition, fairness, and transparency.[111] Consent viewed as a relative standard sees context as a means to verify meaningful consent.[112] As a result of this realistic consideration of context, federal contracting policy ameliorates traditional bargain disparities through enhanced access to government contracting for traditionally disadvantaged bargainers.[113]

The binary nature of positive and negative freedom of contract explains the tension in contract law between its facilitative, power-conferring role and its value-laden, duty-imposing interventions. The view of contract law as a preference-protecting device fails to recognize that "a person's preferences are never entirely self-generated."[114]

The normative power of contract law rests on its ability to order social relationships.[115] Contract in context and contract as context are based on a view that contract law should function to be both preference-protecting and preference-enhancing. The preference-enhancing view recognizes that the primary role of contract law is to enforce contract-ordered preferences in a value-neutral way.[116]

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110. *See* Morant, *supra* note 77, at 928.

111. *Id.* at 952–53.

112. In comparing the notion of informed consent in medical decisions and contractual consent, one commentator notes that the "doctrinal heterogeneity bespeaks a recognition that the notion of consent has different meanings and normative resonances in different contexts." Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 952 (1994). Another example is found in insurance contract law, which recognizes an insurer's duty to disclose. *See* Dudi Schwartz, *Interpretation and Disclosure in Insurance Contracts*, 21 LOY. CONSUMER L. REV. 105, 105–06 (2008) (arguing that the way in which courts interpret insurance contracts provides incentives to future insurers to disclose information to potential consumers).

113. Morant, *supra* note 77, at 928.

114. Vanessa E. Munro, *Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 923, 955 (2008).

115. Contracts seen as a "community of practice cannot be imputed to a priori identity of understanding or of articulation or explicit conceptualization. But there can be adequate community of practice to engender a measure of orderliness." NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 16 (2007).

116. *See* SUNSTEIN, *supra* note 78, at 36–37.

However, preferences constituted, at least partially, through the abusive exercise of power, or the freedom-diminishing influences of race, class, and identity biases should meet with contract law's expression of disapproval. Context provides the means not only to interpret contracts, but also to advance justice-based social and contractual norms.[117]

III. IDENTITY, POWER, AND CONTRACTUAL JUSTICE

The assumed neutrality of freedom of contract contributes to a presumption that the influences of race, gender, class, and power are irrelevant. Context, however, exposes the fallacy of this presumption. A 2006 Massachusetts state court decision, which states that a burrito is not a sandwich, illustrates the insidious operation of race, class, and culture in contract interpretation.[118]

In *White City Shopping Center, LP v. PR Restaurants, LLC*, the contract term at issue was an exclusivity clause in a commercial lease.[119] The provision provided that the landlord would not rent space in its plaza to any other business that sold sandwiches.[120] The court stated that an establishment that sold burritos did not violate the tenant's exclusivity right because the plain meaning of "sandwich" did not include burritos.[121] One commentator observed that the court's analysis "lacked subtlety, complexity, or nuance."[122] This failure underscores the need for a more complete, contextual analysis of even the most common terms or social conditions.

The lack of acknowledgement of cultural, class, and racial factors in the interpretation and enforcement of contracts—bias and discrimination issues aside—relates partially to contract law's egalitarian underpinnings. Freedom of contract, in its purely theoretical form, has as its foundation the reasonable person. Neutrality typifies the reasonable person. She is neither black nor white, lower- nor upper-class, male nor female, big nor small. To ignore such contextual factors, however, does not promote, but rather prevents, the court from examining the effects of biases related to those factors. Recognition of the influences of identity,

117. *See* Zamir, *supra* note 58, at 1714 ("[S]ocial values should, and do, play a key role in the interpretive process . . . .").

118. White City Shopping Ctr., LP v. PR Rests., LLC, No. 2006196313, 2006 WL 3292641, at *3 (Mass. Dist. Ct. Oct. 31, 2006); *see also* Marjorie Florestal, *Is a Burrito a Sandwich?: Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 8 (2008); Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 183–85 (1994) (arguing that contractual race discrimination can be policed through the duty of good faith and fair dealing).

119. White City, 2006 WL 3292641, at *1–2.

120. *Id.* at *1.

121. *Id.* at *3.

122. Florestal, *supra* note 118, at 6.

prejudice, and power in the initial bargaining context challenges freedom of contract's neutrality rationale.[123] If such influences exist, then a broadened contextual inquiry should uncover the freedom-diminishing role such factors play in the bargaining process.

Contract law succeeds in efficiently fulfilling mutual understandings through the utilization of "stipulated patterns" and model transaction types as guides to interpretation.[124] A mutual understandings view of contract law assumes that such understandings are based upon mutual expectations of fairness. As such, fairness requires the measurement of bargaining conduct, whether during the formation or enforcement phase, against a purer model of freedom. Despite the idealistic contractual law model that assumedly operates free of irrational bias and discrimination, contextual realities might occasionally require measured regulation of bargaining power to ensure the integrity of the bargaining process. Such context-based regulation for traditionally disadvantaged parties may allow the weaker party the "freedom to resist" in the negotiation of contract terms.[125]

IV. THE SYMPOSIUM

The articles contained in this Symposium demonstrate the breadth of context as it relates to bargain formulation, contractual regulation, and contractual equity. Readers will experience both the internal and external focus of context as the authors examine both the efficacy and the adaptability of traditional contract doctrine as applied to various bargaining contexts. Though diverse in their subject matter, the articles' common thread rests with the undeniable impact that context has on contract formation and regulation.

Professor Hillman's article explores the uniqueness of software contracts.[126] Although software is often bought and sold like goods, software contracts do not fit easily into the sale-of-goods rubric of Article 2. Based on his work as Reporter for the American Law Institute's *Principles of the Law of Software Contracts*,[127] Professor

123. Robert Hale long ago argued that contract law's decision to enforce or not to enforce is an exercise of power. *See* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 621–23, 627–28 (1943).

124. *See* Florestal, *supra* note 118, at 8–9 (referring to the "culture of contracts" as "the set of customs, beliefs, and shared understandings that exist within society, which contract law incorporates into every agreement"). The concept of transaction types is generally associated with the work of Karl Llewellyn. *See* LLEWELLYN, *supra* note 42, at 121–24. Prior to Llewellyn, Nathan Isaacs described the notion of transaction types in his critique of the *First Restatement of Contracts*. *See* DiMatteo & Flaks, *supra* note 23, at 344–45.

125. *See* Hale, *supra* note 123, at 628.

126. Hillman, *supra* note 54.

127. See Hillman & O'Rourke, *supra* note 55.

Hillman explores whether such a project was needed and, if so, what in particular is unique about such contracts. In so doing, he examines the fundamental issue posed by this Symposium: should definitive contractual contexts be better reflected in contract law; or, alternatively stated, should certain contractual contexts be more directly addressed by contract law?

Professor Emerson investigates the problem of franchisor encroachment within the "perceived" territory of an existing franchisee.[128] Since these cases often involve franchise contracts with no express grant of territorial exclusivity, the focus for many disputes is on the aggrieved franchisee's expectations and general concepts of fairness. Emerson explores the muddled case law of franchise encroachment and provides findings from surveys conducted in 2000 and 2008 to show how nuances in nonexclusivity clauses can result in vastly different interpretations. In the end, he suggests a number of possible solutions, such as requiring expanded disclosures, including limitations on franchisee rights, use of collective bargaining between a franchisor and its franchisees, and additional anti-encroachment statutory or case law protections.

Professor Barnhizer's article explores the appropriate role for expanded use of context in the regulation, creation, and enforcement of contracts.[129] Expansive use of context to permit regulators and courts to explore the "real" relationship between the parties provides a seductive picture of finely grained understandings of all the factors that relate to the justice of a contract.

As Barnhizer explains, this expansive use of context in contract is also "seductive for another reason."[130] Although particular components of an expanded contextual analysis are often seen as important for assessing the parties' relative bargaining power, in reality, context-based arguments are about power on a more fundamental level. Arguments for expanded contextual analysis are really arguments that attempt to "change or expand the metaphorical field of battle for power in the contract [relationship]."[131] For example, the claim that contract law should explicitly account for the lack of meaningful alternatives facing consumers, employees, and franchisees in contracting with established business firms is not limited to accounting for perceived bargaining power disparities between sophisticated and unsophisticated parties. This argument is also an attempt to alter the language of contract regulation, formation, and enforcement by elevating the bargaining position of apparently weaker parties. Context is not just a component of bargaining power in individual

128. Robert W. Emerson, *Franchise Territories: A Community Standard*, 45 WAKE FOREST L. REV. 779 (2010).

129. Barnhizer, *supra* note 37.

130. *Id.* at 609.

131. *Id.*

cases. It also represents control of the power relationships in contract by those who successfully expand or restrict contextual considerations to their advantage.

These dual roles of context challenge the operation and legitimacy of the institutions in which expanded contextual inquiries seek to operate. Barnhizer analogizes the regulatory arena, where context is an abstract ideal, as nothing more than the inevitable give-and-take of Madisonian factions as each interest group attempts to use its political power to obtain advantages for its members. He also asserts that although potentially fragmenting, regulatory context arguments must occur in a functioning democratic polity, and many of the dangers of fragmentation can be alleviated through the relatively transparent nature of political processes. In contrast, context-based arguments in the judicial forum are more likely to be corrosive and delegitimizing because they are not legally cognizable. Beyond a certain point, users of the legal system cannot perceive expanded judicial use of context as consistently applicable or credible. Barnhizer concludes that absent mechanisms for demonstrating to users of the legal system in general the transparency and legitimacy of such contextual inquiries, expanded application of such factors to judicial enforcement actions should be restricted.

Professor Phillips provides an analysis of the relationship between standard form contracting and the doctrine of unconscionability, as well as other contract policing doctrines.[132] He brings an English perspective to a doctrine that is more expansively used in other common law countries, including the United States. Phillips offers a controversial theory of unconscionable bargains that would supplant other consent-questioning doctrines, such as undue influence and duress. He notes that the Australian approach requires a party to show that it was under a serious disability (disadvantage) and that the stronger party was aware of that disability.

Under such a system, if the elements of serious disability and exploitation are proven, then the burden shifts to the stronger party to prove that the transaction was fair, just, and reasonable. Phillips notes that "one-sided transactions may be 'fair, just, and reasonable.'"[133] Thus, the determination of what is fair, just, and reasonable requires a sophisticated contextual analysis. Phillips references the United Kingdom's *Unfair Contract Terms Act*[134] as an example in which such an analysis is frequently undertaken. He asserts that the doctrines of duress, undue influence, and parts of

132. John Phillips, *Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine*, 45 WAKE FOREST L. REV. 837 (2010).

133. *Id.* at 845.

134. Unfair Contract Terms Act, 1977, c. 50 (U.K.).

the mistake doctrine can be subsumed into the doctrine of unconscionable bargains. At their core, all these doctrines require a contextual analysis of substantive and procedural factors to determine whether there is a case of unfair active or passive advantage taking.

Professor Kim places American contract law in the context of the global market.[135] As she notes in her opening:

> An increasingly globalized marketplace and technological advancements have resulted in greater diversity between and among contracting parties inside and outside the United States. The parties to a contract might not share the same set of cultural references, vocabulary, or business practices. Technology increases the likelihood of bringing together parties of different experiential reference points by greatly facilitating transactions across vast geographical distances. It also increases the likelihood of substantive misunderstanding by creating novel contracting situations that often reveal implicit and unexpressed assumptions held by the parties.[136]

Her article asserts that courts should take into consideration the social and cultural backgrounds and identities of the parties in analyzing contract disputes.

Kim's article discusses the role that identity and experience play in contract law and introduces the tension between sociocultural dissonance and the objective approach to interpretation. It analyzes the difference that culture makes by examining a recent contract dispute—the "blood contract" case between two Korean-born businessmen.[137] Finally, Kim analyzes the difference that gender makes by examining a case involving in vitro fertilization.[138] She concludes that courts should consider contextual factors, including the parties' sociocultural backgrounds and experiences, in order to better conform to the expressed goal of contract law—protecting the reasonable expectations of the parties.

Professor Oman begins with the premise that certain religious traditions, particularly Islam, make law a central aspect of religious piety.[139] Being a faithful believer means that one voluntarily submits one's self to religious law. In secular legal systems, where the state is officially neutral in matters of religion, contract offers a potential avenue for believers to incorporate religious commitments into their legal obligations. This strategy, however, creates potentially difficult questions for courts faced with contracts that incorporate religious law by reference. Such contracts require

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135. Kim, *supra* note 52.
136. *Id.* at 641.
137. Kim v. Son, No. G039818, 2009 WL 597232, at *1 (Cal. Ct. App. Mar. 9, 2009).
138. *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).
139. Oman, *supra* note 30, at 588.

secular courts to engage in religious jurisprudence, an activity that presents thorny practical, constitutional, and normative questions. Oman uses the Islamic *mahr* contract to illustrate the misapplication of a body of specialized rules—divorce law—to what is essentially a simple contract. He argues that such an agreement should be reviewed under the general law of contracts.

Professor Threedy explores the importance of context at the case level.[140] Her previous research in legal archaeology worked from the premise that cases are not always what they may seem.[141] The official or historical narrative of a case may be investigated and questioned through a closer examination of the nonreported context.[142] The importance of digging deep into the context of individual cases was alluded to by Oliver Wendell Holmes when he asserted that law was an "anthropological document" whose study is "an exercise in the morphology and transformation of human ideas."[143] Threedy investigates the famous Arthur Murray dance cases and discovers that they involved not only female plaintiffs, but also male plaintiffs. She finds that courts' approaches to similarly situated parties and almost identical fact patterns were skewed by preconceived male-female narratives—the helpless, lonely old lady versus the savvy old man entering the marketplace for companionship.

Professor Miller examines the importance of considering context in resolving disputes between majority and minority LLC investors.[144] The LLC method of business organization is premised upon freedom of contract principles that allow member parties to provide a governance structure through the drafting of an operating agreement that may even include the elimination of fiduciary duties.[145] The article criticizes the approach taken by law-and-economics scholars who presuppose a level contractual playing field. She explores the valuable role that empirical data and

140. Threedy, *supra* note 87.

141. *See, e.g.*, Debora L. Threedy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, 80 TUL. L. REV. 1197 (2006).

142. *See generally* James J. Fishman, *Introduction: The Enduring Legacy of* Wood v. Lucy, Lady Duff-Gordon, 28 PACE L. REV. 161 (2008) (exploring the context and alternative interpretations of the famous Cardozo opinion); Judith L. Maute, *Response: The Values of Legal Archaeology*, 2000 UTAH L. REV. 223.

143. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

144. Miller, *supra* note 83.

145. To review the current debate on the freedom of contract paradigm of limited liability companies and fiduciary duties, see Larry A. DiMatteo, *Policing Limited Liability Companies Under Contract Law*, 46 AM. BUS. L.J. 279 (2009); Sandra K. Miller, *Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties*, 46 AM. BUS. L.J. 243 (2009); and Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221 (2009).

interdisciplinary research can play in understanding context. Miller argues that the law can respect contractual freedom, yet leave room to offer equitable remedies and status-based statutory protections in recognition of asymmetries in power. In the end, Miller advocates for expanded empirical research to determine whether lawmakers should impose statutory LLC oppression remedies that recognize the importance of enforcing the operating agreement, yet provide statutory default rules and equitable relief in an effort to resolve majority-minority LLC disputes in a fair and efficient manner.

Professor Schmitz focuses on what she labels as "consumer contracting culture."[146] In this culture, consumers rarely ask for contract terms prior to completing a purchase. This leads to the issue of post-contract consent, which refers to the scenario in which consumers are bound by terms they receive after purchasing a product or service. The key question posed in this area is whether the reception of such terms qualifies as consent under contract law. The answer has generally been in the affirmative. In *Hill v. Gateway 2000, Inc.*,[147] the court concluded that the purchaser assented to the terms by not returning the computer within thirty days, as provided by an "approve-or-return" provision. The court added that this approve-or-return form of contracting benefits consumers "as a group" since they benefit from the resulting savings in transaction costs.[148] Courts now routinely apply this efficiency-focused and formulaic analysis to contract terms.

Professor Schmitz explores post-contract consent from theoretical and empirical lenses in order to shed light on the policy implications of the post-contract consent rule. She provides background on the varying theoretical perspectives of post-contracting consent (classical, law-and-economics, and behavioral), and then explores the available empirical data on the questions of whether consumers read contract terms, when they read them, and ultimately whether the current practice results in unfairly one-sided terms. Schmitz presents the preliminary results from a recent online survey relating to consumer form purchase terms.

Professor Abril applies Broken Window Theory ("BWT"), first used in the area of criminal law, to the online social networking environment.[149] She argues that rampant evidence of disrespect for online social contracts—website terms, conditions, and privacy policies that govern interpersonal interaction and behavior online—is deleterious to both users and the future of social media.

BWT highlights the power of context to govern individual and group behavior. Abril explains, the theory posits that evidence of

146. Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863 (2010).

147. 105 F.3d 1147 (7th Cir. 1997).

148. *Id.* at 1149.

149. Abril, *supra* note 68.

communal abandonment (in the form of "broken windows") creates a public perception of ambivalence, which in turn propagates antisocial behavior and disorder. BWT's second premise is that by addressing minor crimes (repairing broken windows) the culture of a community can be changed, thereby creating the perception that no offense, regardless of how insignificant, is tolerated.

Abril observes that "[t]he online social environment is suffering from a multitude of broken windows."[150] Observational evidence demonstrates an environment in which dignity and privacy violations have become the norm. Empirical evidence suggests that websites' terms, conditions, and privacy policies are seldom read and understood by users socializing online. Data also suggests that a majority of users feel helpless in controlling their privacy and reputation, despite the presence of online social contracts. Anecdotal evidence indicates that monitoring of violations of online social contracts is scant and redress is often unavailable. Abril surmises that this is due to the fact that courts have traditionally suffered crises of context when applying traditional legal rules to the online environment. Moreover, there is no existing framework for online social contracts that is workable and well-accepted. In short, the "broken windows theory" questions the very role of contract in the online social context.

Informed by the BWT, Abril proposes a framework for recasting social contracts in the online context. It focuses on the function of contracts in establishing expectations, rules, and norms among contracting parties. Contracts can only be effective in this manner when they are consistently enforced and are perceived as mechanisms for proscribing improper behavior.

CONCLUSION: THE SEARCH FOR CONTRACTUAL JUSTICE

The tension between freedom of contract and freedom from contract reflects the ancient struggle between the right and the good, and the centuries-old struggle between law and equity in the Anglo-American contract law system.[151] A contract law model based upon unfettered freedom of contract centers on the importance of the *right* to contract over the *good* of the bargain struck. The *right* of contracting is closely aligned with the formal application of contract rules in isolation from both the contractual outcome and important contextual factors that impact contractual intent, formation, and performance. This classical notion of contract law becomes a form of procedural justice, which applies rules objectively, without regard to societal or humanistic variances. True contractual justice, however, requires the use of all contextual factors and influences that

150. *Id.* at 103.

151. *See generally* LARRY A. DIMATTEO, EQUITABLE LAW OF CONTRACTS: STANDARDS AND PRINCIPLES (2001).

question whether the bargain was the product of a free exercise of the right to contract. The integrity of contract law and the bargains dependent upon that law, demand an analysis reflective of the world in which these bargains operate, and in which bargainers must function.

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