

Michigan Journal of Race and Law

Volume 4

1998

Law, Literature, and Contract: An Essay in Realism

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Recommended Citation

Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1 (1998).

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LAW, LITERATURE, AND CONTRACT: AN ESSAY IN REALISM

Blake D. Morant*

In this Essay, the Author examines contract doctrine's weaknesses as applied to issues of race and gender. By contrasting the doctrinal silence concerning these issues with facts and circumstances that may have influenced the results in specific cases, the Author challenges classical contract theory's assertion of objectivity and its associated assumption of bargaining equality as an integral component of each contract. The Author then uses literature as an illustrative tool to highlight contract law's failings in contexts where bargaining disparities related to race and gender issues are present. This approach is not meant to eliminate contract rules but rather to lessen their formalistic nature to make contract rules more effective. Accordingly, the Article establishes that a law and literature analysis not only exposes flaws in the contract doctrine but demonstrates the need for a more flexible application of contract rules in cases involving race and gender disparity. Arguing that prejudicial behavior must be addressed and pre-empted in order to prevent its harmful effects in the formation of contracts, the Author again uses literature to develop a framework to remedy the biased conduct that leads to inequalities in contract formation.

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* Associate Professor of Law, Washington and Lee University School of Law. B.A., J.D., University of Virginia. I must first, and foremost, acknowledge the very helpful suggestions, ideas, and synergy provided during my presentation at the *Michigan Journal of Race & Law* Speakers Series, "Understanding Race: (De)Constructing Paradigms and Implications for Legal Education—Third Session: Does Race Belong in Contract Law?" (Feb. 23, 1998). I also express my appreciation to the participants in the Fourth Annual Mid-Atlantic People of Color Legal Scholarship Conference, where I garnered ideas and perspectives. I also extend gratitude to a number of individuals, without whom this piece could not have been completed: Professors Robert S. Chang and David Millon, whose comments on the drafts of my articles have been most helpful; and Reginald Robinson, for his persistence that I tackle this worthy project. I extend my sincerest appreciation to Annie Lee, my research assistant; Lynn Fitch, my very able secretary; and, of course, Paulette J. Morant, who has persevered through my many moments of self doubt; and to all of those scholars and colleagues who have enlightened me to the valuable intersection of law, race, gender, class, and literature. I also appreciate the financial support provided by the Law Center of the Washington and Lee University School of Law.

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INTRODUCTION

At first glance, the tenets of contract and literature appear antithetical. Contract law has a seemingly objective, dispassionate quality.¹ On the other hand, literature embodies the essence of human emotion and spirit.² From initial appearances, no two genres could be more disparate. The union of the two within one analytical exercise seems more like an exercise in contradiction than informed legal analysis.

Yet, like most seeming paradoxes in law, finding a correlation between literature and contract presents an intriguing challenge—one that tests the efficacious function of contract rules within the more humanistic context created by prose. The results of this intersection can be both revealing and fascinating.

Indeed, this exercise places the application of contract rules within the realistic context of human interaction. Further, as explained in more detail below, the evaluative constructs of literature expose the limited functionality of contract doctrine as it applies to issues of race and gender.

This Essay examines the weakness of the rules of contractual formation as they apply to bargaining circumstances that implicate

1. See Larry A. DiMatteo & Saint Thomas Aquinas, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 306, 310 (1997); see also Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1001–02 (1985) (stating that “[contract] doctrine favors objective interpretations . . . over subjective ones”); Melvin A. Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1130–31 (1994) (recognizing the objectivity in contract law as it relates to a “directly observable state of the world”); Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1110, 1115 (1984) (discussing the “classical school’s” requirements of standardization and objectivity); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 890 (1997) (commenting on contract law’s “illusion of empiricism”) [hereinafter Morant, *Race and Disparity*]; Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 126 (1992) (explaining the relationship between objectivity and “freedom of contract”).

2. For a general description of the law and literature movement, see *infra* notes 79–100 and accompanying text.

issues such as race and gender inequality.³ This exercise will not concern itself solely with the failure of these rules, for such a critique alone would not reconcile rigid contractual dogma with issues of disparity.⁴ However, the detailed scrutiny of contract rules within the world of prose provides an opportunity to test the effectiveness of those rules and highlights the need for their more flexible application to variant transactional circumstances.

Part I of the Essay will delineate contract law's seeming disassociation with issues such as gender and race. The genesis of this illusion remains situated in the traditional, albeit classical, notion of contract theory. However, the portrayal of cases and circumstances that implicate race and gender will dispute classical contract theory's illusory posture of objectivity.

To demonstrate further the lack of complete objectivity in bargaining transactions, Part II will describe the evaluative mechanism afforded by the law and literature movement. The general analytical framework afforded by this movement reveals the problems associated with applying rigid contract rules to bargaining situations that implicate issues of race and gender disparity. Literature serves to illustrate the operation of disparity in the formation of bargains. My aim here will be to contrast the reality of disparity's operation with contract dogma's egalitarian approach to such problems. To this

3. Rules of law often have dubious effects given their ubiquitous application in cases with varying facts. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957 (1995) (noting that rules are often "too crude"). When issues of race or gender are involved, legal rules, particularly those that are not specifically designed to accommodate such issues, can not only be crude but can lead to misconceptions and create false perceptions. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1007, 1081 (1995). Given these observations, I, too, have cautioned against the overreliance on rigid rules of contract as they apply to issues of reduced bargaining power. 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, 455-57 (1996) [hereinafter Morant, *Contractual Rules and Terms*].

4. I employ the term "disparity" as a generalized description of bargaining contexts that include bargainers who operate under some disadvantage that can often be associated with unequal bargaining power or knowledge of the parties to an agreement. See David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 989 (1998) (defining unequal bargaining power in terms of differences in bargaining skill, bargaining leverage, and the ability to impose costs with the intent to gain an advantage in bargain negotiations); Steve D. Shadowen & Kenneth Voytek, *Economic and Critical Analyses of the Law of Covenants not to Compete*, 72 GEO. L.J. 1425, 1447 (1984). Consequently, those who possess superior bargaining power or knowledge relating to the bargain's subject matter may exploit this advantage through opportunistic or pejorative behavior. Bias or prejudice may influence both this behavior and other actions affecting bargaining decisions. See *infra* notes 119-133 and accompanying text. As a possible trigger of bias, disparity can implicate issues of gender, race, class, or comprehension.

end, a telling scene from the screenplay for the motion picture *Places in the Heart*⁵ will provide probative illustration.

Part II will further explore the reality of disparity within the bargaining relationship. With the portrayal of the operation of disparity within bargaining contexts established, this section provides a more probative explanation of bias and prejudice. A brief explanation of social cognition will provide some proof of the reality of bias and prejudice within the bargaining context.

This portion of the Essay will also provide an operational framework to remedy the biased conduct that creates disparity issues within bargaining contexts. A portion of John Grisham's book and the motion picture *A Time to Kill*⁶ illustrate that biased behavior must be preempted or, at the very least, confronted to remedy its effects.

Part III of the Essay will also distill the lessons learned from the intersection of literature and contract theory. Humanism and realism, so prevalent in literature, become key determinants. They force the reevaluation of contract rules in light of their effectiveness and application.

My ultimate thesis here remains grounded in reality rather than illusion. Contract rules, which are more formalistic in nature,⁷ should be applied with a degree of realism to correct deficiencies relevant to disparity in bargaining contexts. The goal is not to demolish contract rules, but to enhance their efficacy and remedial potential.⁸

I. THE FORMALISM OF CONTRACT RULES AND THE REALITY OF BARGAINING BEHAVIOR

A. *The Interpersonal Nature of Contract*

Matters of disparity⁹ appear to have little relevance or analytical import to the doctrine of contract law. Conventional wisdom supports this notion. Think of the countless, everyday, somewhat mundane contracts that occur with regularity: the purchase of

5. PLACES IN THE HEART (Tri-Star Pictures 1984).

6. A TIME TO KILL (Warner Brothers 1996).

7. See *infra* notes 47-49, 161 and accompanying text.

8. A complete retreat from contractual rules has never been my credo. However, these rules must be scrutinized carefully in distinct situations to ensure efficacy and utility. See Morant, *Contractual Rules and Terms*, *supra* note 3, at 462; see also Sunstein, *supra* note 3, at 1023 (suggesting that a practice of casuistry is needed for the proper interpretation of rules).

9. See *supra* note 4 and accompanying text.

groceries; payment of mortgages or rent; and perhaps an automobile negotiation, which involves gamesmanship if not an immense degree of patience.¹⁰ None of these agreements appears to implicate issues relevant to race or gender. And discussion of these issues within the context of bargained transactions seems irrelevant, if not superfluous. As a consequence, my own initial pedagogy of contract law included the avoidance of disparity issues in the discussion of transactional issues in the field.¹¹

The seeming empiricism of contract may be little more than an egalitarian facade.¹² The avoidance of race and gender as influential issues in bargaining can be disingenuous for a number of reasons. To ignore disparity when it is evident from the facts begets a fragmentary analysis at best.¹³ This tactic remains completely inapposite to my prevalent thinking, which calls for utilizing analytical methods that fit the contextual circumstances of a bargain.¹⁴

Issues related to race and gender inevitably arise during discussions of some notable judicial decisions that involve bargaining relationships. Moreover, the facts of these cases provide a relevant basis for the consideration of race or gender in the bargaining relationship, or the decision-maker's resolution of disputes arising from that relationship.

In the renowned case of *Williams v. Walker-Thomas Furniture Co.*¹⁵ an African American mother on government assistance signed a preformed contract for the purchase of sundry household items from the Walker-Thomas Furniture Co.¹⁶ The contract contained an onerous provision that allowed the company to repossess all items purchased by Mrs. Williams, regardless of the total amount paid on

10. See *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 202-03 (1966) (citing House Conf. Rep., p. 25; 95 Cong. Rec. 11003-04; 95 Cong. Rec. 12502) (1966) (acknowledging that the sundry consumer transactions that are commonplace in the market include transactions with grocery stores, hardware stores, coal dealers, automobile dealers, clothiers, dry goods merchants, department stores, etc.).

11. See Morant, *Race and Disparity*, *supra* note 1, at 889-94.

12. See *id.* at 891-92.

13. See *id.* at 896-99.

14. A number of scholars have acknowledged the importance of a contextual approach to the scrutiny of legal problems. See David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 159 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 375-77 (1990). For a discussion of the importance of race as a contextual element in legal pedagogy, see generally Frances Lee Ansley, *Race and the Core Curriculum*, 79 CAL. L. REV. 1512 (1991).

15. 350 F.2d 445 (D.C. Cir. 1965).

16. *Id.* at 447.

her account.¹⁷ Eventually, the Court of Appeals found that provision unconscionable.¹⁸

Various factors led to the court's ruling in *Williams*. Of paramount importance was Mrs. Williams' disparate bargaining position. Her limited education and financial means underscored her lack of sophistication in that bargaining context.¹⁹ The court intimated that Mrs. Williams, given her limitations, could not have been expected to understand the full import of the default provision contained in the adhesion contract.²⁰ The totality of this factual circumstance contributed to the court's finding of procedural unconscionability.²¹ The form of the contract notwithstanding, Mrs. Williams' status as a woman of color on government assistance may have implicated gender and race as potential factors that influenced the contract's genesis. This, in turn, may have affected the resolution of resultant disputes.²²

The United States Supreme Court's decisions in *City of Richmond v. J.A. Croson Co.*²³ and *Adarand Constructors, Inc. v. Peña*,²⁴ both of which invalidated minority set-aside contracting programs, thrust the issues of race and gender into the public's consciousness.²⁵ Even

17. See *id.* at 447–50.

18. See *id.* at 449 (acknowledging that Mrs. Williams, as an unsophisticated bargainer, could not have been expected to understand the full import of the default provision).

19. See Eric Mills Holmes & Dagmar Thürmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L & COMP. L. 323, 397 (1987) (noting that *Williams* focused on the "exploitation of the underprivileged, unsophisticated, uneducated and the illiterate") (quoting *Hawes v. Kansas Farm Bureau*, 710 P.2d 1312, 1314 (Kan. 1985)); Douglas Kari, *Buchwald v. Paramount: Minding Hollywood's Business*, ENT. L. REP., May 1991, at 3, 5 (describing Mrs. Williams as "impoverished and unsophisticated").

20. *Williams*, 350 F.2d at 449.

21. The difference in bargaining power, or the presence of a preformed agreement authored by the more powerful bargaining party, evinces procedural unconscionability. Substantive unconscionability involves the presence of a contract or a term thereof that is patently unfair. See Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752–53 (1982) [hereinafter Eisenberg, *The Bargain Principle*]; Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 (1967) [hereinafter Leff, *Unconscionability and the Code*]. For more on unequal bargaining power, see *supra* note 4 and accompanying text.

22. See Morant, *Race and Disparity*, *supra* note 1, at 927–30 (suggesting that gender and socioeconomic status factored into the court's decision and, therefore, implying that race could not have been ignored in the reasoning).

23. 488 U.S. 469 (1989).

24. 515 U.S. 200 (1995).

25. In *Croson*, the Supreme Court invalidated the City of Richmond's minority set-aside program and required a firm evidentiary basis for any affirmative action policy directed toward the inclusion of traditionally excluded groups identified by race. *Croson*, 488 U.S. at 510. As a result, such programs would be subject to stricter

the famous case of *In re Baby M*,²⁶ involving Mary Beth Whitehead, a woman of modest means who contracted to serve as a surrogate mother in exchange for compensation provided by a more affluent bargainer, tacitly involves issues of gender and class, and overtly involves concerns of morality and illegality.²⁷ Indeed, in many controversies involving principles of contract, factors of race, ethnicity, or gender can play a tangential, if not pivotal, role in the formation and adjudication of many binding obligations.²⁸

scrutiny, with a mandate that they be narrowly tailored to accomplish a remedial purpose. *Id.* at 507. The Supreme Court solidified its stance regarding government contracting set-aside programs in *Adarand*. In this case, the Court required that federal set-aside programs, similar to those adopted by the states, survive strict scrutiny analysis. *Adarand*, 515 U.S. at 222. Consequently, these programs must be narrowly tailored to achieve a compelling governmental interest. *Id.* The federal government could not implement an affirmative action program solely on the basis of perceived discrimination. *Id.* at 226. In effect, the standard of proof applied to programs designed to remedy discrimination based upon race or gender had been heightened significantly.

26. 537 A.2d 1227 (N.J. 1988).

27. In *In re Baby M*, the Supreme Court of New Jersey clearly indicated its displeasure with the surrogacy arrangement between the Sterns and Mary Beth Whitehead. *Id.* at 1249. The contextual circumstances of this case clearly implicate issues of gender and class. The court's opinion noted that Mrs. Whitehead was a woman of modest financial means. *Id.* The Sterns, on the other hand, were highly educated and economically secure. *Id.* Even though the parties carefully crafted their agreement to avoid conflict with the state's baby selling statute, the court found the agreement invalid in light of overwhelming public policy concerns. *Id.* at 1250. See also Morant, *Race and Disparity*, *supra* note 1, at 936-38 (arguing that disparity in bargaining must be viewed to include any group, including women, whose bargaining options are hindered by prejudice or stereotypes).

28. See, e.g., *In re Greene*, 45 F.2d 428 (S.D.N.Y. 1930) (holding that a formal, written contract between a woman and a married man, with whom she had previously maintained an adulterous relationship, could not be enforced due to policy concerns imbued in marriage, notwithstanding the contract's formal recitation of consideration); *Kirksey v. Kirksey*, 8 Ala. 131 (1845) (holding that brother-in-law's promise to provide sister-in-law a suitable home on his property if she would "quit the country" and move did not constitute a binding promise, even though she moved to his property in reliance on that promise and was subsequently evicted without apparent cause); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (holding that an unmarried woman in a "family-like" relationship complete with children and other "respectable appearances" could not sustain a promissory estoppel claim for spousal-like support against her presumed husband, notwithstanding his promises to sustain her because of her continued support and personal sacrifice to ensure his professional education and subsequent pedodontia practice); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. App. 1959) (sustaining a promissory estoppel claim against a former employer who promised Ms. Feinberg a monthly pension for her many years of superior and loyal service, noting the extent of reliance on her part, and tacitly observing that a woman of advanced age, suffering with cancer would experience difficulty in acquiring gainful employment); *Wood v. Lady Lucy Duff Gordon*, 118 N.E. 214 (N.Y. 1917) (maintaining the validity of an exclusive dealings contract between an agent and Lady Lucy Duff Gordon, irrespective of arguments of a possible lack of mutuality on the agent's part, and further noting that such agreements

The contextual circumstances presented by notable contract decisions compel a readjustment of contract pedagogy and demand a more probative analysis of bargaining relationships.²⁹ Thus, factors of racial or gender bias command attention, particularly when they can impact the formation or judicial interpretation of agreements.³⁰

A more persuasive reason to investigate issues of bias and prejudice in contractual relations extends beyond the mere presence of gender or race as factual circumstances. Study of these factors relates to the very nature of the bargaining relationship. Negotiation and ultimate consummation of a contract represent an interpersonal exchange in which parties seek each other out and evaluate the merits of a potential deal in terms of what the other party may offer and who that party represents.³¹ Factors related to race, gender, or class can easily influence judgments based upon facts gathered during the pre-bargain phase of a transaction.³² This thought process may also have an effect on both the willingness to seek out a bargain with an individual and the ultimate terms of that bargain.³³ To a large extent, this occurs as a manifestation of the bargainer's lack of perfect information,³⁴ which can justify remedial action once the bargain breaks down.

contain an implied, good faith term for the parties to utilize "reasonable efforts" in the fulfillment of their duties); *Helmick v. Cincinnati Word Processing, Inc.*, 543 N.E.2d 1212 (Ohio 1989) (allowing a meritorious claim of detrimental reliance to enforce a specific promise of job security as an exception to the employment at-will doctrine, in a case involving sexual misconduct in the workplace).

29. See Morant, *Race and Disparity*, *supra* note 1, at 898–99 (noting the issue of race in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

30. See *id.* at 898–99, 938–39.

31. Relational theorists appreciate the notion that bargains represent an exchange with interpersonal dynamics. See Ian R. MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985). See generally Steven R. Salbu, *The Decline of Contract as a Relationship Management Form*, 47 RUTGERS L. REV. 1271 (1995) (reviewing the different functions of contracts and explaining their evolution).

32. See *infra* notes 126–128 and accompanying text.

33. See *infra* notes 130–133 and accompanying text.

34. Imperfect information during precontractual negotiations often causes problems for bargainers. See Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 8 (1992) (discussing the difficulties faced in dispute bargaining as a result of imperfect information); Barry Perlstein, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 BROOK. L. REV. 877, 882 (1992) (stating that contracts would be "self-executing if information is perfect both during the formation of the contract and through its performance").

B. Contract Theory—Classicism, Neoclassicism, and Paternalism

The traditional, albeit classical, theory of contract fails to mention or accommodate issues of racial or gender bias in bargaining relationships. To appreciate this weakness, one must first comprehend the foundational underpinnings of traditional contract theory.

The traditional notion of bargain formation has a formulaic fixation with bargaining autonomy. This relates directly to the *laissez faire* movement that was prevalent during the nineteenth century.³⁵ Pursuant to this line of thinking, parties must be free to seek out and fashion their own agreements with minimal institutional intrusion.³⁶ Nonetheless, contractual freedom, a foundational element of classicism, has definite boundaries and limits that focus on policy concerns related to paternalism.³⁷ Furthermore, the limitations on contractual freedom signal a potential problem with the strict adherence to the classical theory of contract.

35. A primary feature of classical contract thinking is the idea of freedom to contract. This concept can be traced back to the *laissez faire* movement of the nineteenth century. See Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1118 (1997) (discussing the influence nineteenth century *laissez faire* thinking had both on classical contract law and on modern contract law); Adam B. Seligman, *Individualism as Principle: Its Emergence, Institutionalization, and Contradictions*, 72 IND. L.J. 503, 509 (1997) (noting the use of classical impediments to contract to preserve the individual freedom to contract).

36. See Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921) (recognizing that philosophers of the late eighteenth century advocated freedom as a guiding postulate. "Freedom" has its definitional base in the Declaration of Independence and reflects Jeffersonian democracy, thereby facilitating individual action and minimizing governmental activity or interference); see also *Lochner v. New York*, 198 U.S. 45, 53 (1905) (indicating that an individual's right "to make a contract in relation to his business [constitutes a] liberty of the individual protected by the Fourteenth Amendment"), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) (discussing the need for economic freedom as a means to achieving political freedom); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 570 (1982) (recognizing that "[f]reedom of contract is freedom of the part[ies] from the state as well as freedom from imposition by one another").

37. See *West Coast Hotel*, 300 U.S. at 391–92 (overruling *Lochner* on the ground that law may infringe upon liberty to protect against "evils which menace the health, safety, morals, and welfare of the people"); Darby Dickerson, *Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments*, 41 VAND. L. REV. 129, 138 (1988) (noting that courts should not honor parties' freedom to contract, thereby allowing exculpatory clauses absent legislation to the contrary); Morant, *Contractual Rules and Terms*, *supra* note 3 at 469–70 (noting that "[p]resent views of 'the freedom of contract' recognize it may have limitations"); Note, *Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics*, 97 HARV. L. REV. 978 (1984); see also *infra* notes 57–71 (discussing various approaches to paternalism and limitations on freedom of contract).

Classicism also mandates that parties rigidly adhere to contractual rules in order to form a binding agreement.³⁸ The promise, together with some mutuality demonstrated by an exchange of consideration, constitutes the heart of an enforceable bargain.³⁹ When truly voluntary bargainers conform to these rules of engagement, the conventional wisdom is that a binding, enforceable agreement results.⁴⁰

A key element of voluntariness is consent, a mandatory requisite of any valid agreement.⁴¹ Such consent must be authentic to justify ultimate enforcement of the contract.⁴² While not exclusive of consideration,⁴³ consent essentially justifies the enforcement of valid agreements.⁴⁴

Originally, subjective intent, substantiated by a meeting of the minds, dominated the consent inquiry.⁴⁵ However, subjectivity is a

38. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 106–07 (1982); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 777–84 (1985).

39. See RESTATEMENT OF THE LAW OF CONTRACTS § 1 (1932); see also 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.1, at 161 (2d ed. 1990) (discussing the assent requirement in the bargaining process); 1 SAMUEL WILLISTON & WALTER H.E. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* § 22 (3d ed. 1957) (stating that the manifestation of mutual assent is essential to the formation of a contract).

40. See Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 653 (1983) (stating that “the very purpose of a contract is to ensure performance”); Steven R. Salbu & Richard Braham, *Strategic Considerations in Designing Joint Venture Contracts*, 1992 COLUM. BUS. L. REV. 253, 305 (1992) (noting that contracts “perform the traditional legal role of enunciating the terms . . . and help[ing] to ensure performance or to fashion a remedy in the absence of performance”); see also Henry N. Butler & Barry D. Baysinger, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics, and Organizational Theory*, 32 EMORY L.J. 1009, 1038–39 (1983) (stating that “the underlying [goal] of both the classical and neoclassical [contract law] systems is . . . ‘to enhance the utilities created by choice-generated exchange but not necessarily those created by other kinds of exchange’ . . . [such as] the restructuring of a contract, long after the offer and acceptance, in order to uphold the relationship of the contracting parties”) (quoting Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 872 (1978)).

41. See *supra* notes 35–36 and accompanying text.

42. Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 424 (1993); see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) (arguing that “[c]onsent is the moral component that distinguishes valid from invalid transfers of alienable rights”). Professor Barnett further states that the consent theory not only provides a foundation for the “objective” approach to the determination of contractual intent but also explains “the enforcement of certain commitments where no bargained-for exchange exists.” *Id.* at 270, 297–309.

43. See *supra* note 39.

44. See Morant, *Race and Disparity*, *supra* note 1, at 905–07.

45. See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1–4(b), at 8 (3d ed. 1987) (explaining the historical importance of

rather amorphous standard of proof and was eventually augmented by a more objective manifestation of assent.⁴⁶ To complete the enforceable agreement, objective assent had to be accompanied by an exchange of promises.⁴⁷ These rules formed the basis of the bargain principle which lives on today as a determinant of contractual validity.⁴⁸ In fact, decision-makers cling to the basic rules of contract formation as justifications to invalidate agreements.⁴⁹

subjective intent in contract law). See also E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 943 (1967) (stating that the belief that a "meeting of the minds" was required for a contract originated in the sixteenth century); E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 576-77 (1969) (arguing that prior to contracts, parties voluntarily determined the terms of an exchange); Roscoe Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1, 3 (1954) (discussing how subjective intent played a significant role in Roman law, English law, and the law of continental Europe in the third century and seventeenth and eighteenth centuries, respectively).

46. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contract Consent*, 78 VA. L. REV. 821, 857-59 (1992); 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 72 at 304, § 73 at 310 (1963).

47. See *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739, 744 (6th Cir. 1993) (illustrating that the prerequisites for contract formation are offer, acceptance, and consideration); *Tsiatsios v. Tsiatsios*, 663 A.2d 1335, 1339 (N.H. 1995) (stating that "[o]ffer, acceptance and consideration are essential to contract formation"); *Serand Corp. v. Owning The Realty, Inc.*, No. C-941010, 1995 WL 653846 (Ohio Ct. App. 1995) at *2 (stating that elements of an effective contract are offer, acceptance, and consideration); *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. 1995) (stating that "[i]t is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds"); see also RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) (defining a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"). The Uniform Commercial Code states that a "'contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201 (1989). For more detailed descriptions of the variety of definitions of the term "contract," see Orville C. Snyder, *Contract—Fact or "Legal Hypothesis?"*, 21 MISS. L.J. 304 (1950). See also Dennis Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 236 n.3 (acknowledging efficiency theory as a descriptive tool in contract law and adopting the Restatement's definition of contract as "[a] contract is not a certain sort of promise. Rather, a contract is a promise 'for the breach of which the law provides a remedy'").

48. Compare Eisenberg, *The Bargain Principle*, *supra* note 21, at 743-48 (discussing the reasons supporting the bargain principle), with Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982) (discussing the bargain principle but suggesting it is only one of many different conditions of enforceability).

49. Courts will generally void a contract if the contracting parties fail to adhere to the rules of contract formation. See *Project Dev. Group, Inc. v. O.H. Materials Corp.*, 766 F. Supp. 1348, 1352 (W.D. Pa. 1991) (stating that offer, acceptance, and a manifestation of assent are required for contract formation); *Local Union 529, United Bhd. of Carpenters v. Bracy Dev. Co.*, 321 F. Supp. 869, 875 (W.D. Ark. 1971) (requiring the manifestation of mutual consent and obligation for a binding contract);

The twentieth century ushered in a more realistic notion of contract. This was bound to occur for a number of reasons. The real world complexities of bargaining relationships do not always conform to the rigid constructs of classicism.⁵⁰ Moreover, the formalism of the classical theory of contract can be awkward in the real world context. Legal rules, given their inherent rigidity, can be crude as they apply to variant circumstances.⁵¹ Thus, unrelenting reliance upon rules as the cure-all can be flawed.⁵²

The apparent shortcomings of contract rules prompted a more elastic approach that included fairness in the evaluation of bargains.⁵³ Aware of some of the shortcomings of classicism, neoclassicists sought to mollify classicism's harshness with a degree of realism.⁵⁴ Neoclassicism, to a limited extent, revised the classicist's notion of obligation. The requirements for an enforceable agreement were somewhat liberalized, and impediments to the enforcement of

Lonergan v. Scolnick, 276 P.2d 8, 10 (Cal. Dist. Ct. App. 1954) (voiding a contract for lack of valid offer).

50. See Morant, *Race and Disparity*, *supra* note 1, at 910 (observing that within the real world of relationships, "consent is not formed in a sterile environment, protected from pejorative external influences," i.e., prejudice, opportunism, avarice, and bias).

51. See Sunstein, *supra* note 3, at 957 (stating that "[o]ften rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved"). Professor Richard McAdams seems to echo this sentiment regarding the pejorative characteristic of rules ("law" in his terms) within the context of racial discrimination, as it relates to individualized sacrifices on behalf of groups. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production*, 108 HARV. L. REV. 1003, 1007 (1995). McAdams notes that, notwithstanding the crudeness of law, it may nonetheless significantly influence individual perceptions and attitudes:

Law is more crude than an intellectual critique, yet it is inherently more public, and can carry more weight. When Jim Crow laws mandated certain forms of segregation, whites confidently spoke of segregation as the natural order of things; when the laws forbade segregation, discriminatory whites had a greater difficulty believing their own ideology. Rationalizations can be fragile things; sometimes they require that dissent be held to a minimum.

Id. at 1081.

52. See *supra* note 51 and accompanying text; see also Morant, *Contractual Rules and Terms*, *supra* note 3, at 462 (explaining that "[d]ecision-makers and bargainers should . . . examine the utility of . . . rules in light of the parties' overall goals and expectations"); Sunstein, *supra* note 3, at 1023 (arguing for the need for "flexible, contextual interpretations of rules").

53. See generally Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995) (discussing the push for fairness as an equitable variable in twentieth century contractual theory) [hereinafter Mooney, *The New Conceptualism in Contract Law*].

54. For more discussion of legal realism, see *infra* note 161.

certain bargains were acknowledged.⁵⁵ Under the neoclassicist's notion, certain promises could be enforced without the requisite element of consideration.⁵⁶

Neoclassicism also permitted intrusion in the performance and culmination of the bargain to protect certain parties from improvident agreements. Thus, paternalism surfaced as an operative goal in certain contracts.⁵⁷ Decision-makers could more actively police the pejorative behavior of certain bargainers, thereby protecting the weaker party in the transaction. Of course, paternalism can vary in form and serve several goals, including

55. For an explanation of neoclassical theory of contract law, see Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1285–89 (1990); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 235–38 (1979). See also Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U. L. REV. 303, 319–22 (1983) (providing a cogent explanation of the “neoclassical” model of contract theory, which, inter alia, supports the enforcement of bargained promises). More specifically, a significant amount of scholarship has been dedicated to the neoclassical theory of contract law as it relates to the traditional, contractual paradigm. See Eisenberg, *The Responsive Model of Contract Law*, *supra* note 1, at 1111 (indicating that neoclassical contract theory should be elaborated upon in order to ensure that the theory encompasses principles which are “intellectually coherent and sufficiently open-textured to encompass the complex and evolving realities of contract as a social institution”). See generally Eisenberg, *The Bargain Principle*, *supra* note 21 (discussing the limits on the enforceability of the bargain principle); Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979) (discussing the impact of substantive and administrative concerns on the enforceability of formal and informal gifts and other donative promises); Eisenberg, *The Principles of Consideration*, *supra* note 48 (criticizing the axiomatic school and calling for a more careful scrutiny of enforceable promises to ensure that they are conscionable).

56. A promise that can be enforced if it induced reliance under prescribed circumstances is the essence of the promissory estoppel doctrine, which is now codified in RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). It has been eschewed as a blow to the reality of true contract. See GRANT GILMORE, *THE DEATH OF CONTRACT* 57 (1974) (stating that “the theory of contract, as formulated by Holmes and Williston . . . [has] gone into its protracted period of breakdown almost from the moment of its birth”).

57. See HUGH COLLINS, *THE LAW OF CONTRACT* 115–16 (1986) (noting a rather narrow definition of paternalism in classical contract law and stating that paternalism appears in modern contract law as a means of preventing strong parties from dominating weaker parties); DONALD VANDEVEER, *PATERNALISTIC INTERVENTION* 12 (1986) (“[A] paternalistic act is one in which one person, A, interferes with another person, S, in order to promote S’s own good.”); Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 655 n.9 (1992) (providing sources that attempt to define paternalism); Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1372 (1995) (“Paternalism is often defined as an exercise of control over an individual that purports to be implemented in the interests of that individual, either overriding or filling in for unreliable or nonexistent individual choices.”); Kennedy, *supra* note 36, at 572 (suggesting paternalism requires the decision-maker’s intervention to replace the will of a party with what the decision-maker thinks is better for the party).

economic efficiency and distributive fairness.⁵⁸ By design, paternalism limits basic, contractual freedom in order to protect a bargainer from either her own improvident actions⁵⁹ or external harm caused by other, opportunistic bargainers.⁶⁰ Intrusion upon bargains, regardless of its protectionist goals, invokes criticism given its possibly erroneous assumptions that parties lack the facility to fend for themselves, or that decision-makers can better decide what is best for the parties.⁶¹ This criticism is manifested more pointedly in those cases where the paternalism is designed to protect the bargainer from herself.⁶²

The intrusive nature of paternalism becomes less troublesome when the bargainer is protected from external harms.⁶³ Protection of weaker parties from opportunistic stronger parties in a bargain serves to level an otherwise disparate bargaining field.⁶⁴ The questionable nature of the bargainer's assent to the harmful bargain may justify intrusion and diminish its criticism.⁶⁵ The bargainer's option to employ such protection lessens its moral repugnance.

A mainstay of paternalism remains the somewhat moral obligation to free impaired individuals from agreements or

58. See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 766-74 (1983). Kronman's example of distributive justice is the decision-maker's refusal to allow disclaimers of the warranty of habitability in landlord/tenant relationships. The concept of unconscionability would also fit within the rubric of this justification. See also Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 473 (1980) (noting such additional forms of distributive justice as usury laws limiting interest rates, warranties of quality, and minimum wage laws) [hereinafter Kronman, *Contract Law and Distributive Justice*].

59. See Kronman, *Contract Law and Distributive Justice*, *supra* note 58. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (delineating generally the intersection of legal rules with paternalism and other mechanisms).

60. See JOEL FEINBERG, HARM TO SELF 12-16 (1986) (categorizing legal rules that protect weaker parties from the opportunism of stronger parties as "soft paternalism"; "hard paternalism," on the other hand, seeks to protect bargainers from their own actions).

61. See Thomas Hudson, Note, *Immutable Contract Rules, the Bargaining Process, and Inalienable Rights: Why Concerns Over the Bargaining Process Do Not Justify Substantive Contract Limitations*, 34 ARIZ. L. REV. 337, 343-44 & n.61 (1992) (citing JOEL FEINBERG, HARM TO SELF 23-26 (1986)).

62. See *id.*; JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 117 (1980). An example of a paternalistic restriction designed to protect an individual from her own acts would be the prohibition of the sale of alcoholic beverages on certain days, or during certain hours of the day.

63. See FEINBERG, *supra* note 60, at 12.

64. The doctrine of unconscionability attempts to foster the paternalistic goals of protecting weak or disadvantaged bargainers from onerous deals advanced by stronger, more powerful bargainers. See *infra* notes 72-73.

65. See Hudson, *supra* note 61, at 344 n.66.

provisions thereof, or to invalidate contracts that resulted from some discrepancy in the bargaining process.⁶⁶ The motivations of the bargaining parties, if based upon negative factors such as opportunism, bias, or prejudice, could arguably justify paternalistic intervention.⁶⁷

Paternalism forms the foundation for several mechanisms that may rescue an impaired bargainer from an unfair or improvident agreement. The concept of capacity, a justifiable remedy given its nexus with assent and public policy, serves to prevent enforcement of an agreement when the party is a minor or is operating under some supervening disability.⁶⁸ Other

66. See F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 35 (1990) (arguing that “[e]fficiency explanations of substantive fairness norms are more persuasive than distributional ones”). Nonetheless, I find Dean Kronman’s analysis both comprehensive and probative. For additional discussion of paternalism in contract law, see, for example, Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kuklin, *supra* note 57; Arthur Allen Leff, *Thomist Unconscionability*, 4 CAN. BUS. L.J. 424 (1980); and MacNeil, *supra* note 31.

67. Opportunism focuses upon a bargainer’s self-interest, which can prompt behavior adverse to other bargainers. The definitions of opportunism range both by fields of study and within these same fields. The most frequently cited definition comes from economist Oliver Williamson, who defines opportunism as “self-interest seeking with guile.” G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 228 (1991) (quoting OLIVER WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 26 (1975)). Another frequently cited definition is “when a performing party ‘behaves contrary to the other party’s understanding of their contract, but not necessarily contrary to the agreement’s explicit terms, leading to a transfer of wealth from the other party to the performer.’” *Id.* (quoting Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 521 (1981)); see also George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 957 (1992) (offering a broad definition of opportunism as “any contractual conduct by one party contrary to the other party’s reasonable expectations based on the parties’ agreement, contractual norms, or conventional morality”). See generally Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621, 689–705 (1993) (advocating the use of default rules to prevent opportunism); Perlstein, *supra* note 34, at 879 (advocating the use of tort damages to prevent opportunism); Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789, 795–98 (1993) (discussing the threat opportunism poses to bargaining relationships). Bias or prejudice can intersect with opportunism or function alone as an influence on bargainers. See Morant, *Race and Disparity*, *supra* note 1, at 917 (asserting that motivation may provide the justification to analyze the legitimacy of transactions affected by race and disparity).

68. See Morant, *Race and Disparity*, *supra* note 1, at 920 n.172.

paternalistic devices include such mechanisms as duress,⁶⁹ fraud,⁷⁰ and undue influence.⁷¹

Perhaps the most notorious paternalistic device is the concept of unconscionability.⁷² The absence of meaningful choice by one of the parties (procedural unconscionability) and the presence of an onerous or unfair term (substantive unconscionability) constitute

69. Duress is an “unlawful threat or coercion used by a person to induce another to act (or to refrain from acting) in a manner he or she otherwise would not (or would).” BLACK’S LAW DICTIONARY 504 (6th ed. 1990); accord RESTATEMENT (SECOND) OF CONTRACTS §§ 174, 175(1) (1981). “A finding of duress at least must reflect a conviction that one party . . . [was] so improperly imposed upon by the other that a court should intervene.” *In re Hellenic Lines, Ltd.*, 372 F.2d 753, 758 (2d Cir. 1967). A contract entered into under duress is voidable at the discretion of the party suffering duress. See *Chouinard v. Chouinard*, 568 F.2d 430, 434 (5th Cir. 1978). Duress is predicated on the unlawful acts of the other party. See *id.* Thus, one who enters into a contract because of an unfortunate financial situation or where the other party has refrained from pursuing a legal right in exchange for the contract has not suffered duress. See *id.*; see also HUGH GRAVELLE & RAY REES, MICROECONOMICS 248–53 (1981) (discussing the stability of market equilibrium).

70. Fraud represents “[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing . . . or to surrender a legal right.” BLACK’S LAW DICTIONARY 660 (6th ed. 1990). A statement is fraudulent if the maker intends the statement to induce manifestation of assent and the maker knows that the statement is not in accord with the facts, implies the truth of the statement, and knows that he does not have a basis for the assertion. See RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981). Like undue influence, the person alleging fraud must show it by clear and convincing evidence. See *id.*

71. Undue influence is “[p]ersuasion, pressure, or influence short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.” BLACK’S LAW DICTIONARY 1528 (6th ed. 1990). However, the mere existence of a confidential relationship does not create a presumption that undue influence was exercised. See *Bradbury v. Rasmussen*, 401 P.2d 710, 714 (Utah 1965). The party alleging undue influence must ordinarily prove it by clear and convincing evidence. See *id.*; *Armstrong v. Anderson*, 417 P.2d 326, 328–29 (Okla. 1966).

72. See *supra* note 21 and accompanying text. Courts have defined unconscionability as the “absence of a meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other party.” *Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 587 (Wis. Ct. App. 1992) (citing *Discount Fabric House, Inc. v. Wisconsin Tel. Co.*, 345 N.W.2d 417, 424 (Wis. 1984)). Similarly, the West Virginia Supreme Court describes unconscionability as an “overall and gross imbalance, one-sidedness or lop-sidedness that justifies a court’s refusal to enforce a contract as written.” *McGinnis v. Cayton*, 312 S.E.2d 765, 776 (W.Va. 1984); see also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (indicating that courts recognize unconscionability to include “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party”). Furthermore, the doctrine is broken down into two components. See *McGinnis*, 312 S.E.2d at 777. Substantive unconscionability is characterized as “unfairness in the contract itself—overall imbalance, one-sidedness, *laesio enormis*, and the evils of the resulting contract,” whereas procedural unconscionability “involves inequities and unfairness in the bargaining process.” *Id.*

the general elements of an unconscionable agreement.⁷³ While unconscionability has the potential to repair agreements damaged by the pejorative influences of race and gender, its academic constructs do not lend it to that use.⁷⁴ The previously described case of *Williams v. Walker-Thomas Furniture Co.* illustrates this point.⁷⁵

Notwithstanding neoclassicism's amelioration of classicism's rigidity, there remains a void regarding the conspicuous consideration of bias or prejudice issues in transactional relationships. None of the paternalistic tools designed to police the legitimacy of bargains, i.e., duress, fraud, undue influence, or unconscionability, includes factors of bias as elements that prompt a remedy.⁷⁶ This omission has become more severe, if not pronounced, by the resurgence of classicism in recent, significant decisions.⁷⁷

With the foregoing predicate established, several key inquiries emerge: How can parties or scholars highlight the possible pejorative function of bias or prejudice in bargaining relationships within the confines of present contract rules? Equally significant, can parties insert this issue into the discourse concerning contract disputes and remedies? The rapidly burgeoning field of law and literature provides probative insight into these queries.

II. LAW, LITERATURE, AND CONTRACT THEORY—AN INTERSECTION

A. *The Basic Constructs of Law and Literature*

Because contract law ignores the operation of biased behavior within bargaining circumstances,⁷⁸ some catalyst is needed to demonstrate the operation of interpersonal modalities related to human

73. Disparate bargaining positions of the parties have also been recognized as a form of procedural unconscionability. For a complete explanation of the unconscionability doctrine, see Eisenberg, *The Bargain Principle*, *supra* note 21, at 752–53; Leff, *Unconscionability and the Code*, *supra* note 21, at 488.

74. Cf. Morant, *Race and Disparity*, *supra* note 1, at 924 (stating that the concept of race is not considered in the unconscionability doctrine).

75. See *supra* notes 15–19. Mrs. Williams' status as an African American woman of color seems of little significance in the court's decision to grant her relief pursuant to unconscionability. *Williams*, 350 F.2d at 448–50.

76. See *supra* notes 68–73.

77. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The court adopts, in both cases, a somewhat *laissez faire* attitude toward bargaining relationships. For more regarding the seeming rise of classicism as an evaluative norm among judicial decision makers, see generally Mooney, *supra* note 53, depicting the American contract jurisprudential move from egalitarianism to an individualistic, conceptionalist model that facilitates bargained-for exchanges.

78. See *infra* Section II. B.

perception. Literature can serve that function. Its unencumbered nature allows the author to explore perceptual manifestations in their most stark reality. Once exposed, this revelation can justify use of remedial tools to blunt the effects of resultant biased behavior.

The interrelation of literature with contractual theory comes from the very nature of the law and literature movement itself.⁷⁹ Literature functions as a litmus test to illustrate the operation of law within a variety of interpersonal contexts.⁸⁰ And the prose created demonstrates an interrelationship between society, culture, and the law.⁸¹

Fiction comprises much of the literature in this movement.⁸² But that factor does not diminish the effectiveness of the analysis it bears. Indeed, fiction has historically been known to reflect, if not influence, society.⁸³ Consequently, the examination of law and literature in tandem has rapidly developed into a movement with substantial probative force.⁸⁴

Literature can operate metaphorically to explain the function of law within human relationships and transactions. As a result, the genre enriches our understanding of the law as a human artifact.⁸⁵ Analysis of its implications can provide some insight into societal attitudes and norms. Fiction, particularly if it is probative and insightful, can reveal the applicability of legal principles to human

79. My admittedly cursory description of the law and literature movement is not meant as a complete exposé. Such an effort would require far more detail than this Essay could offer. But one must attain some rudimentary understanding of this movement to appreciate its intersection with contract theory.

80. See generally James Boyd White, *What a Lawyer Can Learn from Literature*, 102 HARV. L. REV. 2014 (1989) (expounding upon the proper focus of law and literature).

81. See Carol Sanger, *Seasoned to the Use*, 87 MICH. L. REV. 1338, 1339 (1989) (noting that the “shadows cast by legal fiction may be especially strong because of the ‘strikingly legalistic’ character of American culture, where ‘legal terms, images, and scenarios infuse . . . conversations and imaginations’”) (quoting David Ray Papke, *The Advocate’s Malaise: Contemporary American Lawyer Novels*, 38 J. LEGAL EDUC. 413 (1988) (book review)) [hereinafter Sanger, *Seasoned to the Use*].

82. See *id.*

83. See *id.*; Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 973 (1991).

84. For general sources regarding the law and literature movement, see Richard Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988); *Law and Literature: A Symposium*, 29 RUTGERS L. REV. 223 (1976); *Symposium: Law and Literature*, 32 RUTGERS L. REV. 603 (1979); *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982); *Symposium: Terror in the Modern Age: The Vision of Literature, the Response of Law*, 5 HUM. RTS. Q. 109 (1983).

85. See Debora L. Threedy, *The Madness of a Seduced Woman: Gender, Law, and Literature*, 6 TEX. J. WOMEN & L. 1, 15–16 (1996) (stating that literature that focuses on law as legal themes should “enrich our understanding of law as a human artifact, as a means of ordering society”).

interactions⁸⁶ and suggest those relationships which should be remedied.

Authors of literature operate freely, unencumbered by the constraints of dogma or rules. They can readily explore the effect of law's operation within a world replete with human frailties and emotions such as love, fear, hate, anguish, passion and motivation, and perception. This freedom can stretch the boundaries, allowing the test of legal principles in a panoply of contexts that are difficult to replicate in real life.

Great writers such as William Shakespeare often speak prophetically of either the changes law imposes on society or the changes that are needed in the law itself.⁸⁷ Their works are generally seen as the classics of literature.⁸⁸ Several of today's commercially prominent writers, such as Scott Turow (*Presumed Innocent*) and John Grisham (*The Firm, A Time To Kill, The Chamber, The Rainmaker, Street Lawyer*),⁸⁹ further the literary exploration of law's operation within the context of human interaction.⁹⁰

The analytical constructs of literature provide a nontraditional method of evaluating the functionality of legal principles in society.⁹¹ As such, it operates similarly to narrative and storytelling which

86. See *id.* at 15; see also James Boyd White, *Law and Literature: "No Manifesto"*, 39 MERCER L. REV. 739, 751 (1988) (asserting that "[l]iterature and law are both about reason and emotion, politics and aesthetics"). See generally Bruce L. Rockwood, *The Good, the Bad, and the Ironic: Two Views on Law and Literature*, 8 YALE J.L. & HUMAN. 533 (1994) (reviewing DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL* (1994) and IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* (1995)).

87. See Sanger, *supra* note 81, at 1342-43. Sanger includes Melville, Dickens, Kafka, Faulkner, and Shakespeare as paradigms of the great authors. *Id.* at 1343.

88. Professor Deborah Thredy states that "[t]he accepted canon of law and literature includes such standards as *The Merchant of Venice* by William Shakespeare, *Billy Budd* by Herman Melville, *The Trial* by Franz Kafka, *Bleak House* by Charles Dickens, and *The Outsider* by Albert Camus." Thredy, *supra* note 85, at 1-2. "These five texts appear most frequently on law-and-literature reading lists." *Id.* at 2 n.3.

89. See James R. Elkins, *Troubled Beginnings: Reflections on Becoming a Lawyer*, 26 U. MEM. L. REV. 1303 (1996) (using the writings of John Grisham to examine legal education).

90. The distinction between the great writers and the more modern, popular author relates more to the establishment of literary credentials and worth than the trust born in the analysis presented by their works, or than through commercial or popular acceptance. The themes and analysis contained in the great authors' works require less defense and garner more immediate acceptance and credibility. See Sanger, *supra* note 81, at 1343 n.19 (citing Parker, *A Review of Zen and the Art of Motorcycle Maintenance with Some Remarks on the Teaching of Law*, 29 RUTGERS L. REV. 318 (1976)).

91. See, e.g., Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 385 (1985) (utilizing Kafka's fiction to counter Judge Posner's view that consent justifies the theory of wealth maximization).

utilize contextual reality to test the effectiveness of legal rules and judicial opinions.⁹²

As prose, literature's interpretation of legal conflicts and principles is somewhat akin to narrative,⁹³ a persuasive tool used in large measure by Critical Race and Feminist scholars.⁹⁴ Narrative represents a fascinating dynamic in which the narrator delivers a story designed to entice the audience to comprehend certain points through shared norms or understood conventions.⁹⁵ It can describe law as practice, impact and evaluate judicial decisions, and offer new perspectives on problems suffered by divergent groups.⁹⁶ The law and literature movement shares these traits.⁹⁷

The constructs of the law and literature movement have two alternative, analytical prongs: (1) the search for the literary aspects of law—that law and legal context have some literary significance (law

92. Many have used the terms "storytelling" and "narrative" interchangeably to describe the genre of legal criticism designed to criticize or deconstruct legal theories and rules as they apply to various circumstances. See, e.g., Michael A. Coffino, *Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases*, 1994 WIS. L. REV. 679, 681 (1994) (stating that "[a] narrative is a story about an event delivered to an audience by a narrator"); Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narrative*, 45 STAN. L. REV. 807 (1993) (using "legal storytelling" and "narrative" interchangeably) [hereinafter Farber & Sherry, *Telling Stories*]; Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 435–36 (1996) (approving the interchangeable use of the terms "narrative" and "story") [hereinafter cited as Hayman & Levit, *The Tales of White Folks*]. Professors Jane B. Baron and Julia Epstein have attempted to differentiate between storytelling and narrative. They define a "story" as "an account of an event or set of events that unfolds over time and whose beginning, middle, and end are intended to resolve (or question the possibility of resolving) the problem set in motion at the start." Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 147 (1997). They state that "narrative [signifies] a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories . . . [It organizes] certain kinds of problems into a form that renders culturally meaningful both the problems and their possible resolutions." *Id.* To Professors Baron and Epstein, stories are a subset of narrative. The distinction is too fine for constructive analytical purposes; therefore, I use the terms interchangeably, with narrative dominating my discourse.

93. Several scholars describe narrative and its use in scholarship. See, e.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Barbara J. Flagg, *On Selecting Black Women as Paradigms for Race Discrimination Analysis*, 10 BERKELEY WOMEN'S L.J. 40 (1995); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994).

94. See Johnson, *supra* note 93, at 813.

95. See Coffino, *supra* note 92, at 681.

96. See Hayman & Levit, *The Tales of White Folks*, *supra* note 92, at 434–37.

97. See generally *supra* notes 79–90 and accompanying text.

as literature);⁹⁸ and (2) the examination of the law-related content of a literary work (literature explicating law).⁹⁹ The latter prong can pointedly expose the effectiveness or failures of legal principles. It may also reveal the function of bias within transactional relationships.¹⁰⁰

B. A Transactional Narrative from *PLACES IN THE HEART*

Perhaps the law and literature movement's most probative power is its tendency to reveal law's nature and its implications in the lives of individuals.¹⁰¹ This can be particularly helpful when testing the need for contract rules designed to correct or remedy problems resulting from transactional irregularities. Like prose, movies can also elucidate the efficacy of law with the circumstance of human interaction.¹⁰² A poignant scene from the movie *Places in the Heart* vividly demonstrates this point.¹⁰³

98. See PAUL GEWIRTZ, INTRODUCTION IN *LAW'S STORIES: NARRATIVE AND RHETORIC IN LAW* 2, 34 (1996) (noting a comparison of law as literature with narrative); Anthony V. Alfieri, *Race Trials*, 76 *TEX. L. REV.* 1293, 1297 (1998) (discussing the utility of the "law as literature" concept in the analysis of narrative); James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 *U. CHI. L. REV.* 684, 693-97 (1985) (arguing that law is a form of rhetoric and, therefore, operates through members of the community in order to construct societal structures). John Grisham speaks, albeit indirectly, to the notion of law having literary qualities. In his personal note in his novel, *A TIME TO KILL*, Grisham observes that "[t]he greatest dramas occur not on screens or stages, but daily in countless courtrooms across the country." JOHN GRISHAM, *A TIME TO KILL* ix (1989) (Author's Note).

99. See Sanger, *Seasoned to the Use*, *supra* note 81, at 1342.

100. See *id.* See generally, Gary Minda, *Law and Literature at Century's End*, 9 *CARDOZO STUD. L. LITERATURE* 245, 245-46 (1997) (discussing what law and literature has come to mean).

101. For example, Bruce L. Rockwood writes:

[S]ome scholars pursue the detailed study of specific texts and authors for the light they shed on the nature of law and its impact on our lives. . . . [Hers] engage in the systematic introspection required for the application of critical theory . . . in an attempt to make a place for the law and literature movement within, or as a continuation of, modern and postmodern intellectual history.

Bruce L. Rockwood, *Book Review—The Good, the Bad, and the Ironic: Two Views on Law and Literature*, 8 *YALE J.L. & HUMAN.* 533, 533 (1996) (reviewing DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL* (1994) and IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* (1995)).

102. See generally John Denvir, *One Movie No Lawyer Should Miss*, 30 *U.S.F. L. REV.* 1051, 1051 (1996) (discussing the benefit of analyzing movies to gain legal insights); Norman Rosenberg, *Professor Lightcap Goes to Washington: Rereading Talk of the Town*, 30 *U.S.F. L. REV.* 1083, 1083 (1996) (discussing varied interpretive lessons gained from analyzing movies).

103. One may question the inclusion of a screenplay within the general body of works called literature. While this term conjures notions of traditional, printed prose,

A work of significant popular and commercial appeal, *Places in the Heart*, involves a woman's fight against "poverty, racism, and sexism while enduring back-breaking labor."¹⁰⁴ The film chronicles the dilemma of Edna Spaulding, a recently widowed woman in Depression-era Texas. Following her husband's sudden death, Mrs. Spaulding discovers that the mortgage on her family farm is in arrears. Without some appreciable income, the bank would foreclose the mortgage loan and compel her family to live with relatives. During a moment of intense despair, Mrs. Spaulding meets and takes into her employ Moze, an African American drifter trying to find work. Moze believes that Mrs. Spaulding's farm appears suited to grow cotton. He further convinces her that "he knows all there is to know about [growing] cotton."¹⁰⁵ Mrs. Spaulding then resolves to plant cotton and enters into an informal partnership with Moze.¹⁰⁶

To begin her grueling quest to grow and harvest cotton, Mrs. Spaulding initiates a deal with the local merchant for cotton seed. She specifies the grade of seed, and the merchant agrees to supply the seed for a stated price. The merchant's employees then commence to load onto Mrs. Spaulding's truck a more inferior seed than originally bargained for. Thanks to her knowledgeable partner, Moze, Mrs. Spaulding calls the error to the merchant's attention. He immediately apologizes for the error and compliments Moze for being a "credit to his race."¹⁰⁷

Whether the seed merchant's error is intentional remains a mystery. As in real-life occurrences, this scene provides no clear evidence of bad faith on the merchant's part. Nonetheless, the dia-

its definition cannot be narrowly confined to that type of writing. Literature encompasses a range of material, prose or verse, of an imaginative or creative nature. See WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY 1321 (1986) (defining the term "literature"). Accordingly, screenplays for motion pictures can be viewed legitimately as literary works that analyze law and legal rules. Screenplays, and the motion pictures they support, may be more deserving of such treatment in this analytical exercise, given the inherent nature of those writings to display human interaction so vividly.

104. VIDEOHOUND'S GOLDEN MOVIE RETRIEVER 697 (Martin Connors & Jim Craddock, eds., 1998). The accolades garnered by Robert Benton, author of the screenplay for *PLACES IN THE HEART*, confirm his worth as a creator of literature and boost the credibility of his work. The screenplay for *PLACES IN THE HEART* has received both an Academy Award and New York Film Critics Award for Best Original Screenplay. Benton has also received awards for the screenplays for *BONNIE AND CLYDE* and *KRAMER V. KRAMER*. See *id.* For more information regarding awards for films, see also *IMDB Internet Movie Database* (visited Nov. 24, 1998) <<http://us.imdb.com>>.

105. See *supra* note 5.

106. For a general description of the plot of *PLACES IN THE HEART*, see *id.*

107. *Id.*

logue and actor's portrayal lead one to suspect the possibility of deception.¹⁰⁸

But irrespective of deception, a curious query remains as to whether reliance upon negative stereotypes and associated beliefs influenced the merchant's conduct. It is plausible that he *possibly* harbors beliefs and attitudes regarding the business acumen and power of women and African Americans. His perceptions of Mrs. Spaulding as an inexperienced, female bargainer and Moze as an African American laborer, *could* have triggered those beliefs.¹⁰⁹ In turn, those beliefs may have influenced his bargaining conduct in

108. A party to any contract has an affirmative duty of good faith and fair dealing in its performance and enforcement. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); FARNSWORTH ON CONTRACTS § 7.17, at 310 (1990). Various scholars have written extensively on the concept of good faith and fair dealing. See generally Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299 (1988) (proposing a working definition of contract enforcement and the good faith requirement); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) (presenting a theory for distinguishing good faith from bad faith); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981) (articulating the function of the good faith obligation under Article 2); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984) (offering a distinction between good faith and bad faith performance); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963) (discussing the Code's provisions on good faith); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) (examining good faith in contract case law and in Code provisions); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) (discussing the Restatement's view of good faith). See also Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Risks from the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483 (1994) (discussing the viability of the tort remedy of implied covenant of good faith and fair dealing for a breach of contract); Nina G. Stillman, *Wrongful Discharge: Contract, Public Policy, and Tort Claims*, 527 PLI/Lit 313 (1995) (discussing the implied covenant of good faith and fair dealing in the employment context).

109. Life for African Americans in Depression-era Texas, as in other southern states, was characterized by poverty, racial bigotry, and legally imposed segregation and inequality. See JOHN EGERTON, *SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* 29–33 (1994). Southern society also viewed women as naturally dependent and only competent in the domestic sphere. See SARAH M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 203–04, 211 (1989). These historical circumstances supported a culture that viewed both African Americans and women as pawns to be manipulated by those in control of power and material resources. See EGERTON, *supra*. For discussion of the portrayal of these attitudes and circumstances in film, see Douglas Y'Barbo, *The Heart of the Matter: The Property Right Conferred by Copyright*, 49 MERCER L. REV. 643, 675–76 (1998), for a description of racial attitudes in the Depression-era South, utilizing the film, *DRIVING MISS DAISY* (Warner Brothers 1989). See also Calvin Woodard, *Listening to the Mockingbird*, 45 ALA. L. REV. 563 (1994) (discussing the excellent portrayal of racial attitudes that were prevalent in the South during the Great Depression in the film *TO KILL A MOCKINGBIRD* (Universal International Pictures 1962)).

the transaction for the cotton seed.¹¹⁰ While there is no definitive proof of this dynamic, the contextual possibility of its operation demands that it be explored as a factor in a complete analysis of the transaction.

Mrs. Spaulding's transaction with the seed merchant, complete with offer, acceptance, consideration, and delivery, comports with the objective tenets of contract law.¹¹¹ Because the elements of a valid contract are present, the result pursuant to classical theoretical norms is the enforcement of the agreement, barring extraordinary impediments.¹¹² Ostensibly, this should provide Mrs. Spaulding security, even in the face of the merchant's mistake. In fact, modern contract law provides a remedy for this error, albeit a difficult one given the evaluation of risk allocation.¹¹³

Had Mrs. Spaulding discovered the erroneous seed delivery subsequent to her encounter with the merchant, contract rules would have provided for her right to reject the defective tender by the merchant.¹¹⁴ However, the opportunity costs and emotional toll associated with that remedy can be extensive. Moreover, the requirement of proof, particularly in the context of a parole agreement, can loom as a formidable burden.¹¹⁵

To support a proffered remedy, the party seeking relief must substantiate its imposition. The rejuvenated classical view of contracts further demands this predicate for intervention into the bargaining relationship.¹¹⁶ The motivation of the seed merchant to attempt delivery of the lesser grade seed can serve as significant justification for Mrs. Spaulding's remedy.¹¹⁷ Surely his perception of Mrs. Spaulding as an inexperienced woman, advised only by an African American laborer, may have significantly influenced the merchant's "mistake" in providing her the wrong seed. If not, at least that perceptual possibility, evident from the context of the bargain itself, demands exploration of this dynamic. Confirmation of

110. See *infra* notes 123–133 and accompanying text.

111. See *supra* notes 45–49 and accompanying text.

112. See *supra* notes 47, 66–80 and accompanying text.

113. RESTATEMENT (SECOND) OF CONTRACTS §§ 151, 152, and 154 (1981); see also JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 91 (3d ed. 1990) (providing a comprehensive discussion of mistake as well as risk allocation).

114. Pursuant to the perfect tender rule, a buyer has the right to reject the whole and any part of a tender of delivery that fails "in any respect to conform to the contract." U.C.C. § 2-601 (1989).

115. The traditional, unfettered right of rejection pursuant to the "perfect tender rule" of U.C.C. § 2-601 has been tempered to avoid surprise rejection and general opportunism by the buyer. See U.C.C. §§ 1-203, 2-504, 2-508, 2-605, and 2-608 (1989).

116. See Mooney, *supra* note 53 and accompanying text.

117. For more regarding the motivation to contract, see Morant, *Race and Disparity*, *supra* note 1, at 911–17.

this behavior can substantiate not only the merchant's flawed delivery but also Mrs. Spaulding's right to relief.

Of course, Mrs. Spaulding's right to grade A seed is secured by the oral terms of the agreement.¹¹⁸ Barring the impediments of proof of those oral terms, her right to redress could be augmented significantly by an analysis of the possible perceptual bias in the transaction.

C. Perception, Social Cognition, and Marginalization

Bargainers' perceptions of one another may influence bargaining conduct to some extent. This certainly may have been a factor in the bargaining relationship between Mrs. Spaulding and the seed merchant, described above in the scene from *Places in the Heart*.¹¹⁹

The operation of perception and biases from within the consumer context is no new phenomenon. Indeed, it is likely as old as contract law itself.

Many have noted the disparity with which women and individuals of color have been discriminated against in a variety of transactional contexts.¹²⁰ Controlled experimentation also confirmed the operation of perception, attitudes, and beliefs within the specific market of car sales.¹²¹ Courts have also confronted cases where

118. As a general postulate, a contract expressed orally is binding so long as the elements of a binding agreement are present and the agreement is not subject to the Statute of Frauds. See MURRAY, *supra* note 113, at §§ 68–80; U.C.C. § 2-201 (1989); see also 2 CORBIN, *supra* note 46, at § 275 (providing a history of the statute of frauds); Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931) (discussing informal verbal modifications of written contracts).

119. See *supra* notes 106–107 and accompanying text.

120. See Ian Ayres & Peter Seigelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995); John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881 (1986); *Prime Time Live: True Colors* (ABC television broadcast, Nov. 26, 1992) (documenting the travails of affluent-looking African Americans seeking housing and retail purchases). See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* (1992).

121. Perhaps the most compelling proof of the operation of perception in bargaining conduct is a controlled experiment performed by Ian Ayres. Professor Ayres tested a theory that women and minorities were generally given worse deals when they attempted to negotiate for a new car. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). He assembled a number of individuals who would function as testers of the car market in metropolitan Chicago. *Id.* The testers were meticulously selected and trained to ensure uniformity. *Id.* Ayres' study demonstrated that African Americans and women paid substantially higher prices for the same vehicle as those offered to white males. *Id.* Moreover, car dealers altered their bargaining techniques and goals based upon their perception of the consumer. *Id.* For more discussion of the operation of perceptions in personal and judicial decision making, see generally Jonathan K. Stubbs, *Perceptual*

allegations of discrimination based upon race have been central to the disputes.¹²² Others have highlighted the existence of biased behavior in the housing industry as well.¹²³ These cases and studies, like Mrs. Spaulding's transaction in *Places in the Heart*,¹²⁴ document the fact that not all contracts are cast in a colorblind milieu.¹²⁵

While anecdotal evidence indicates that, in certain instances, individuals may rely upon attitudes and preformed beliefs in formulating bargains, social scientists provide a more persuasive methodology that confirms the existence of biased conduct. Social psychologists have often examined the influences perception has on human behavior and term this phenomenon "social cognition."¹²⁶ Pursuant to this theory, individuals tend to use shortcuts as a natural cognitive means to process information. Individuals are bombarded by so much information that, as a consequence,

Prisms and Racial Realism: The Good News About a Bad Situation, 45 MERCER L. REV. 773 (1994), which discussed the prism model, a model that contends that people tend to see the world differently according to their varying perceptions, and those differences affect human decision-making in judicial and other contexts.

122. See *Perry v. Command Performance*, 913 F.2d 99, 100 (3d Cir. 1990) (concerning the refusal by a beauty salon hairdresser to serve a black woman). African Americans and businesses with ties to the NAACP have historically suffered discrimination in the sale of such goods as milk, bread, groceries, gas, credit, fertilizer, seed, insecticides, and farm machinery. See AMERICAN FRIENDS SERV. COMM. ET AL., *INTIMIDATION, REPRISAL, AND VIOLENCE IN THE SOUTH'S RACIAL CRISIS* (1959), reprinted in *Civil Rights—1959: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess. 1573 (1959). Cases have also proved discriminatory actions in the sale of real estate. See, e.g., *United States v. Pelzer Realty Co.*, 484 F.2d 438, 442–43 (5th Cir. 1973) (holding that a real estate agent's requirement that African American home-buyers either bring the agent additional business or pay higher prices violated the Fair Housing Act).

123. Many sources note the prevalence of racial and sexual discrimination in both the housing and automobile markets. See Joyce Jones, *Let the Home Buyer Beware*, BLACK ENTERPRISE, Aug. 1997, at 19 (addressing the discrepancies in home insurance coverage that occur along racial lines); Ed Morales, *Apartment-heid*, THE VILLAGE VOICE, May 5, 1998, at 25 (discussing the continued existence of housing discrimination in New York despite a consent decree to increase minority housing percentages); Emily Rosenbaum, *Racial/Ethnic Differences in Home Ownership and Housing Quality*, 1991, 43 SOC. PROBS. 403, 418 (1996) (finding that Black and Hispanic families were less likely than White families to live in high-quality units and neighborhoods).

124. See *supra* notes 106–107 and accompanying text.

125. For more on colorblindness, see *infra* note 164 and accompanying text.

126. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 5–8, 117–120 (1995). See generally Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 419 (1997) (discussing how, in decision-making, people use mental shortcuts because of limited time, information, and cognitive capacity, which sometimes lead to miscalculations) [hereinafter Langevoort & Rasmussen, *Skewing the Results*]; Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129 (1956) (dealing with people's decision-making when faced with multiple goals asserting that rational behavior is closely related to perception and cognition).

they require an abbreviated mechanism to process this panoply of information efficiently.¹²⁷ Thus, individuals *may* resort to categorizations or stereotypes to speed cognitive processes.¹²⁸ Known as heuristics, this process can occur naturally as an almost automatic response mechanism.¹²⁹

If implemented by the bargainers, behavior influenced by heuristics could manifest itself as bias and prejudice.¹³⁰ These influences on judgment can operate tacitly or unconsciously.¹³¹ This is particularly true if the perceiver fails to recognize distinctions between the individual perceived and the group to which that individual belongs.¹³² This, in turn, can be the precursor to unfair or inequitable bargains.¹³³

In the scene from the film *Places in the Heart*, described above,¹³⁴ the seed merchant's perception of Mrs. Spaulding, a woman with no experience in bargaining assisted by a person of color who is assumed to possess little knowledge of the transaction, may have spurred the merchant's carelessness in tendering the lower grade of cotton seed.¹³⁵ The merchant's utilization of stereotypes associated with those groups could have easily influenced his bargaining conduct with individuals of those groups—Mrs. Spaulding and Moze.

127. See *supra* note 126 and accompanying text. See generally Hal R. Arkes, *Costs and Benefits of Judgment Errors: Implications for Debiasing*, 110 *PSYCHOL. BULL.* 486 (1991) (noting generally the efficiency in streamlining informational processes, which ultimately affects behavior).

128. Stereotypes include acquired or learned beliefs, generally associated with distinct groups. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 5, 6 (1989); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Academia*, 1990 *DUKE L.J.* 705, 710; Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 *HASTINGS L.J.* 471, 489 (1990).

129. See A. TVERSKY & D. KAHNEMAN, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1974); STEVEN J. SHERMAN & ERIC CORTY, *Cognitive Heuristics*, in *HANDBOOK OF SOCIAL COGNITION* 189–286 (R.S. Wyer & T.K. Skruell, eds., 1984). See generally ARONSON, *supra* note 126 (discussing dissonance theory and the effects on behavior).

130. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 *CAL. L. REV.* 733, 742 (1995) [hereinafter Armour, *Stereotypes and Prejudice*].

131. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 *U. PA. L. REV.* 463, 472 (1998) (discussing the subconscious role race may play in the decision of a juror).

132. Langevoort & Rasmussen, *Skewing the Results*, *supra* note 126, at 420 n.94; see also Dale F. Wyatt & Donald T. Campbell, *On the Liability of Stereotype or Hypothesis*, 46 *J. ABNORMAL AND SOC. PSYCHOL.* 496 (1951).

133. The description of heuristics is admittedly abridged given the natural constraints of this Essay. The goal, nonetheless, is to provide some basic understanding of the social psychological implications of relationships within the bargaining context.

134. See *supra* notes 106–107 and accompanying text.

135. See *supra* notes 106–110 and accompanying text.

The influence of stereotypes could be subtle or unconscious, a state symptomatic of both the entrenchment of stereotypes in general and the automatic operation of heuristics.¹³⁶ In effect, the merchant may have marginalized Mrs. Spaulding to the point where he was not as vigilant as he would have been had he dealt with one he perceived to be a more sophisticated customer.¹³⁷

It is important to note that individuals may not automatically behave in accordance with learned categorizations. In fact, individuals may know of stereotypes and actively avoid their implementation in the decision on how to behave.¹³⁸ In some instances, affirmative steps can be taken to halt the natural use of negative stereotypes.¹³⁹

But the absence of biased behavior cannot be assumed, particularly if a factual predicate for such behavior exists. Scrutiny of disputed bargains, therefore, requires analysis of the possible operation of negative stereotypes and biases to prompt and justify relief. For this reason, decision-makers should examine the role each party's bargaining position and attitudes played in the transaction.

D. *The Influence of Perception—A TIME TO KILL*

The influence of perception as it relates to conduct can be quite powerful. But recognition of that power should prompt action to halt the ill effects of bias on bargaining conduct. When a factual context such as the one demonstrated in the scene from *Places in the Heart* implicates bias resulting from perception, decision-makers must acknowledge its existence and operation. They should, accordingly, take affirmative steps to counter its adverse results in cases where disadvantaged bargainers have little choice.¹⁴⁰ To this end, literature can shed light on the need to address bias and dem-

136. For more on unconscious racism, see generally Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 811–14 (1994) [hereinafter Armour, *Race Ipsa Loquitur*]; Armour, *Stereotypes and Prejudice*, *supra* note 130, at 742, which discussed the relationship between acknowledged stereotypes and personal beliefs.

137. Similarly, in the case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), Mrs. Williams could have been marginalized in her dealings with the furniture company, given her lack of financial prowess and choice. See *supra* notes 15–22, 75 and accompanying text.

138. See generally Armour, *Race Ipsa Loquitur*, *supra* note 136.

139. See Armour, *Stereotypes and Prejudice*, *supra* note 130, at 750–60 (arguing that non-prejudiced personal beliefs must be summoned to offset the unconscious discrimination that can occur from stereotyping).

140. Armour endorses the use of tactics that prompt individuals to employ non-prejudicial beliefs in their thought processes. *Id.* at 757–60.

onstrate effective methods to halt the influence of negative stereotypes on judgment and behavior.

A Time to Kill, John Grisham's first, favorite, and perhaps best novel to date, echoed themes of racism, revenge, and equal justice under the law in the state of Mississippi.¹⁴¹ An actual rape trial inspired the story, in which a young girl testified against a man who had brutally raped her.¹⁴² Grisham's book and the commercially successful film of the same name serve to underscore the powerful tool of narrative as an illustrative device in legal theory.¹⁴³ Both the book and, more vividly, the film depict the powerful influence that perception has on conduct and judgment.¹⁴⁴

The central story line focused on Carl Lee Hailey, an African American family man, accused of killing two rednecks who had viciously raped his ten-year-old daughter. Jake Brigance, a young, relatively inexperienced attorney, agreed to defend Carl Lee. Conflicts swirled around Jake's ability to proffer a credible and effective defense in the wake of intense racial angst that permeated the small Mississippi town where the events transpired.¹⁴⁵ Whether Carl Lee could receive a fair and unbiased trial in the face of racial tensions in the town and the seating of an all-White jury became the omnipresent issue.

In his closing argument, Brigance challenged the jury to focus beyond the element of race.¹⁴⁶ Through the imagery of a parent's grief, he induced the jury to identify emotionally with Carl Lee Hailey.¹⁴⁷ In effect, Brigance sought to alter the jury's judgment base—to reject or disregard attitudes or beliefs grounded in race and focus more upon a universal sense of fairness and justice. Interestingly, the

141. See GRISHAM, *supra* note 98; Robert A. Creo, *An Essay on Professionalism: The Portrayal of Lawyers in Popular Fiction*, 146 PITTSBURGH LEGAL J. 7, 11 (1998) (discussing Grisham's portrayal of lawyers in *A Time to Kill*).

142. See *supra* note 141.

143. See Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L.J. 549, 552–58 (1997) (exploring *A Time to Kill* as an example of storytelling).

144. VIDEOHOUND'S GOLDEN MOVIE RETRIEVER, *supra* note 104, at 907. The screenplay for the movie was written by Akiva Goldsman. See *id.*

145. See generally *id.*

146. Grisham evoked a tacit premise: the impact of the rape of the child would be greater if the all-White jury could identify more with the victim; i.e., if the victim were also White. GRISHAM, *supra* note 98, at 455–56.

147. Grisham's idea for this transference of pathos originated from his own feelings of empathy. While witnessing the actual rape trial on which *A Time to Kill* was based, Grisham was moved by the testimony of the young rape victim. He then personalized the rage he believed the family sensed. He states, "I wondered what I would do if she were my daughter. As I watched her suffer before the jury, I wanted personally to shoot the rapist. For one brief yet interminable moment, I wanted to be her father. I wanted justice. There was a story there." *Id.* at ix–x.

book and film implemented this attitudinal trigger in a strikingly dissimilar manner.

In the book, Grisham took a less direct approach to confronting biased behavior. He attempted to counter the biased judgments premised on race with an appeal to the universality of intense human suffering, identifiable to anyone regardless of race—a more colorblind approach. Jake Brigance's closing argument in the book included the following:

Suppose . . . your ten year-old daughter is raped, and you're a Vietnam vet, very familiar with an M-16, and you get your hands on one while your daughter is lying in the hospital fighting for her life. Suppose the rapist is caught, and six days later you manage to maneuver to within five feet of him as he leaves court. And you've got the M-16. What do you do?¹⁴⁸

Grisham's narrative then reads *inter alia*:

[Jake] wanted to leave [the jury] with one thought. Picture this if they could. When she was lying there, beaten, bloodied, legs spread and tied to trees, she looked into the woods around her. Semiconscious and hallucinating, she saw someone running toward her. It was her daddy, running desperately to save her . . . She needs him now . . . Let him go home to his family.¹⁴⁹

In the book, Grisham's character successfully diverts the jury's attention from race, particularly that of an African American killing two white men. He prompted the jurors to focus instead on the rape of a child, the senseless and shameful tragedy that led to the killings.¹⁵⁰

The screenwriter for the motion picture confronted the challenge more pointedly. Recognizing that the all-White jury may fixate more on the racial dynamics of the case,¹⁵¹ Akiva Goldsman overtly triggered nonprejudiced beliefs. Brigance's closing argument targeted the racial subtext by use of imagery. He sought to alter the jurors' perception (based on stereotype) to evoke more sympathy for

148. *Id.* at 483.

149. *Id.* at 483–84.

150. In the novel, the success of Brigance's tactics is evidenced by the jury's verdict of not guilty by reason of insanity. *Id.* at 508.

151. In the film, it was clear that Jake Brigance and Carl Lee Hailey were concerned that the jury would not be totally impartial on race. This was particularly troublesome to the pair given that the facts indicated that an African American man had killed two White men. *See supra* note 6.

the true victim, thereby helping the father. Brigrance poignantly states:

I set out to prove a black man could receive a fair trial in the South. That we are all equal in the eyes of the law. That's not the truth, because the eyes of the law are human eyes—yours and mine. And until we can see each other as equals, justice is never going to be even-handed. It will remain nothing more than a reflection of our prejudices. So until that day we have a duty under God to seek the truth, not with our eyes, not with our minds with fear and hatred . . . but with our hearts. But we don't know better.

I want to tell you a story. I'm going to ask you all to close your eyes while I tell you this story. I want you to listen to me. I want you to listen to yourselves. Go ahead, close your eyes, please.

This is a story about a little girl walking home from the grocery store one sunny afternoon. I want you to picture this little girl. Suddenly a truck races up. Two men jump out and grab her. They drag her into a nearby field, and they tie her up, and they rip her clothes from her body. Now they climb on—first one, and then the other—raping her, shattering everything innocent and pure; vicious thrusts in a fog of drunken breath and sweat. And when they're done, after they've killed her tiny womb, murdered any chance for her to bear children, to have life beyond her own, they sat and used her for target practice. So they started throwing full beer cans at her, thrown so hard that it tears the flesh all the way to her bones.

Then they urinate on her.

Now comes the hanging. They have a rope. They tie a noose. Imagine the noose going tight around her neck, a sudden blinding jerk. She's pulled into the air, her feet and legs go kicking—they don't find the ground. The hanging branch isn't strong enough. It snaps and she falls back to the earth. So they pick her up, throw her in the back of the truck, drive out to Foggy Creek Bridge,

pitch her over the edge. She drops some thirty feet down to the creek bottom below.

Can you see her—her raped, beaten, broken body—soaked in their urine, soaked in their semen, soaked in her blood, left to die? Can you see her? I want you to picture that little girl. [pause] Now, imagine she's white. [pause] The defense rests, your honor.¹⁵²

The impact and implication were clear: if Brigance could neutralize the all-white jury's racially biased perception of his client's actions by changing the victim of the underlying crime of rape from black to white, he could engender more sympathy for the actions of his client. His imagery sought to trigger the nonprejudiced beliefs of the jurors by inducing their empathy.¹⁵³

Brigance's tactic to neutralize the jury's negative, racial perception as it applied to his client's slaying of two white men does not suggest that race is an irrelevant factor in the overall dynamics of the case. That idea would be ludicrous because racial attitudes and bias permeate the novel's story line.¹⁵⁴ Yet his strategy prompts decision-makers to ignore or reject unconscious, prejudiced beliefs through recognition of the tacit operation of those beliefs in cognitive decision-making.¹⁵⁵ Brigance's appeal to pathos diverts the jury's focus from the image of a black man shooting two white men, to a distraught father seeking justice for the brutal rape of his pre-pubescent daughter. Father/daughter empathy eclipses the black/white character of the case.

Employment of race-neutralizing tactics as a means to lessen biased decision-making does not eliminate racial prejudice. To the contrary, the very need to implement this strategy contradicts that notion. It does, however, contribute to informed decision-making by blunting the influence of unconscious or tacit bias.

Scenes from both the novel and the film of *A Time to Kill* illustrate the potential effectiveness of techniques that neutralize the effects of negative stereotypes and beliefs premised on race. These literary works also underscore the potential to alter such

152. *A TIME TO KILL* *supra* note 6.

153. *See supra* notes 139–140 and accompanying text; *see also* Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 796–97 (1996) (discussing the use of the imaginative empathy form of narrative in *A TIME TO KILL*).

154. *See supra* notes 141–146.

155. *See* Armour, *Stereotypes and Prejudice*, *supra* note 139, at 742–45 (stating that triggering nonprejudiced beliefs may lead to balanced and less biased decision-making).

evaluations, even within the transactional world of contracts. Active use of mechanisms to prompt nonprejudice beliefs can possibly thwart discriminatory conduct.¹⁵⁶ This practice, in turn, can exert a positive influence on bargaining behavior. But as discussed in more detail below, bias-reduction tactics can succeed only when decision-makers construe and apply the rules of contract more broadly.

III. THE LESSONS OF LITERATURE—THE NEED FOR REALISM AND HUMANISM

The most telling point that scholars and adjudicators of contracts can glean from the law and literature movement must be to view contract rules more fluidly. This of course means that contractual rules, in the abstract, cannot be viewed as panaceas in all situations.¹⁵⁷ The present tendency to do so may be due to the overestimation of the power of rules to alter bargaining conduct.¹⁵⁸ Rules, by their rigid nature, fail to be all things in all situations given the multiplicity of human variables.¹⁵⁹ In fact, the rigidity of sterile contractual rules may be disadvantageous to distinct groups of bargainers.¹⁶⁰ At best, rules must be applied contextually to function effectively as tools of security and justice. This is not to say that rules should be abandoned; rather, they should be interpreted in view of the dynamics of interpersonal exchanges that occur within the transactional relationship.

156. The use of triggering devices to thwart discriminatory conduct in bargaining relationships implies the use of methods that encourage bargainers to contract with individuals with whom they generally have not bargained, i.e., people of color, women, and the disabled. See *supra* notes 139 & 140. The traditional mechanism for encouraging such “counter perceptual” bargaining is the use of programs such as set-asides in government contracts. The Supreme Court has limited the use of such programs by subjecting them to strict scrutiny review. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The limitations imposed on the use of these programs suggest the need to develop alternative means to entice people to move beyond their perception-based biases in bargaining relationships. The intriguing nature of this doctrinal intersection notwithstanding, a complete analysis of these programs in light of social cognition extends beyond the bounds of this Essay and, therefore, must be reserved for future discussion.

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

158. See Barbara A. Fure, *Contracts as Literature: A Hermeneutic Approach to the Implied Duty of Good Faith and Fair Dealing in Commercial Loan Agreements*, 31 DUQ. L. REV. 729, 751 (1993) (stating that contract rules do not succeed because they are premised on careful bargaining by bargainers sensitive to the threat that contract rules can impose).

159. See *supra* notes 3, 51–52 and accompanying text.

160. See Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN’S RTS. L. REP. 147, 151, 208 (1996) (stating that the current use of premarital agreements is unfair to women).

The formalism imbued in contract law should accommodate flexibility, reflective of an analytical approach based upon realism.¹⁶¹ This tactic does not supplement the standard operation of contractual rules which emphasize objective manifestations of a bargain.¹⁶² Instead, this tactic causes decision-makers to fuse the application of these rules with consideration of the attitudinal dynamics that permeate any bargaining relationship. Such an approach, of course, destroys the assumption that all deals are struck with total objectivity,¹⁶³ i.e., without the impact of categorizations based upon race or gender.¹⁶⁴

161. Legal realism arose in the early twentieth century in response to the dogmatic formalism displayed in *Coppage v. Kansas*, 236 U.S. 1 (1915), which allowed workers to contract with their employers without state interference. Realism uses social condition as an operative factor in decision-making; strict reliance on legal rules thus becomes a potentially unnecessary and awkward exercise. From a realist's perspective, the decision-maker should apply legal rules contextually in view of the circumstances that influence the conduct of the parties. See Gregory A. Mark, *Realms of Choice: Finance Capitalism and Corporate Governance*, 95 COLUM. L. REV. 969, 974 n.17 (1995) (defining legal realism as the integration of social science into the realm of law). For a discussion of the development of legal realism, see KERMIT L. HALL, *THE MAGIC MIRROR, LAW IN AMERICAN HISTORY*, 269-71 (1989); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER, 359, 359-63 (Lawrence M. Friedman & Harry N. Scheiber, eds., Harvard Univ. Press 1988); G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 821-25 (1986).

162. See *supra* note 46 and accompanying text.

163. For more regarding the pseudo-objectivity of contract law and the deconstruction of contract principles as they relate to society, see Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1039-66 (1985); see also Morant, *Race and Disparity*, *supra* note 1, at 892 (stating that the "truism of imperfect objectivity led to the rise of the neoclassicists in the field [of contracts]").

164. The tendency to view bargaining relationships objectively, without consideration of the implication of bias related to gender or race, is directly related to the concept of colorblindness. Justice Harlan, in the dissent of *Plessy v. Ferguson*, 163 U.S. 537 (1896), probably originated the concept of "colorblindness," stating that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559. In more modern times, the concept has been repudiated by a number of scholars. See Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 51-52 (1995) (declaring that "the 'colorblind' approach is impossible"); Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 773 (1996) ("Color-blindness is a pathology, a disease of the eye. In striving for a color-blind society, the Supreme Court [in recent decisions involving civil rights and affirmative action] is turning a blind eye to the gross racial inequities that pervade American society. . ."); Katheryn K. Russell, *Affirmative (Re)Action: Anything but Race*, 45 AM. U. L. REV. 803, 805 (1996) (reiterating Justice Blackmun's concurring statement in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) that to get past race, one must consider race). See generally T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996) (discussing whether the use of quotas or credits in affirmative action programs would meet the narrowly tailored prong of strict scrutiny analysis); Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution*, 28 U.S.F. L. REV.

In effect, traditional contract rules can be too crude and inflexible in some contexts and make little allowance for the operation of the human spirit in relationships. Shakespeare makes reference to this fallacy of contract law in his classic work, *Merchant Of Venice*.¹⁶⁵ The play vividly underscores the limitation of contractual rules that in that context, do little to foster amity and trust between the bargainers.¹⁶⁶

Despite its benefits, the analytical merit of the law and literature movement, i.e., literature explicating law,¹⁶⁷ may not be immune from criticism. Because of its nexus with narrative,¹⁶⁸ critics may ascribe such faults to law and literature analysis as limited utility and a lack of typicality.¹⁶⁹ The fact that literature tends to be fiction may enhance this criticism.¹⁷⁰ Furthermore, the use of law and literature to support a more contextual approach to the application of

343 (1994) (book review); Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 838–39 (1995) (arguing that the colorblind approach is used by some politicians as a tool with which to perpetuate racism); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); Jerome McCristal Culp, Jr. et al., *Foreword: A New Journal of Color in a "Colorblind" World: Race and Community*, 1 AFRICAN-AM. L. & POL'Y. REP. 1 (1994).

165. SHAKESPEARE, *THE MERCHANT OF VENICE* (10th ed. 1888).

166. Debora L. Threedy describes this fallacy of contract quite pointedly:

In the crass, competitive world of Venice, contract law allows the antagonists, Shylock and Antonio, to enter into a relationship with one another, but that relationship remains basically adversarial. The relationship based upon contract (law) creates no trust or intimacy between Shylock and Antonio, and it is no surprise that it ends in a duel in court, with its winners and losers.

Threedy, *supra* note 85, at 14–15. I would be remiss not to acknowledge that *Merchant of Venice* includes other societal issues and themes of a fractious nature. My goal here is to highlight only the story's revelation of the failings of contractual rules.

167. See *supra* notes 80, 84 and accompanying text.

168. See *supra* notes 92–97 and accompanying text.

169. See Farber & Sherry, *Telling Stories*, *supra* note 92, at 854; Johnson, *Defending the Use of Narrative*, *supra* note 93, at 807; Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2126 (1989).

170. Storytelling can be based in truth or fiction, while literature has a substantial foundation in fiction. This constitutes a distinguishing feature of the two genres. Yet this minuscule distinction does not diminish literature's analytical import. The illustrative nature of literature serves as a superb evaluative tool, since the testing of legal principles in fiction is generally without human consequence. Fiction often springs from real world experiences. For example, *PLACES IN THE HEART* was based on the early life of its writer, Robert Benton. See *supra* note 104 and accompanying text. Likewise, an actual trial inspired John Grisham's idea for the story in *A TIME TO KILL*. See *supra* notes 127, 142 and accompanying text. Having some basis in reality should heighten, to some extent, the probative value of analysis through literature.

contract rules can highlight theoretical conflict between fairness, individualism, and preservation of the marketplace.¹⁷¹

Despite the aforementioned criticisms, the analytical revelations provided by law and literature test the relevancy of contractual rules as applied to bargaining circumstances. The context provided by the imagination of authors who interpret human experiences can help portray the effect of law on human relationships. These revelations can be valuable in assessing the law's efficacy *before* it impacts actual bargaining relationships.

The analytical constructs of literature can also serve to bolster remedial intervention into agreements that are inequitable. Despite its flaws, contract law does have mechanisms to remedy bargain unfairness. Duress,¹⁷² fraud,¹⁷³ and undue influence,¹⁷⁴ can, if proven,¹⁷⁵ afford the victim some relief. Perhaps the most notable remedial device to correct unfair bargains is unconscionability.¹⁷⁶ But unconscionability, like other interventionist devices, suffers from amorphousness, making it difficult to prove¹⁷⁷ and, therefore, to obtain as a remedy.¹⁷⁸ Moreover, interventionist remedies such as unconscionability contradict the objectives of the classical notion of contract theory: the preservation of bargains that contain the elements of an enforceable agreement, made by autonomous

171. See Jay Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983) (discussing collectivism and individualism in modern contract law and noting that decision-makers' failure to acknowledge these competing interests produces inconsistent rules).

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

173. See *supra* note 70 and accompanying text.

174. See *supra* note 71 and accompanying text.

175. See *infra* note 180 and accompanying text.

176. See *supra* notes 21, 72-75 and accompanying text.

177. See *infra* note 180 and accompanying text.

178. See generally M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969) (supporting the need for unconscionability in modern contract law); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) (noting that the doctrine's generality could prompt its abuse); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (noting the vagueness of U.C.C. § 2-302); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 482-86 (1995) (stating that unconscionability, as generally applied in all jurisdictions that recognize the doctrine, is limited to application "at the time the contract was made" and delineating the doctrine's general use); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969) (noting that the doctrine suffers from vagueness and should be applied only when both procedural and substantive conditions are met).

individuals of free will.¹⁷⁹ The invocation of such doctrines, therefore, always comes to the decision-maker under a cloud of suspicion and with a daunting burden of proof.¹⁸⁰

However, the analytical revelations of literature, coupled with cognition, can test the bounds of the objective bargain and support interventionist mechanisms of relief. Factual corroboration of flawed behavior due to biases and beliefs should support the decision-maker's grant of relief, regardless of the remedial mechanism employed.

CONCLUSION

It is life that shakes and rocks us; it is literature which stabilizes and confirms.¹⁸¹

Literature sheds light on the weaknesses of contract doctrine and simultaneously exposes a solution. Decision-makers cannot simply rely on the sterility and formalism of classical contract theory in the evaluation of bargains. They must appreciate the full dynamic of the interpersonal exchange which often impacts bargaining conduct. Racial and gender stereotyping and other biases are often an intrinsic part of this reality. The analytical features of the law and literature movement serve to reveal that dynamic and weaken the false security inherent in rigid contractual rules.

Recognition of human dynamics through law and literature does not operate as a deconstructive force that reduces the relevance of contract rules. Instead, the analysis afforded by this powerful movement reveals contextual factors such as perception that, if addressed by the decision-maker, make contract rules more functional in the real world. Realism in the evaluation of bargains reflects fidelity to the human dynamic in contracting and thereby forms the foundational element for bargaining fairness and equity.

179. See *supra* notes 35–37 and accompanying text.

180. In cases dealing with the issues of duress, unconscionability, or undue influence, the burden of proof lies with the proponent. See *Industrial Recycling Sys., Inc. v. Ahneman Assocs.*, 892 F. Supp. 547 (S.D.N.Y. 1995) (stating that the burden of proof for duress lies with the asserting party); *Comeau v. Mt. Carmel Med. Ctr., Inc.*, 869 F. Supp. 858 (D. Kan. 1994); see also *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1990); *Pig Improvement Co. v. Middle States Holding Co.*, 943 F. Supp. 392 (D. Del. 1996) (holding that the burden of proof for unconscionability lies with the claimant); *Silling v. Erwin*, 885 F. Supp. 881 (S.D. W.Va. 1995) (maintaining that the person asserting undue influence has the burden of proof); *Vails v. Southwestern Bell Tel. Co.*, 504 F. Supp. 740 (W.D. Okla. 1980).

181. WEBSTER'S NEW WORLD DICTIONARY OF QUOTABLE DEFINITIONS 332 (Eugene E. Brussell, ed., 2d ed. 1988) (quoting Heathcote W. Garrold).