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Power Outage: Amplifying the Analysis of Power in Legal Relations (With Special Application to Unconscionability and Arbitration)

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**POWER OUTAGE: AMPLIFYING THE ANALYSIS OF
POWER IN LEGAL RELATIONS (WITH SPECIAL
APPLICATION TO UNCONSCIONABILITY
AND ARBITRATION)**

MICHAEL HUNTER SCHWARTZ*

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I. INTRODUCTION

With increasing frequency, courts, legislators, and particularly commentators explicitly consider issues of power in the many human interactions the law addresses. These discussions of “the power relationship,” of “empowerment,” or of “disempowerment” respond to dissatisfaction with the legal system and with particular legal doctrines.¹ The prevalence of such scholarship, statutes, and case opinions suggests a need for careful examination of the bases or contours of power. This examination has not occurred. Power is assumed to be a unitary, self-evident concept.² The potential and actual harm caused by the use, possession, and lack of power captures the scholarly, legislative, and judicial attention.

We view human power much as we view electrical power. Only the end products of electrical power are important to us, such as lighting for courtrooms, offices, and classrooms. The

1. See *infra* notes 26-71 and accompanying text.

2. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 61 (5th ed. 1984) (noting that power is relevant to the emotional distress doctrine without defining or explaining the term “power”). Those authors who recognize that power may not be either unitary or self-evident, nevertheless, present only limited visions of power. See, e.g., Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 FAM. L.Q. 177, 194-207 n.25 (1994) (listing five “bases” of power without explanation or examination); Scott H. Hughes, *Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 574-75 (1995) (inventing five power “areas”). Neither Bryan nor Hughes actually develops or justifies a model of power, and both fail to explore the larger implications of their ideas about power.

process of how electrical power works—the force of attraction created when an electron and proton are brought close to each other³—is irrelevant to us. Similarly, we know human power matters because we can see the products of human power's operation: constriction of the spectrum of political and legal discussion, unfair contractual bargains, subjugation, discrimination, battered women, low-quality justice, and harassment of persons who possess relatively little power. The discourse on human power, with its focus on the products of power, seldom confronts the sources of the exercised power.

This Article analyzes the sources of power. Specifically, I weave together ideas from the fields of law, psychology, and philosophy to create a multidimensional model of power. I then demonstrate the usefulness of the model for legal analysis and for legal systems analysis. I begin my analysis by situating my model in the context of current legal, psychological, and philosophical thinking regarding the nature of power.

A. *The Nature of Power*

Even though power is perceived as important and influential in human interactions and experiences, there is no genuine consensus of what power is.⁴ Nearly all theorists who have discussed power, however, have suggested a particular vision. Power theorists may be seen as being part of one of two camps, “the traditional camp” and the “Foucauldian camp.” Although traditional theorists focus mostly on interpersonal power and Foucauldians focus mostly on social power, each implicates the other. The real difference between the two camps is in the aspects of power they examine. Foucauldians focus on the effectivity or operationality of power, whereas traditionalists focus on the source of power. The model presented here draws from both camps.

Theorists in the traditional camp, many of whom are social psychologists or have been influenced by the large body of social psychology power scholarship, view power mostly as a personal

3. CONCISE ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 664 (Sybil P. Parker ed., 1987).

4. James T. Tedeschi & Thomas U. Bonoma, *Power and Influence: An Introduction*, in THE SOCIAL INFLUENCE PROCESS 1, 2-8 (James T. Tedeschi ed., 1972).

property.⁵ Although the actual phrasing of this idea changes depending on the theorist's linguistic preference, typically power is defined as the capacity to secure compliance against another's will.⁶ There are three key ideas to the traditional camp's understanding of power: (1) power is a personal faculty; (2) power reflects a potential for obtaining desired ends through its use; and (3) power implies an ability to obtain the compliance of another, contrary to that other's preferences.⁷

Thus, to these theorists, power means interpersonal power. The idea of interpersonal power, however, implicates social power. By the term "interpersonal power," traditional theorists (at least recent commentators) communicate something broader than the simple person-to-person power relationship. The term also includes *any* relationship between one person, group, or organization and any other person, group or organization.⁸ Thus, traditional theorists believe that power resides in individuals, groups, or organizations and involves the potential to exact a desired response from other individuals, groups, or organizations.

Those in the other camp believe, as Michel Foucault argues, that "[p]ower is neither given, nor exchanged, nor recovered . . . it only exists in action. . . . Power . . . is above all a relation of force."⁹ Foucauldian theorists believe that power constructs reality through a pervasive social discourse, expressed

5. See, e.g., Arthur J. Jacobson, *Modern American Jurisprudence and the Problem of Power*, 6 CARDOZO L. REV. 713 (1985); David Kipnis, *The Use of Power in Organizations and in Interpersonal Settings*, 5 APPLIED SOC. PSYCHOL. ANN.: APPLICATION IN ORGANIZATIONAL SETTINGS 179 (Stuart Oskemp ed., 1984); Bertram H. Raven, *A Power/Interaction Model of Interpersonal Influence: French and Raven Thirty Years Later*, 7 J. SOC. BEHAV. & PERSONALITY 217 (1992).

6. Tedeschi & Bonoma, *supra* note 4. BARRY BARNES, *THE NATURE OF POWER* 20 (1988) ("Power is the generalized capacity to secure the performance of political obligations, and serves as an exchange medium in a system of specific capacities to secure the performance of political obligations."); Henry L. Mutton, *Power and Personality*, in *THE SOCIAL INFLUENCE PROCESS*, *supra* note 4, at 100-01 ("Power can be conceptualized as the ability to overcome resistance in the course of obtaining intended effects.").

7. I regard any performance in compliance with another's will as contrary to one's own will because the motivation for the performance is not self-generated.

8. See, e.g., Raven, *A Power/Interaction Model*, *supra* note 5, at 235 (discussing hospitals' efforts to influence hospital staff); Anthony T. Cobb, *Informal Influence in the Formal Organization: Psychological and Situational Correlates*, 11 GROUP & ORG. STUD., 229, 234 (1986) (noting the intersection of interpersonal and work group power).

9. Michel Foucault, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS* 89 (Colin Gordon ed., Colin Gordon et al. trans., 1980).

as a set of truths, needs, images, and ideas.¹⁰ Power, therefore, is a complex, mobile, collective force that at least appears to set boundaries of what is possible in society and is only truly meaningful in its exercise.

According to Allan Hutchinson, the traditional theorists' focus on interpersonal manifestations of power "obscures its more subtle and pervasive dimensions."¹¹ As Hutchinson recognizes, however, interpersonal interactions do matter, even under a Foucauldian analysis. He argues that power operates "not only through discursive practices . . . but *also* through roles assigned and assumed in social practices."¹² Foucault suggests that the relationship between pervasive social power and interpersonal interactions is even more complicated than Hutchinson indicates. According to Foucault, power is omnipresent "because it is produced from one moment to the next, at every point, or, rather, in every *relation* from one point to another."¹³ More importantly, power occurs in human interactions: "Power is everywhere; not because it embraces everything, but because it comes from everywhere."¹⁴

In short, interpersonal power cannot be separated from pervasive social power and discursive practices. Instead, pervasive social power and discursive practices are imbricated with interpersonal power and vice-versa. In each human interaction, conversation, writing, and reading, both interpersonal power and pervasive social power operate dependently, independently, sequentially, and nonsequentially. Each is, establishes, manifests, and reinforces the other.¹⁵

The link between interpersonal and pervasive social power

10. Allan C. Hutchinson, *Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850, 877 (1985). See also Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (1992) (arguing that through repetition, the dominant stories, narratives, myths, and symbols become accepted as true depictions of the world).

11. Hutchinson, *supra* note 10, at 875.

12. Hutchinson, *supra* note 10, at 881 (emphasis added). Although I generally agree with Hutchinson on this point, I believe his analysis is incomplete. I do not perceive such a clear demarcation between interpersonal interactions and discursive practices. To me, each makes and is made by the other, so much so that a beginning and an end are indecipherable.

13. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 94 (Robert Hurley trans., 1978) (emphasis added).

14. *Id.*

15. Although I believe the imbrication of interpersonal power and pervasive so-

stems from the automatic process by which interpersonal power is exercised. The exercise of power often occurs on subtle, sub-conscious levels. Contrary to the assertions of many traditional theorists that power is exercised volitionally and consciously,¹⁶ power often is communicated, understood, and exercised without intent or awareness.¹⁷ For example, imagine that a middle-aged, able-bodied, white male enters the room in which you are reading this Article. Even as this image enters your mind, you form conclusions about his power in our society based solely on his age, skin color, sex, and ability to walk. The mental "training" we have received from a lifetime of images, slogans, and ideas confers and exercises the man's interpersonal power without his saying a word. His power is exercised automatically.

In this sense, every human interaction is power-mediated. We send messages about our power through our physical characteristics, the way we move, our tone of voice, the words we use, misuse, and choose not to use, the clothes we wear, the items we display in our offices, and countless other details of our existence. Moreover, each power-mediated interaction between an individual, group, or organization and another individual, group, or organization recapitulates, reinforces, and re-establishes the power story.¹⁸ Each time we experience an interpersonal power

cial power helps perpetuate the existing social structure, I do not purport to address, in this Article, how that mechanism works.

16. See, e.g., Bertram H. Raven & Arie W. Kruglanski, *Conflict And Power, in THE STRUCTURE OF CONFLICT* 69, 69-70 (Paul Swingle ed., 1970); Kipnis, *supra* note 5, at 184.

17. Steven Winter makes a similar point in his recent insightful discussion of power from a fairly strict Foucauldian perspective. Steven L. Winter, *The 'Power' Thing*, 82 VA. L. REV. 721, 830-32 (1996) (arguing that power relations are an "interpretive institution" influenced by "inequalities in access to resources and legitimate powers . . . [and] [i]nequalities in psychological and emotional states").

18. My experience as a law professor inclined to minimize the power imbalance between my students and me illustrates the pervasiveness and subtle operation of both discursive social power and interpersonal power. For several years now, I have asked my students to refer to me by my first name and have promised to refer to them by whatever name they chose. I believed this practice addressed (in a small way) some of the power imbalance. In fact, the assertion of interpersonal power imbedded in my policy very likely served to enhance my power. By acknowledging my power to control both their manner of addressing me and my manner of addressing them, I reinforced my power. In fact, by insisting they call me by my first name, I may have disempowered those whose educational experiences or cultural values made them feel uncomfortable with my preference for informal address.

Also, the policy seems to suggest that I am somehow different from their other professors. This suggestion also enhanced my power because it was a misleading sug-

interaction (and such experiences occur many times a day), we deliver a message of acquiescence to the power-mediated nature of that interaction. In fact, even a protest of the power in an interaction acknowledges and, arguably, reinforces the power-mediated nature of the interaction.¹⁹ This process of automatic exercise coupled with automatic assent places interpersonal power interactions at the core of the concern about power. Interpersonal power, therefore, is, manifests, re-establishes, and reinforces pervasive social power.

From this perspective, power is a socially constructed and mediated capacity that is manifest and immanent throughout all human experience; and all human experience operates through small interpersonal power interactions. Because power operates in such a complex, often unseen yet large and varied tableau, a unitary meaning of "power" makes no sense. Instead, it makes more sense to regard power as multidimensional. Accordingly, to capture the complexity of power, this Article articulates a multidimensional model of power.

B. Overview of Article

In Part II of this Article, I elaborate on the importance of power to law, to society, and to each individual in society. First, I argue that power is important because it intersects with the law in at least four important ways: (1) power relations are a specific doctrinal consideration for certain legal issues; (2) power underlies or should underlie the analysis of other doctrinal issues; (3) law and lawmaking are a discourse about and a means to enforce and maintain power; and (4) power and empowerment are standards by which our governmental and legal systems can be measured. Second, I argue that power is important because it

gestion. Students typically perceive grading as their most important interaction with their professors. I, like all their professors, intended to grade their work; therefore, I would be helping to place them in the artificial hierarchy created by my school's grading system. As I suggest in Part III of this Article, misleading is a technique for obtaining and preserving power.

19. See generally EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 10 (1990) (arguing that a deconstructive analysis of power is not sufficient, standing alone, to disable the power involved). Sedgwick believes that such an analysis is "necessary." *Id.* This Article reflects my belief that identification of power is necessary, and application of my ideas about power to the existing structure of unconscionability doctrine is my attempt to make the analysis of power a disabling force, even within the current legal structure.

is a means of maintaining social control. Finally, I argue that power is important because Western psychologists perceive power as a basic human need, and also because a powerholder is likely to abuse her power.²⁰

In Part III of this Article, I describe and explain the model of power I have developed. I look to the considerable body of social psychology research and theory, and I create a model of power that is a synthesis, expansion, and reorganization of these works in light of the Foucauldian insight into the nature of power. At the core of this model is my perspective on the link between Foucauldian ideas of pervasive, discursive social power and traditional ideas of interpersonal power. I argue that interpersonal power is a complex interaction of the following vectors:²¹ (1) enfranchisement, (2) force, (3) social customs (based on status, social norms, values, traditions, and personal associations), (4) compact (based on giving or taking away things of value to the target), (5) information (knowledge that has persuasive force), (6) expertise (from education, training, or experience), (7) reference (from a desire by the target for social acceptance and identification by and with the powerholder), (8) perceived trustworthiness of the powerholder, (9) personal qualities (such as charisma, determination, and calmness), and (10) manipulation. An eleventh vector, discourse power, can be seen as a vector of power, as a tool of powerholders, and/or as a product of power relations. These vectors intersect, interact, and overlap. In any interpersonal relationship, the vectors may change in strength and direction over time. Part III of this Article concludes with a discussion of the limitations and qualifications inherent in this and in any other model of a human experience such as power.

20. As reflected in my choice of the word "her" here, this Article uses traditionally female pronouns where gender is wholly neutral. However, in several instances, I use male pronouns where gender is ostensibly neutral because such choice is relevant to my analysis, such as in my discussion of the gender of those who commit sexual harassment. Those who commit sexual harassment overwhelmingly are male.

This Article uses the term "target" for the person(s) who are subject(s) of power exploitation, and the term "powerholder" for the person(s) who possess and/or seek to exploit their power vector(s). My selection and use of this terminology is for convenience sake only and is not intended to communicate that power always (or even usually) is asserted by a conscious, volitional act or expression.

21. See *infra* Part III(A)(1) for an explanation of why I use the term "vectors" as opposed to more common legal terms such as "factors" or "elements" or common social psychology terms such as "bases of power" or "influence tactics."

Part IV of this Article is designed to show how the model can be used to enrich legal analysis and thinking. I discuss two apparently unrelated and vastly different areas where power is significant: (1) the use of power as a doctrinal consideration in the law of unconscionability, and (2) the power, empowerment, and disempowerment²² issues with respect to arbitration²³ as a method of dispute resolution. By applying the model in two such divergent legal constructs, I suggest the potential of this model to enhance legal thinking in a variety of contexts and ways.

I selected unconscionability doctrine as an example for two reasons: (1) Unconscionability is one of the few areas of law where the explicit analysis of power is a doctrinal requirement; and (2) the law of unconscionability, although relatively new, is well-developed and has been the subject of considerable scholarly commentary.²⁴ I selected arbitration for inclusion in this Part because there is no explicit doctrinal recognition of the power issues in arbitration, and it seems unlikely that power ever will be a major consideration in arbitration doctrine. Instead, power and empowerment are significant to our analysis of arbitration because they are standards by which the efficacy of arbitration as a means of dispute resolution can be assessed. Moreover, almost nothing has been written about power and empowerment as they relate specifically to arbitration.²⁵ This Part of the Article is intended to augment the assessment of the efficacy of arbitration as a means of dispute resolution by raising

22. By the term "empowerment," I mean the conferring of power as that term is used in this Article. By the term "disempowerment," I mean the divesting, in whole or in part, of power.

23. This Article uses the term "arbitration" to refer to any court adjudication-like procedure that occurs outside the formal court system in which a person or an arbitration panel has the power to make a final, binding decision subject only to limited court review (for overt bias, fraud, etc.).

24. See, e.g., M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

25. Scholars who have written about power in connection with Alternative Dispute Resolution ("ADR") either have lumped all forms of ADR together in an overarching analysis of the power issues of ADR or have addressed power as a consideration in evaluating or conducting one particular form of ADR—mediation. See *infra* notes 348-361 and accompanying text.

and applying empowerment as a standard by which arbitration can be critiqued.

Three themes emerge from these efforts: (1) Interpersonal power matters because it is so pervasive that it mediates our experience with the world; (2) if we decide to consider power in any way, a complex, multidimensional vector model of power is a useful tool with which to begin; and (3) we can enrich and improve our consideration of the power issues raised by individual legal doctrines and by the legal system as a whole by viewing power in such a way.

II. THE IMPORTANCE OF POWER

Power is an important construct because: (1) Power pervasively intersects with the law; (2) power maintains social control, aside from power's intersection with the law; and (3) power has significant interpersonal meaning and effects—power is perceived as a basic human need, and the abuse of power is perceived to harm both the powerholder and her target(s). Power, therefore, is a core human institution, commanding the attention of legal scholars, philosophers, and psychologists because of its influence on all human relations.

A. *The Intersection of Power and the Law*

Power issues permeate the law. First, the consideration of power and power relationships is an explicit doctrinal principle in some areas of the law. Second, in those doctrinal areas in which power is not explicitly considered, the failure to consider power often is either an exercise of or, at least, a reflection of power issues. Third, law is a means by which power is maintained; expressions of law in cases, statutes, and regulations are both expressions of power and discourses about power. Fourth, power is a standard by which the legal system can be measured. In short, power and law intersect, overlap, and interact; law cannot be considered without also considering power.

1. *Power as a Specific Consideration in Contemporary Legal Doctrine*

Power is explicitly considered an issue in several contexts. Explicit analysis of power issues can be seen in contract doctrines such as unconscionability, undue influence, and duress; in

tort emotional distress doctrine; and in equality-related issues such as sexual harassment and antidiscrimination law.

a. Power in Contract Doctrine

Traditionally, grossly unfair contractual bargains loosely were policed through a forced and somewhat disguised focus on "contract defenses"²⁶ or through the refusal of courts of equity to specifically enforce unfair bargains.²⁷ Now, most jurisdictions recognize that if an imbalance in the parties' relative interpersonal power ("gross inequality of bargaining power") results in an unreasonably one-sided bargain, enforcement of the contract should be denied or curtailed.²⁸ Thus, power is given explicit status as a consideration in the courts' assessment of contracting parties' requests for relief.²⁹

Similarly, the doctrines of undue influence and duress have been expanded to reflect a recognition that power operates in human relations in complex and unseen ways. Duress, for example, once applied only where a party used or threatened to use actual force or imprisonment to obtain contractual assent.³⁰ In the past century, the doctrine of duress has been expanded to include other forms of coercion, particularly economic coercion.³¹ Accordingly, duress has been found where a person who was not a party to a transaction obtained a lien right from the contracting parties by exploiting the contracting parties' need to close the transaction,³² and where one party to a contract exploited the other's desperate and immediate need for performance to negotiate a new and more favorable bargain.³³ Thus, as

26. See generally Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

27. See RESTATEMENT OF CONTRACTS § 367 (1932). See, e.g., *Miller v. Coffeen*, 280 S.W.2d 100 (Mo. 1955) (denying specific performance because contract consideration was inadequate).

28. U.C.C. § 2-302 (1995); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

29. Leff, *supra* note 26, at 537-41. See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965).

30. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-2, at 336-37 (3d ed. 1987).

31. *Id.* § 9-6, at 346-47.

32. *Fizzell v. Meeker*, 339 F. Supp. 624 (W.D. Mo. 1970).

33. *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 102-03 (9th Cir. 1902) (rescission of contract price increase granted where fish packers refused to pack fish when packing company could not find replacement packers in time to avoid spoilage of its fish); *Capps v. Georgia Pac. Corp.*, 253 Or. 248, 453 P.2d 935 (1969) (exploitation of the

Clare Dalton asserts, the real concern of duress is abuse of power.³⁴ The rise of the doctrine of economic duress is simply a recognition that power may be abused (*i.e.*, coercion may occur) without resort to force or threats of force.

Undue influence doctrine has undergone a similar expansion. Traditionally, a finding of undue influence required showing that the parties were in a confidential relationship.³⁵ Recently, however, undue influence has been found where one party exploited another party's "weakness of spirit," caused by physical exhaustion and emotional turmoil, through the use of excessive pressure tactics, such as negotiating the contract in an inappropriate setting and insisting that the other party decide immediately without consulting an advisor.³⁶ This expansion reveals the concern addressed by the doctrine of undue influence is exploitation and/or dominance (*i.e.*, power). Undue influence occurs when one party exploits the weakness of another party (produced either by the natural relaxation of vigilance when dealing with a person one trusts or by one's traumatic experiences or fragile psyche) to the first party's gain.

b. Power in Emotional Distress Doctrine

Courts addressing tort claims of intentional infliction of emotional distress also explicitly consider power. According to Prosser and Keeton, the extreme and outrageous conduct element of the emotional distress tort may be met "not so much from what is done as from abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage plaintiff's interests."³⁷ Thus, the outrageous conduct standard has been met in cases involving abuses of power by a school that bullied a young girl into confessing to acts

plaintiff's desperate need for cash to obtain assent to a payment of only 3% of total amount acknowledged by the defendant justified rescission).

34. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997, 1024 (1985) (arguing that duress and unconscionability involve an attempt, through the exercise of state power, "to prevent one contracting party from exercising illegitimate power over the other").

35. See CALAMARI & PERILLO, *supra* note 30, § 9-11, at 354 (noting that nearly all twentieth-century undue influence cases have involved a confidential relationship).

36. *Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1966).

37. KEETON ET AL., *supra* note 2, at 61.

she had not committed;³⁸ by a landlord who embarrassed and humiliated a tenant by a wrongful, racially discriminatory eviction;³⁹ by an association that threatened violence against a business owner and damage to his truck;⁴⁰ and in a number of cases involving collection agencies using threats of arrest or telephone calls around the clock, and involving neighbors, employers, and relatives in the collection effort.⁴¹ In all of these cases, the defendant's abuse of power and the plaintiff's consequent loss of power and/or status met the tort requirement.⁴²

c. *Power in Antidiscrimination Law*

Discrimination doctrine long has been premised on a certain view of power.⁴³ Under this view, courts assume that white persons traditionally have held power (from knowledge, wealth, and/or birth) and that the state should exercise its power to equalize power by conferring "equal treatment" on nonwhite persons.⁴⁴ The most recent doctrine in this area appears to reflect a perception that antidiscrimination law has vested too much power in persons who are members of traditionally disenfranchised groups at the expense of those who traditionally possess the power in this society.⁴⁵

38. *Johnson v. Sampson*, 208 N.W. 814 (Minn. 1926).

39. *Shaw v. Cassar*, 558 F. Supp. 303 (E.D. Mich. 1983).

40. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952).

41. KEETON ET AL., *supra* note 2, at 61-62.

42. For an analysis of the power vectors of the landlord-tenant relationship and an argument that the power imbalance in that relationship warrants application of the foregoing line of emotional distress principles, see Susan Keller, *Does the Roof Have to Cave In?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663 (1988).

43. See generally Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1 (1991) (criticizing the notion that color-blind constitutionalism is a meaningful decision-making standard).

44. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (suggesting that inferior education may fail to empower a child by preventing her from (1) succeeding in life, (2) adjusting to her environment, and (3) preparing for a profession); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (finding that Title VII's purpose is "to achieve equality of employment opportunities and remove barriers that have operated . . . to favor . . . white employees . . ."). See also CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 216-34 (1989) (arguing that the focus of sex discrimination doctrine—that equality means treating likes alike and unlikes unlike—reinforces and recapitulates male power because it fails to recognize that male power already has constructed an unequal reality for women in their dealings with men).

45. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989).

Until twenty-five years ago, without risk of liability, a man could use his status to induce sexual favors from women co-workers or, through the use of sexually explicit references or jokes, could create a workplace atmosphere that inhibited women's ability to work.⁴⁶ In *Meritor Savings Bank v. Vinson*,⁴⁷ however, the Supreme Court held that such behavior is a form of sex discrimination even where the male demands no *quid pro quo*.⁴⁸ Sexual harassment law, particularly hostile workplace cases following *Meritor Savings*, reflect an explicit recognition that men in this society exercise power over women by making sexual advances, by requesting sexual favors, and by engaging in other verbal or physical conduct of a sexual nature.⁴⁹ Such conduct may cause a woman to feel so disempowered that her workplace becomes intolerable.

2. *The Subtle Power Ramifications of Specific Legal Doctrine*

Even when power is not an express doctrinal consideration, legal disputes and doctrinal debates often concern the distribution of power.

For example, in the recent Supreme Court decision in *Miller v. Johnson*,⁵⁰ the Court held that the state of Georgia's drawing of political districts to help assure minority group political representation violated the Equal Protection Clause of the Fourteenth Amendment.⁵¹ As the Court acknowledged, the issue in *Miller* implicated minority group members' political power; specifically, the issue implicated the political power of African-Americans

See also Joel W. Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEX. L. REV. 41, 59-69 (1986); U.S. COMM'N ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF STOTTS 56-58 (1985) (indicating that the commission now applies the "color-blindness" principle, including "color-blind" affirmative action). *But see* Gotanda, *supra* note 43, at 2-3.

46. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (noting that the EEOC first added regulations addressing sexual harassment in 1980). See also Jill L. Goodman, *Sexual Harassment: Some Observations on the Distance Traveled and the Distance Yet to Go*, 10 CAP. U. L. REV. 445, 445-63 (1981).

47. 477 U.S. 57 (1986).

48. *Id.* at 65. See also *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

49. Goodman, *supra* note 46, at 456-57 (noting that sexual harassment is degrading to women and that victims of sexual harassment experience depression and other physical and emotional symptoms and can lose their ability to work effectively).

50. 115 S. Ct. 2475 (1995).

51. *Id.* at 2490-91.

living in Georgia.⁵² The Court, however, held that redistricting must be based on "race-neutral considerations."⁵³ The result, therefore, reflects a conclusion that the potential for maximizing political empowerment of African-Americans in Georgia is not sufficiently compelling to justify Georgia's redistricting plan.⁵⁴

Modern labor law can be seen as an attempt to balance the employer's desire for absolute power over the work force and the employees' desire to curtail such power through unionization and doctrinal protection against employer abuses (e.g., race, sex, and age discrimination).⁵⁵ Decisions for employers or employees tend to expand or contract the parties' relative power in an inverse relationship.⁵⁶

Recent recognition of "battered women's syndrome" as a defense for criminal behavior⁵⁷ also marks recognition of interpersonal power as an important legal construct in two ways. First, the "battered women's syndrome" theory explains, in power and disempowerment terms, why a battered woman may stay with a battering spouse despite the abuse; she stays because the physical abuse has degraded her self-esteem and her sense of self-empowerment.⁵⁸ Second, the idea that a homicide may be justified,⁵⁹ or a murder sentence reduced,⁶⁰ because the battered woman feared her mate so much that she felt the only way to

52. *Id.* at 2492-93 (criticizing the Department of Justice for its "maximization policy," a policy by which the Department of Justice refused to approve redistricting plans that failed to maximize minority-controlled voting districts).

53. *Id.* at 2488.

54. *See id.* at 2491.

55. William R. Corbett, *Taking the Employer's Gun and Bargaining About Returning It: A Reply to a "Law, Economics and Negotiations Approach" to Striker Replacement Law*, 56 OHIO ST. L.J. 1511, 1520-22 (1995).

56. For examples of this zero-sum game in play, see *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (upholding employee's right to protest working conditions); *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) (suggesting that employer had the right to terminate employee who supported consumer boycott of employer's product).

57. Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 709-13 (1994).

58. *Id.* at 708.

59. *See generally* *Kansas v. Stewart*, 763 P.2d 572 (Kan. 1988); *People v. Humphrey*, 13 Cal. 4th 1073, 921 P.2d 1 (1996).

60. *See generally* *United States v. Johnson*, 956 F.2d 894 (9th Cir. 1992) (approving consideration of Battered Women's Syndrome as a valid ground for a discretionary downward departure from future sentencing guidelines).

survive was to kill reflects a recognition that lack of empowerment may create a compelling need for self-help.

Critics of the legal system and of legal doctrine often argue that power is ignored or insufficiently analyzed. Thus, doctrinal critics of landlord-tenant law⁶¹ and divorce and child custody law,⁶² for example, criticize the legal system's failure to incorporate power considerations into legal doctrine.

3. *Law and the Legal System as Instruments of and Discourses About Power*

Our system of government (and perhaps all current systems of government) and our legal system are premised on possession, exercise, and retention of power. Laws are enacted by lawmakers, exercising power conferred on them by law. These lawmakers are influenced by, among others, those who derive power because they possess the skill of persuasion (*i.e.*, lobbyists), those who possess wealth and/or status that the lawmakers value (*i.e.*, lobbies), and those who possess knowledge and information that the lawmakers need or desire. The legal system helps produce control through the use of state force—imprisonment or court-ordered action or inaction (*i.e.*, injunctions). In this sense, law is “an instrument of power.”⁶³

But law also is a “discourse of power.”⁶⁴ Legal discourse—the stories told in cases, statutes, and regulations—is one of the many means by which power is maintained and reinforced. Allan Hutchinson summarizes this idea as follows:

[L]aw is a special form of worldmaking [L]egal stories gain meaning from selective emphasis of certain features of our always complex and frequently ambiguous experience The legal raconteurs [lawyers, judges in opinions, legislators] claim an authority and objectivity for their tales that effectively overwhelms and trivializes other stories about the social world.⁶⁵

In short, law exercises power through discourse, thereby empow-

61. Keller, *supra* note 42.

62. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1561 (1991).

63. Foucault, *supra* note 9, at 89.

64. Jerry D. Leonard, *Foucault: Genealogy, Law, Praxis*, 14 LEGAL STUD. F. 3, 10 (1990).

65. Hutchinson, *supra* note 10, at 861 (footnotes omitted).

ering some people at the expense of others.⁶⁶

Moreover, although rules of law “are empty in themselves,” the manipulation of rules of law helps maintain the social order.⁶⁷ As Leonard explains,

The effect of this discursive *machination* [*i.e.* the manipulation of rules of law] is that, just as oppositional forces effectively expose legal illegitimacies to the dangerous extent that the dominant legal consciousness must acknowledge crisis and the concomitant necessity of reform(ation) . . . , the dominant regime’s seemingly innocent interpretation of a new set of rules or “rights” effectively works to recoup the losses of the crisis-moments in order to reinscribe but another form of hegemony.⁶⁸

Thus, great societal conflicts—such as the Civil Rights Movement, the Labor Movement, and even small ruptures in legal thought through the exposure of indeterminacy in the law—are subjugated through a murky process of encapsulation. On a case-by-case basis, through an imperfect, zigzag, give-and-take process, the indeterminacy is controlled. There is, of course, no monolithic conspiracy to preserve control, but the effect is as if a secret controlling cabal were in place. Courts establish new law or reinterpret old law to respond to a problem. This process of addressing a problem and thereby calming tension has the effect of entrenching the legal system as it stands. Power is preserved.

4. *Empowerment as a Standard by Which the Legal System Can Be Measured*

Finally, empowerment is a standard by which the legal system can be critiqued. The structure and form of the legal system can be seen as an exercise in power dynamics. Critics of courtroom adjudication and of alternative dispute resolution regularly consider power and empowerment as critical issues in evaluating how we resolve disputes. They argue that courtroom adjudication, through its forms and rituals, disempowers its users.⁶⁹ Similarly, others argue that alternative dispute resolution, lacking

66. *Id.* For a discussion of how court opinions engage in world-making in connection with contract law, see Dalton, *supra* note 34.

67. Leonard, *supra* note 64, at 14.

68. *Id.*

69. See, e.g., Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982-83).

both formal oversight procedures and the behavior modulation inherent in more formal human interactions, facilitates bias against disempowered members of society.⁷⁰ Taken together, these commentators suggest that a legal dispute resolution system should empower its users and that a legal system fails when its users are left with a sense of disillusionment and disempowerment.⁷¹

B. Power as a Means of Maintaining Social Control

From the standpoint of society as a whole, power is important because it is a means of maintaining social control. Power can be seen as “war by other means . . . , and [r]elations of subjugation, or more extreme and intense relations of domination [are] . . . none other than the realization . . . of a perpetual relationship of force.”⁷² In other words, the pervasive intrusion of power into every human interaction maintains social control. “The role of . . . power is . . . to reinscribe it[self] in social institutions, in economic inequalities, in language”⁷³ Power, therefore, exists not only as an end in itself, recapitulating itself throughout all experience and interaction, but also as the means of its own preservation.

C. The Interpersonal Meaning and Effects of Power

On an individual level, power is an end in itself, a force for self-control and for loss of control, and the means of its own self-maintenance. The motivation for power and the harm that the exploitation of power causes to both the powerholder and the power target are matters of concern.

Human beings seek power out of a complex and indeterminate combination of predisposition and socialization, which Western social psychologists see as a “psychological need.”⁷⁴

70. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388-89 (arguing that the lack of formality in ADR fosters prejudice because the social ideals of fairness and equality do not check the parties' natural biases); Grillo, *supra* note 62.

71. See generally Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 845-59 (1984).

72. Leonard, *supra* note 64, at 7, quoting Foucault, *supra* note 9, at 78, 89, 92.

73. Foucault, *supra* note 9, at 90.

74. Cobb, *supra* note 8, at 231-32. See also William L. Cook, *Interdependence and the Interpersonal Sense of Control: An Analysis of Family Relationships*, 64 J. PERSONALITY & SOC. PSYCHOL. 587, 587 (1993) (“human beings are inherently motivated to achieve control in their environmental relations.”).

People also seek power to obtain or fulfill needs and desires or to protect themselves against what they fear. Social psychologists refer to the idea that power is a tool for personal gain as the "instrumental utility of power."⁷⁵ Consequently, power is significant because individuals, groups, and organizations want to have it and use it.

Power is also significant because it is abused so easily. Social psychologists believe that the possession of superior power creates a likelihood of abuse of that power. In line with the well-known syllogism, "Power tends to corrupt, and absolute power corrupts absolutely,"⁷⁶ they contend that powerholders cannot resist exploiting their superior power for personal gain.⁷⁷

The social psychology literature also indicates that the possession and use of power potentially can harm both the powerholder and the power target. Having exploited a weaker target, the superior powerholder tends to devalue the target, who is perceived as inferior and weak, mostly because the target complied with the powerholder's desire.⁷⁸ Thereafter, "the target . . . is not given full credit for anything he or she does."⁷⁹ David Kipnis calls this process of devaluation "the metamorphic effects of power."⁸⁰ In fact, a failure to exercise power, if recognized by the powerholder and the target as such, may have a metamorphic effect similar to the metamorphic effect caused by the exercise of power. If an exercise of power increases the powerholder's power and decreases the target's power, a recognized failure to exercise power should have the opposite effect,

75. Cobb, *supra* note 8, at 232.

76. Letter from Lord Acton to Bishop Creighton (Apr. 5, 1887), in *ESSAYS ON FREEDOM AND POWER* 329, 335 (1972).

77. See Bertram Raven, *The Bases of Power: Origins and Recent Developments*, 49 *J. SOC. ISSUES* No. 4, 227, 241-42 (1993). The idea that humans cannot resist exploiting their superior power raises the question of whether there is a distinction between the *use* of power and the *abuse* or *exploitation* of power. On one hand, I believe that any use of power to benefit the powerholder is an abuse if the powerholder obtains her will at the expense of the target's will. However, on the other hand, my experience as a parent of small children has convinced me (or I have come to rationalize) that power can be used benevolently. If I gave my daughter a "time out" for hitting her baby sister or running out into the street, I would not feel that the use of my power was an abuse of power. I also concede the possibility of beneficent uses of power outside the parenting context.

78. *Id.*

79. Kipnis, *supra* note 5, at 200-01.

80. *Id.* at 200.

decreasing the powerholder's power and increasing the target's power.

The target of a power assertion, in turn, is likely to develop a sense of learned helplessness.⁸¹ "Learned helplessness occurs when organisms learn that their responses are independent of desired outcomes and consequently manifest behavioral deficits."⁸² In other words, if a person discovers she is subject to forces outside her control (such as the will of someone more powerful), she devalues herself,⁸³ thereby losing self-esteem.⁸⁴ This sense of helplessness tends to result in depression.⁸⁵

There also is evidence that a victim of power exploitation is more likely to exploit power over others of even less power. The notion of dominance hierarchies, made famous by the analogy suggested in Schjelderup-Ebbe's visceral "pecking order" analysis of relationships among chickens,⁸⁶ suggests that power exploitation begets more exploitation. Thus, a victim of a power exploitation may be more likely to exploit persons who possess even less power.

III. A MODEL OF INTERPERSONAL POWER

A. Sources for the Model

Explained and described below is a detailed model of interpersonal power. The model relies on several different sources from the social psychological, the philosophical, and the legal fields. In this sense, the model is a synthesis and reorganization of the works of others. The idea that power derives from a number of bases, rather than from a unitary source, stems first from the works of Bertram Raven. Raven's lifetime of work re-

81. Lyn Y. Abramson et al., *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49, 50 (1978).

82. Frank D. Fincham & Kathleen M. Cain, *Learned Helplessness in Humans: A Developmental Analysis*, 6 DEVELOPMENTAL REV. 301, 301 (1986).

83. *Id.* at 304.

84. Abramson et al., *supra* note 81, at 50. This idea is really just the flip-side of Kipnis' description of the effect on the powerholder; the powerholder and the target both devalue the target after the power exercise.

85. Cook, *supra* note 74, at 587.

86. Thorleif Schjelderup-Ebbe, *Beiträge zur Sozialpsychologie des Haushuhns*, ZEITSCHRIFT FÜR PSYCHOLOGIE 88, 225-52 (1922). Schjelderup-Ebbe notes that, in a chicken coop, if the strongest chicken in the coop pecks another chicken, the other chicken will respond by pecking an even weaker chicken.

garding interpersonal power⁸⁷ began with the suggestion that power has six bases: (1) information, (2) reference, (3) expertise, (4) legitimacy, (5) reward, and (6) coercion.⁸⁸ These six bases are discussed and form a part of the model described below. In fact, virtually all subsequent interpersonal power theorists and researchers have cited Raven's work and defined their ideas about power in reference to Raven's model, seeking to test his model,⁸⁹ criticize it,⁹⁰ or simply supplement it.⁹¹

The model described below is the product of a hybrid position on Raven's model. On the one hand, my model falls in the supplementation category because it adopts many of the bases of power that Raven first suggested; yet, my model also expands the scope of Raven's categories and suggests additional categories of power. I am also a critic of Raven in the following respects: (1) I use the term "social custom power" instead of Raven's "legitimate power" term because the notion of legitimacy is socially constructed; (2) because Raven's model inadequately addresses the power that derives from being white, male, heterosexual, able-bodied, Christian, etc., I treat such power as a separate power category ("enfranchisement power"); (3) I use the term "vectors of power" rather than Raven's "bases of power" term for reasons explained below; and (4) I find that Raven's omission of *discourse power* as a vector of power is a crucial omission because discourse is one of the most pervasive ways in which power is possessed and exercised.

87. John R.P. French, Jr. & Bertram Raven, *The Bases of Social Power* in *STUDIES IN SOCIAL POWER* 150 (Dorwin Cartwright ed., 1959); Raven & Kruglanski, *supra* note 16; Bertram H. Raven, *A Power/Interaction Model of Interpersonal Influence: French and Raven Thirty Years Later*, 7 *J. SOC. BEHAV. & PERSONALITY* 217 (1992).

88. French & Raven, *supra* note 87, at 232-36.

89. See, e.g., John P. Garrison & Larry E. Bate, *Toward Development and Measurement of the Interpersonal Power Construct*, 97 *J. PSYCHOL.* 95 (1977); Virginia P. Richmond et al., *Power Strategies in Organizations: Communication Techniques and Messages*, 11 *HUM. COMM. RES.* 85 (1984).

90. See, e.g., Kipnis, *supra* note 5, at 182-84 (describing the Raven model as "armchair speculations" and arguing that self-report of influence techniques is a superior methodology for determining bases of power). Kipnis' criticisms of Raven in this regard seem superficial; he criticizes Raven because people do not self-report the use of all Raven power bases. *Id.* at 183-84. However, as I have shown above, power is exercised automatically and often stealthily; the volitional model of power exercise applies to only a very limited number of power categories.

91. See, e.g., John H. Wade, *Forms of Power in Family Mediation and Negotiation*, 1994 *AUSTL. J. FAM. L.* 40 (adopting in large part the Raven model (although not by name) but suggesting additional bases of power).

1. *The "Vector" Idea*

I use the term "vector," as opposed to words more commonly used in the fields of law ("factor" or "element") or social psychology ("basis" or "influence tactics"). My preference for the term "vector" stems from its definitional strengths and from defects in the connotations of other words I might have chosen.

The word "vector" is defined as: "[A] quantity that has magnitude and direction and that is commonly represented by a directed line segment whose length represents the magnitude and whose orientation in space represents the direction."⁹² The vector idea, therefore, simultaneously connotes a concept that has relative weight (magnitude) and bearing (direction). I believe that the categories of power require a concept that can have both magnitude and direction; I do not believe that power interactions involve unilateral imposition of power by one party on another or that all types of power are of equal weight in an absolute or relative sense.

Rather, all parties to an interaction may and often do possess any number of sources of power. Each source of power has weight relative to all other sources of power in a power interaction, and power can move in favor of or against a party.⁹³ Unlike "vector," legal terms such as "factor" and "element" lack the quality of direction. Such terms may constrict the use of my proposed model to only doctrinal use. I suggest that the model can facilitate our assessment of the legal system and its forms. The common social science terminology, "bases of power" and "influence tactics," is no more availing; both terms fail to communicate the weight and direction ideas.

2. *The Vectors of Power*

I perceive eleven vectors of power: (a) force, (b) enfranchisement, (c) social customs, (d) compact, (e) information, (f) expertise, (g) reference, (h) perceived trustworthiness, (i) personal qualities, (j) manipulation, and (k) discourse.

92. WEBSTER'S NEW COLLEGIATE DICTIONARY 1296 (G & C Merriam Co. ed., 2d ed. 1977).

93. For a practical application of these points in the contexts of unconscionability doctrine and arbitration process, see *infra* notes 175-395 and accompanying text.

a. *Force Power*

The most elemental form of power is force. *Force power* derives from the threat or use of pain, restraint, or encapsulation so that compliance with the powerholder's intentions occurs without the target's volition.⁹⁴ All power interactions between an individual and her government involve an implied use of *force power*. The government, through deployment of the military throughout the world, impliedly threatens the use of *force power* to maintain domestic and international stability. Criminal law (through police, judges, and attorneys) also serves as a system of *force power*, incarcerating people who do not comply with the government's rules of behavior. Civil law also involves *force power*, both threatened and actual. Courts enforce injunctions and orders of specific performance, and, through the use of contempt power, sanction disobedience by fine or imprisonment. In one-on-one interactions, force (pain or encapsulation) can be used to secure the powerholder's objectives. For example, a physically abusive husband asserts and maintains power over his target, his wife, by using *force power*.⁹⁵

b. *Enfranchisement Power*

Although a state may be established through *force power*, power is sustained through a sometimes subtle, sometimes violent enfranchisement of power in persons, institutions, and groups.⁹⁶ Enfranchisement, therefore, occurs on many different and complex fronts and is a crucial vector of power.⁹⁷

In fact, those who possess *enfranchisement power* may use all of the power vectors described below to reinforce their power. Thus, the social customs that confer power can be seen as the social customs of those with *enfranchisement power*. The resources that enable someone to promise or threaten (*compact*

94. See Raven, *supra* note 77, at 236.

95. See Hughes, *supra* note 2, at 575 (using the term "physical power" as a substitute for force).

96. See Leonard, *supra* note 64, at 7. See also Winter, *supra* note 17, at 829-32 (noting that power can be imposed through such disparate acts as committing violence and giving affection).

97. See generally LYNDIA M. SAGESTRANO, 16 PSYCHOL. OF WOMEN Q. 439 (1992) (arguing that women use weaker power strategies, even when stronger strategies are available to them, because their status as women automatically places them in a position of less power).

power) are held mostly by those with *enfranchisement power*. Likewise, those powerholders have influenced the construction of our notion of what constitutes information and expertise. *Reference power, perceived trustworthiness power, personal qualities power, and manipulation power* are also socially constructed. Our socialization creates our perception of what we deem trustworthy, of the personal qualities that confer power, and of what works as a manipulation.⁹⁸ Most importantly, *enfranchisement power* is manifested, established, and reinforced through the exercise of *discourse power*.⁹⁹

In general, in the United States, being white, male, heterosexual, upper class,¹⁰⁰ Christian, able-bodied, English-speaking (particularly native English-speaking), and of European descent confers power.¹⁰¹ Those who possess all of the foregoing characteristics can be characterized as totally enfranchised; such persons possess the greatest power. A person who does not possess all of the foregoing qualities risks discrimination, a particularly conspicuous assertion of power by a powerholder against a target. Thus, nonwhite, female, homosexual, lower-class, non-Christian, disabled, non-English speaking, and non-European persons all have been subjected and continue to be subjected to discrimination.

Of course, most Americans possess some, but not all, enfranchisement characteristics. Possession of some, but not all, of the attributes of enfranchisement confers some power or, more precisely, causes disempowerment to the extent the person lacks an enfranchisement characteristic. In other words, as Kimberle Crenshaw argues, those who fall within an intersection of multiple categories of disenfranchisement tend to possess even less

98. Because *enfranchisement power* works on a fairly subtle level in shaping the other vectors of power, their separate consideration is warranted. We may not perceive the operation of *enfranchisement power* when a businessman sets the agenda for a meeting, but we can recognize that activity as an exercise of *status social custom power, information power, and/or discourse power*.

99. See *infra* notes 162-168 and accompanying text.

100. By the term "class," I do not mean class as that term is used in Western European countries. Rather, I mean the idea of class both from control over the means of production and from education, income, and occupation. Duncan Kennedy suggests that both ideas of class are economic, a conclusion with which I mostly agree. See Duncan Kennedy, *Radical Intellectuals in American Politics, or My Talk at the Gramsci Institute*, in *SEXY DRESSING*, ETC. 1, 12 (1993).

101. See James T. Tedeschi et al., *The Exercise of Power and Influence, in THE SOCIAL INFLUENCE PROCESSES*, *supra* note 4, at 287, 302.

power.¹⁰² Thus, white women and African-American men, who otherwise possess all of the other enfranchisement characteristics, tend to have more power than similar African-American women.¹⁰³

c. *Social Custom Power*

Social custom confers power through the target's own value system;¹⁰⁴ a powerholder holds *social custom power* over a target to the extent that society as a whole and the target in particular perceive the powerholder's social customs as meritorious.¹⁰⁵ *Social custom power* operates through a set of symbols, myths, documents, slogans, and legends for its asserted legitimacy.¹⁰⁶

For example, the President of the United States has power because of symbols (the flag, the Presidential Seal), a myth (the President represents all of the people), a "document" (the Constitution), a slogan (the United States President is "the leader of the free world"), and many legends (Washington crossed the Delaware, Lincoln freed the slaves, and Franklin D. Roosevelt made the world safe for democracy). Similarly, a wealthy person has power because of myths (wealth is accumulated based on merit, and anyone with a good idea can get rich), documents (deeds, stock certificates, etc. that confer control of land and business enterprises), slogans ("free enterprise," "freedom of contract," etc.), and legends (the Horatio Alger legend). Such symbols, myths, documents, slogans, and legends become so internalized that they become part of each member of society, producing "an inclination to conformity."¹⁰⁷

Of course, these operations of *social custom power* also are effective because of the implicit threat of force behind them. The State threatens to and does apply force to support these myths, documents, etc. This implied threat can be seen in the United States' use of military force in international arenas, the use of police force under our criminal law system, and the use of

102. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 148-49.

103. *Id.*

104. Tedeschi & Bonoma, *supra* note 4, at 37-38.

105. BARNES, *supra* note 6, at 24.

106. Tedeschi & Bonoma, *supra* note 4, at 38.

107. BARNES, *supra* note 6, at 24-26.

force to enforce private agreements (specific performance) and private rights (injunctions).

Social custom power can be categorized into three sub-vectors: (i) *status power*, (ii) *personal associations power*, and (iii) power from social norms, traditions, and values,¹⁰⁸ each of which is described and explained below.

(i) *Status Social Custom Power*

There is overwhelming consensus that status confers power.¹⁰⁹ *Status power* has been loosely defined as “the degree of deference which others believe a person should receive by virtue of his role position.”¹¹⁰ This perceived legitimacy based on office or socially prescribed role led Raven to term this form of power “legitimate power.”¹¹¹ Because the issue is one of perceived rather than actual legitimacy, the term “status power” more appropriately describes this power vector.

A wide variety of statuses can confer *status power*. First, as explained above, power exists through enfranchisement.¹¹² A second and related form of *status power*—age—confers power within narrow parameters. A person in her thirties, forties, or fifties has greater power than an otherwise identical person in her twenties; in our society, however, a person in her seventies or eighties has less power than most other adults.¹¹³

Third, formal authority confers *status power*. A position, office, or title confers power almost automatically.¹¹⁴ Thus, elected

108. Of course, social norms, values, and traditions explain all of the social custom vectors; they are separated here to illustrate that social norms, values, and traditions confer power even when they do not confer status.

109. Jack M. Weatherford, *Language in Political Anthropology*, in *POWER THROUGH DISCOURSE* 11, 15 (Leah Kedar ed. 1987); Tedeschi & Bonoma, *supra* note 4, at 7.

110. Tedeschi et al., *supra* note 101, at 302.

111. Raven, *supra* note 77, at 233.

112. Enfranchisement is treated as a separate power vector because of its pervasiveness and importance.

113. *But see* ERDMAN PALMORE, *THE HONORABLE ELDERS: A CROSS-CULTURAL ANALYSIS OF AGING IN JAPAN* 127 (1975) (noting that Japanese elders retain much more status than do their Western counterparts).

114. *See* Tedeschi et al., *supra* note 101, at 302; NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* ix (1990); Weatherford, *supra* note 109, at 15; Wade, *supra* note 91, at 46.

officials, CEOs, parents, and school principals possess power.¹¹⁵ In fact, any supervisory position confers power, as does seniority.¹¹⁶

Fourth, control over resources valued by society (money, materials, labor, or other goods or services), which has been called “wealth”¹¹⁷ or *resource power*,¹¹⁸ also confers *status power*.¹¹⁹ In fact, Tedeschi et al. argue that all *status power* stems from control over rewarding and punishing through resource allocation.¹²⁰ I believe that *status power* also derives from, among other things, social norms and values; nevertheless, *resource power* clearly is a particularly formidable source of *status power*. Ross Perot’s power and the power of families such as the Forbes, the Rockefellers, and the Kennedys can be attributed, at least in part, to their control of resources.

Prestige is also a form of *status power*, although it is closely linked to *formal authority* and *resource power*. Prestige can be seen as perceived power. Although prestige may be loosely connected to the powerholder’s actual quantity of disposable influence resources,¹²¹ it depends mostly on the target’s perceptions (and the perceptions of society as a whole, which mediate the target’s perceptions) for its weight.

(ii) *Personal Associations Social Custom Power*

Power from personal associations is a derivative form of *social custom power*; the powerholder’s power originates in another person who already possesses power. *Personal association power* can derive from lineage, which derives from one’s familial background.¹²² Families with generations of political power—such as the Kennedys, the Gores, the Roosevelts, and the Rockefellers—exemplify this form of power; however, such power is not limited to famous people in society. This form of power is evident in the policies of social clubs and fraternities that give

115. See Tedeschi et al., *supra* note 101, at 302; ROSE, *supra* note 114, at ix; Weatherford, *supra* note 109, at 15; Wade, *supra* note 91, at 46.

116. See Tedeschi et al., *supra* note 101, at 302.

117. See S. Jack Odell, *The Powers of Language: A Philosophical Analysis*, in POWER THROUGH DISCOURSE, *supra* note 109, at 19, 20.

118. See Tedeschi et al., *supra* note 101, at 302.

119. *Id.*

120. *Id.*

121. *Id.* at 306.

122. See *id.* at 303; O’Dell, *supra* note 117, at 20.

preferential consideration to the offspring of former members, in workplace environments, and in some schools' and colleges' admissions policies.

Other personal associations also confer power, as long as the association is with a person or people who possess power.¹²³ The addition to our speech of the phrase "Friends of Bill" (or "F.O.B.") and the cache that attaches to those who fall into this group evidences the prevalence and wide acceptance of this form of power.¹²⁴

(iii) *Social Norms, Traditions, and Values Social Custom Power*

Social custom power also derives from oughtness,¹²⁵ social values and norms, and traditions. Oughtness engenders compliance by activating personal and/or social commitments; it comes from the target's inclinations to help others or to conform to normative values regarding human interactions.¹²⁶ Oughtness takes three forms. First, reciprocity—the idea that relationships should be fair and equal—confers power.¹²⁷ Thus, a friend can compel her friend to return a favor. Second, equity—the idea that life should be fair—confers power.¹²⁸ Efforts to remedy past discrimination or to atone for past wrongdoing are examples of this form of power. Third, responsibility or dependence—the human inclination to help those in need—confers some power.¹²⁹ Beggars, addicts, and victims of abuse possess this power.

Although oughtness may confer some power, the power conferred is weak and obscure. Unlike other forms of power, the use of oughtness does not necessarily confer greater power on the powerholder and, in fact, may diminish the power of the oughtness powerholder.¹³⁰ This odd effect occurs because com-

123. Wade, *supra* note 91, at 45.

124. Of course, such power waxes and wanes as the original powerholder's power waxes and wanes. Thus, we would expect that the power of F.O.B.s fluctuated in rough accord with the fluctuations in President Clinton's re-election prospects.

125. Tedeschi & Bonoma, *supra* note 4, at 9-12.

126. *Id.* See also Raven, *supra* note 77, at 234-35.

127. Raven, *supra* note 77, at 234-35.

128. *Id.*

129. *Id.*

130. As I argue above, an exercise of power usually enhances the power of the powerholder because it causes both the powerholder and the target to devalue the target. See *supra* notes 78-85 and accompanying text.

pliance with oughtness can be perceived by both parties as the product of the target's benevolence, rather than as a product of the powerholder's exercise of power. The underlying message when a target complies with an *oughtness power* seems to be: "I will comply with your request this time; but, remember, my compliance is not caused by you; it is caused by my kindness." At the very least, exercise of *oughtness power* may teach the powerholder that she is virtually powerless in all or most other respects.¹³¹

Indeed, the target's actions may be designed consciously or unconsciously to preserve the target's power in the long run by temporarily appeasing the powerholder and encouraging the powerholder to return to a state of quiescence.¹³² Peter Gabel calls this process "pseudo-recognition."¹³³

Social norms and values also may confer power.¹³⁴ Numerous examples of this form of power exist. The social norms and values regarding women in the work force has resulted in women earning less money than men for performing equal work. Democracy has proven to be a very effective power source for the state—so effective, in fact, that young men and women have died willingly in combat believing they were fighting to preserve democracy. Some social values may confer power on those who otherwise might lack it. For example, the social value that our society places on free expression has conferred some power on disenfranchised people expressing unpopular views.¹³⁵ As Gabel and Harris point out, however, "the appeal to rights" also can reinforce powerlessness because it "inherently affirms that the source of social power resides in the State rather than in the people themselves."¹³⁶

Tradition power, also known as "habitual power," is the "power of the status quo that rests on the premise that it is normally easier to maintain a particular arrangement or course of

131. The diminution in power caused by the exercise of *oughtness power* helps explain the disinclination of many people to accept favors, special help, or charity.

132. See generally Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1592-93 (1984).

133. *Id.* at 1593.

134. Wade, *supra* note 91, at 45.

135. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (protecting as speech the wearing of a jacket bearing the statement, "Fuck the Draft").

136. Gabel & Harris, *supra* note 69, at 375.

action than to change it.”¹³⁷ It is easier to maintain the status quo because people tend to fear and, therefore, dislike change. Thus, in a divorce mediation, *tradition power* may influence women to undertake primary responsibility for child care.¹³⁸ *Tradition power* also helps to explain the common law’s durability and the legal concept of *stare decisis*.

d. Compact Power

Compact power involves an agreement of sorts between the powerholder and the target. The powerholder asserts power by promising to add or take away something of value to the target.¹³⁹ The compact may be impersonal (such as a loss or gain in salary) or personal (such as approval or disapproval). This power vector is closely aligned with *resource social custom power* because the powerholder requires control over resources to exercise *compact power*.

(i) Coercive Compact Power

Also known as “*sanction power*,”¹⁴⁰ *coercive compact power* derives from threatening to punish.¹⁴¹ Many employment-related power interactions involve exercises of *coercive power*, such as threats to demote, terminate, or cut pay. Similarly, parents exercise *coercive power* by threatening to take a toy away from a child or to send a child to her room. A lover who threatens to withhold sexual interactions also exercises *coercive power*.

(ii) Reward Compact Power

This is the opposite of *coercive compact power*. It involves promising a benefit to the target.¹⁴² Promises of raises and promotions to employees, of gifts and special treats to children, of love to a lover, and of parole to a prison inmate are all examples of *reward compact power*.

137. Wade, *supra* note 91, at 45.

138. *See id.* at 49.

139. Raven, *supra* note 77, at 233.

140. Wade, *supra* note 91, at 45.

141. Raven, *supra* note 77, at 233.

142. *Id.* *See also* Tedeschi & Bonoma, *supra* note 4, at 9-12.

e. *Information (Knowledge) Power*

Simply put, knowledge confers power.¹⁴³ Specifically, according to Raven, knowledge that has persuasive force confers power.¹⁴⁴ *Information power* can be applied directly by expressing the knowledge to the target, or indirectly by giving hints and making suggestions.¹⁴⁵ In the contract bargaining context, information is a key bargaining tool available to each party to a proposed contract. Knowledge of future development plans of property being sold and knowledge of plans to discontinue building a particular car model both have the potential to greatly affect value. The principle of *caveat emptor*, for example, expresses the courts' inclination to reward those who possess *information power*.¹⁴⁶ Information also may confer power in the workplace (knowledge about favored company projects), education (such as knowledge about scholarships and other financial aid), and in personal relationships (knowledge about a lover's infidelity).

f. *Expert Power*

Expert power arises from possessing great experience, knowledge, or status regarding the subject at issue.¹⁴⁷ Consequently, *expert power* is closely linked to *information power*. *Expert power* can be distinguished from *information power* because whereas *information power* derives from communication, expressions, hints, or suggestions of specific information, *expert power* derives from the possibility that the powerholder possesses relevant information and from the fact that the other party knows of that possibility. Thus, deference to *expert power* derives from the expert's self-confidence, others' perception of her expertise, and the demand for her help.¹⁴⁸

Expert power can be acquired in a variety of ways (educa-

143. Deborah Tanner, *Remarks on Discourse and Power*, in POWER THROUGH DISCOURSE, *supra* note 109, at 3-4; Tedeschi & Bonoma, *supra* note 4, at 9-12.

144. Raven, *supra* note 77, at 232.

145. *Id.* at 235-36.

146. See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 15 (1978) (arguing that the law of nondisclosure should be structured to reward deliberate accumulation of information).

147. Raven, *supra* note 77, at 233; Wade, *supra* note 91, at 45.

148. Tedeschi & Bonoma, *supra* note 4, at 23; Tedeschi et al., *supra* note 101, at 304.

tion, training, or experience) and can take a wide variety of forms (technical, historical, technological, informational, or educational). In fact, the more complicated society becomes, the greater the power of experts in their chosen field. Fields as diverse as medicine, law, psychology, psychiatry, and electronics have witnessed the slow erosion of the influence of the general practitioner. The power of the specialist is growing because it is slowly becoming impossible for one person to be an expert in all sub-fields of a particular field.

g. Reference Power

Reference power is acquired in two ways: (1) the target cedes power to the powerholder because the target desires the powerholder's acceptance, or (2) the target wants to be identified with the powerholder or has a sense of already-existing identification with the powerholder.¹⁴⁹ Tedeschi and Bonoma call *reference power* "social contagion" power¹⁵⁰ because it derives from the target's desire to model or to imitate the powerholder.¹⁵¹ Examples of *reference power* include older siblings' power over younger siblings, and the power of mentors, actors, athletes, and popular musicians.

h. Perceived Trustworthiness Power

Power may come from the powerholder's perceived trustworthiness, particularly the target's perception of the powerholder's inclination to promote the target's self-interest rather than the powerholder's self-interest.¹⁵² Clergypersons, doctors, and psychologists derive power from being perceived as trustworthy, as do parents, friends, and relatives. Indeed, the early development of undue influence law involved a fairly explicit recognition that we defer to powerholders when we perceive these powerholders as inclined to protect our interests, rather than their own.¹⁵³

149. Raven, *supra* note 77, at 233.

150. Tedeschi & Bonoma, *supra* note 4, at 9-12.

151. *Id.* at 24-25.

152. *See id.* at 23.

153. *See supra* notes 35-36 and accompanying text.

i. Personal Qualities Power

On a culturally contingent basis, some character traits tend to confer power.¹⁵⁴ In Western culture, attributes such as self-confidence, determination, endurance, intelligence, persistence, memory, calmness, and charisma all tend to confer power because they communicate something to the target about the powerholder that causes the target to value or to defer to the powerholder. Self-confidence, calmness, and charisma communicate to the target that the powerholder believes that she should have power over the target. Determination and persistence communicate that the powerholder is vested in and believes she is right about the object of her determination and persistence. Memory and intelligence become sources of power, much like *expert power*, when the powerholder and target believe that the powerholder's memory is better than the target's memory,¹⁵⁵ and/or that the powerholder is simply smarter than the target (and therefore is right about whatever she wants).

As noted previously, there is a connection between those who possess *enfranchisement power* and the construction of society's notion of which personal qualities confer power. For example, as Mari Matsuda explains, "accent" is a socially constructed norm.¹⁵⁶ She points out that:

Everyone has an accent, but when an employer refuses to hire a person "with an accent," they are referring to a hidden norm of non-accent—a linguistic impossibility, but a socially constructed reality. People in power are perceived as speaking normal, unaccented English. Any speech that is different from that constructed norm is called an accent.¹⁵⁷

It seems equally likely that self-confidence, determination, endurance, intelligence, persistence, memory, calmness, and charisma are equally and similarly socially constructed.

j. Manipulation Power

Manipulation power is exercised secretly and indirectly.¹⁵⁸

154. See Wade, *supra* note 91, at 45.

155. See *id.* at 51 (arguing that memory for detail confers power in a divorce mediation).

156. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. REV. 1329, 1361 (1991).

157. *Id.*

158. See Tedeschi & Bonoma, *supra* note 4, at 9-12.

It derives from changing some aspect of the target, maneuvering the target's environment to inhibit or to facilitate the desired behavior,¹⁵⁹ distracting the target,¹⁶⁰ or causing the target discomfort that falls short of a direct sanction¹⁶¹ (which would be *coercive compact power*). *Manipulation power* therefore occurs in many different contexts and is difficult to discern. Examples include subtly nudging a spouse so she will awaken and hear a baby crying, designing a car so that it cannot start unless the seat belt is fastened, and pestering and harassing the target until she gives in to the powerholder's desires.

k. Discourse Power

Discourse power is one of the most significant sources of power. Any exercise of power short of force is a language product.¹⁶² In fact, Virginia Richmond and her colleagues argue that communication may be the most important factor in determining an individual's power.¹⁶³ Information, expertise, compacts, social customs, trustworthiness, and manipulations are imposed as power vectors on the target or communicated to the target through the use of speech. Consequently, according to Jack Weatherford, the person who establishes the initial agenda and context of an interaction possesses tremendous power.¹⁶⁴ Likewise, control over the procedures by which decisions are made confers power.¹⁶⁵ Communication skills, such as organization and clarity, also confer some *discourse power*.¹⁶⁶ In fact, "the very act of describing a source of power or perceived power is (itself) a source of power."¹⁶⁷

The importance of *discourse power* can be seen only by more closely examining how and in what contexts it operates. First, the media exercises tremendous *discourse power*. Those who possess power in society, particularly those who possess me-

159. Raven, *supra* note 77, at 236.

160. *Id.* at 237.

161. This form of power sometimes is called "nuisance power." Wade, *supra* note 91, at 45.

162. See Weatherford, *supra* note 109, at 11.

163. Virginia P. Richmond et al., *Power Strategies in Organizations Communication Techniques and Messages*, 11 HUMAN COMM. RES. 85, 89 (1984).

164. Weatherford, *supra* note 109, at 15.

165. Wade, *supra* note 91, at 45.

166. See *id.* at 51.

167. See *id.* at 45.

dia power, define and confine the spectrum of ideas that achieve society-wide dissemination. If movies and television treat marriage between persons of the opposite sex as "normal," then marriage between persons of the same sex is marginalized and made "abnormal." If the model of leadership is almost always depicted as white and male, even when a nonwhite or woman is in charge, leadership by nonwhites and women that conflicts with the white-male model is marginalized.

Patterns of discourse create and reinforce tremendous power in our society. For example, the discourse in our society portrays male as the norm and female as different; women are viewed in reference to men, rather than in reference to women's experiences in a male-dominated world.¹⁶⁸ The discourse about sexuality defines and confines homosexuality in a similar way; the common discourse portrays heterosexuals as normal and marginalizes homosexuals as "outside" normal sexuality. In law, judges exercise *discourse power* through their opinions. The facts they include and omit, the words they use, and the structure of their discussions set boundaries on future discussions.

On a more interpersonal level, an employer may exercise *discourse power* through a number of subtle yet effective techniques. She can emphasize her *discourse power* by controlling the time, location, participants, seating, and agenda for a meeting. Thus, even before the powerholder and the target have met, they have participated in a discourse about the powerholder's power over the target.

B. Limitations on and Complexities in the Model of Power

This model can facilitate our analysis of legal issues, our assessment of doctrine, and our evaluation of our systems of justice. A few important limitations of this model, however, need to be considered.¹⁶⁹

1. Reductionist Nature of Modeling

Any model of power is essentially reductionist. The very process of dividing a construct into vectors and of creating a model reduces and simplifies. This process forces reality to fit

168. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 22-23, 65 (1987).

169. The limitations described below would apply to any model of a social construct.

into the parameters and concepts of the model. Power operates in such complex and subtle ways that any model is inadequate when measured against real-world experience.

2. *Inability to Verify Model*

There is no way to verify the validity of the model. Raven's model of power, on which my model relies significantly, has been the subject of considerable analysis and testing in a wide variety of relationships (*e.g.*, supervisors and supervisees, parents and children, husbands and wives, children and other children, teachers and students, doctors and patients, salespersons and customers, franchisors and franchisees, couples in sexual encounters, and political figures and other political figures).¹⁷⁰ These studies conclude that the model works because some researcher can categorize successfully, after the fact, the power assertions of the parties involved in conformity with Raven's model.¹⁷¹ Statistical, after-the-fact assessments are, in this sense, more about the tester's perceptions than about the real-world interaction being studied.¹⁷²

3. *Indeterminacy of Power Classification Process*

In creating my power model, I assume, in some respects, that each power vector is independent and clearly demarcated. In fact, the lines between the power vectors can be blurred easily. For example, when a parent gives her child a "time out," it may be difficult to determine if she is exercising *formal authority social custom power*, *compact power*, *resource social custom power*, *reference power*, or a particular combination of the foregoing. Similarly, when a judge jails an attorney for contempt, her power exercise is an indistinguishable hybrid of *formal authority social custom power* and *force power*; but her most effective power source in future dealings may be a combination of her continuing *resource social custom power*, *formal authority social custom power*, *reference power*, *discourse power*, and her *prestige social custom power*. A judge's control over her docket is a particularly difficult classification conundrum. It can be a form of

170. Raven, *supra* note 77, at 233-34.

171. See, *e.g.*, Bertram H. Raven, *Political Applications of the Psychology of Interpersonal Influence and Social Power*, 11 *POL. PSYCHOL.* 493 (1990).

172. See Kipnis, *supra* note 5, at 182.

discourse power; however, it can also be part of the judge's *formal authority social custom power*. Clearly, the line drawing in particular human interactions will be somewhat artificial.¹⁷³

4. *Intersection and Interrelationship of the Vectors of Power*

Precisely demarcating the vectors of a power interaction in any context is difficult, if not impossible. The model suggests vectors of power, but it does not attempt to grapple with the many complex, intersecting, and complicated ways in which power operates in the real world.¹⁷⁴ Therefore, the model is useful as a tool for recognizing the sometimes obscure operations of power, but the model cannot be used to derive absolute power values in complex relationships.

In any power interaction, both the powerholder and the target may possess any of the foregoing power vectors. For example, a supervisor may possess *formal authority social custom power* over her supervisee, but a supervisee can exercise *discourse power* by calling a meeting with the supervisor and setting the agenda. If the supervisee is related to the CEO or possesses *enfranchisement power* that the supervisor lacks, the power relationship may be skewed and intersecting; in such a situation, it may be difficult to determine which party actually possesses greater power.

Moreover, the power vectors and sub-vectors are not of uniform strength. For example, *oughtness social custom power* actually may cause the powerholder to lose power and is, therefore, a weaker form of power. On the other hand, the immediacy of *compact power*, where the target gets a reward or punishment, is a stronger form of power in many contexts. *Manipulation power*

173. Although the line drawing is artificial, it is not meaningless. The point of developing this model is to enrich the analysis of power interactions and to aid recognition of the operation of power in situations where the operation of power may be difficult to discern. In other words, it really does not matter whether the judge is exercising *discourse power* or *formal authority* when she controls her docket; what matters is that she is exercising power and that we can recognize her actions as reflecting and manifesting power.

174. See generally Raven & Kruglanski, *supra* note 16, at 81 (noting that, in the real world, "a power relationship includes several bases of power" and that "even greater complexity" is introduced "when there are differing degrees of each power base operating in a given . . . situation"); John P. Garrison & Larry E. Pate, *Toward Development and Measurement of the Interpersonal Power Construct*, 97 J. PSYCHOL. 95, 99-103 (1977) (finding empirical support for the idea that power is multidimensional).

and *discourse power* are more difficult to classify in terms of strength because they are not always recognized consciously.

The magnitude of a powerholder's particular power vector is another complexity worth considering. We know a billionaire possesses more *resource social custom power* than a person with a net worth of \$100,000; how much more power the billionaire possesses is less clear. Within any large, hierarchical employment structure, many people possess substantial *formal authority social custom power* and can exercise *compact power* over their subordinates. Therefore, it is insufficient to note that a person possesses a power vector; the magnitude of that power vector is equally important.

IV. APPLICATION OF THE POWER MODEL TO THE UNCONSCIONABILITY DOCTRINE AND TO THE ANALYSIS OF ARBITRATION AS A MEANS OF DISPUTE RESOLUTION

A. Unconscionability

1. Background of the Doctrine

The legal maxim, *pacta sunt servanda* (agreements must be observed), communicates the courts' overriding preference to avoid interfering with contractual bargains. Occasionally, however, some courts have determined that particular contractual bargains were so one-sided that this principle would work an injustice. For example, courts of equity have denied specific performance on the grounds that "the exchange is grossly inadequate"¹⁷⁵ and indirectly corrected the unfairness of the bargain "by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause was contrary to public policy or to the dominant purpose of the contract."¹⁷⁶

The drafters of the Uniform Commercial Code (UCC) chose to allow courts to confront directly the perceived bad bargain problem. Section 2-302 (and its descendant, *Restatement*

175. U.C.C. § 2-302(1) (1995); RESTATEMENT (SECOND) OF CONTRACTS § 364 (1979) ("specific performance . . . will be refused if such relief would be unfair because . . . the exchange is grossly inadequate."). See, e.g., *Gabrielson v. Hogan*, 298 F. 722, 725-26 (8th Cir. 1924) (affirming the denial of specific performance based on lack of equivalency in a sale of land for one-third more than it was worth).

176. U.C.C. § 2-302 cmt. 1.

(*Second of Contracts*, Section 208) allows courts to assess explicitly the fairness of the bargain as a matter of law.¹⁷⁷ Section 2-302 provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.¹⁷⁸

Neither Section 2-302 nor Section 208 clearly defines the term "unconscionable." In the seminal law review article for unconscionability doctrine, *Unconscionability and the Code: The Emperor's New Clause*, the late Professor Arthur Leff proposed that a contract should be deemed unconscionable only if the court finds both "procedural unconscionability" and "substantive unconscionability" present in the transaction.¹⁷⁹

Substantive unconscionability means that the terms of the contract are unreasonably harsh.¹⁸⁰ Substantive unconscionability, although crucial to a determination of unconscionability, is pertinent to this Article only to the extent that the contract terms may have ramifications bearing on the power between the parties. Particularly unfair terms may evidence a power disparity not apparent from the court's description of the facts or from the parties' presentation of the evidence.¹⁸¹ Where the terms are written in legalese, they also may confer *information power* on the party more familiar with legal language.¹⁸² If the contract includes terms giving one party control over the other, power may be created or reinforced. Finally, some terms are a discourse about the parties' relative power¹⁸³ by communicating a structure for the parties' relationship.¹⁸⁴ Such terms serve a myth-making function; their presence in the parties' proposed

177. *See id.*; RESTATEMENT (SECOND) OF CONTRACTS § 208.

178. U.C.C. § 2-302.

179. Leff, *supra* note 26, at 539.

180. *Id.* at 539-40.

181. *See, e.g.*, *Vockner v. Erickson*, 712 P.2d 379, 382-83 n.8 (Alaska 1986) (arguing that the presence of very unfair terms may either negate or at least reduce the requirement of procedural unconscionability).

182. *See, e.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (D.C. Cir. 1965) (noting that the contract term at issue is virtually incomprehensible yet enforceable).

183. *See supra* sub-part III(A)(2)(k).

184. For a detailed discussion of this point in connection with the surrogate

agreement may limit the parties' conceptions of the power possibilities within their relationship.

While the terms to a contract may bear on, evidence, create, or reinforce power, the focus of this Part of the Article is the procedural unconscionability requirement. Procedural unconscionability, according to Professor Leff, means unfairness in the bargaining process.¹⁸⁵ Early cases applying Professor Leff's procedural unconscionability formulation refined the standard to include "an absence of meaningful choice"¹⁸⁶ and/or a "gross inequality of bargaining power."¹⁸⁷ This refinement is both an explicit and an implicit call for an assessment of power. The call is explicit because a problem with the parties' relative bargaining power may satisfy the requirement. It is implicit because if one party has no "meaningful choice" and therefore must acquire what she needs or wants from the other party, she likely possesses very little bargaining power.

2. *Analytical Perspective*

In subpart (3) below, I describe the ideas that courts have used to grapple with the question of power. This analysis reveals that most courts analyze the parties' relative power incompletely. I do not contend that all of the cases are wrongly decided or that a gross inequality of bargaining power exists in every contract. Rather, I contend that the cases are *reasoned poorly* because they fail to or deficiently analyze a crucial issue.¹⁸⁸ The risk of poor reasoning is the possibility of poor-quality results.

The courts' stories of the parties' relationships do not include all information relevant to an analysis of power. For example, courts rarely mention race, sex, or class,¹⁸⁹ thereby precluding a complete analysis of *enfranchisement power*. Also,

parenting contract between Mary Beth Whitehead and William and Elizabeth Stern, see *infra* notes 342-347 and accompanying text.

185. Leff, *supra* note 26, at 539.

186. *Williams*, 350 F.2d at 449. The power implications of *Williams*, not addressed by the court because of the procedural posture of the case, are detailed below.

187. *Id.*

188. It is worth noting that this Article does not purport to address the question of how much disparity is enough to warrant the conclusion that there was procedural unconscionability.

189. This omission is not necessarily bad. Identifying race, sex, or class as a source of power or disempowerment has the potential to reinforce race, sex, and class as

courts seldom describe the bargaining process with sufficient detail to allow an assessment of the parties' contract formation discourses. Consequently, little or no information exists with which to assess the discourse-based power vectors. This world making and world restricting is an exercise of the judges' *discourse power*. Thomas Ross notes that "[s]ociety generally accepts the notion of judges (or lawyers) crafting their version of the 'facts,' telling the story their way, yet pretending that the events speak for themselves."¹⁹⁰ A judicial opinion is, of course, an advocacy piece. The author of a judicial opinion uses her opinion to argue the wisdom and legitimacy of the particular result she has reached. Facts supporting her result are highlighted and described in detail; facts that do not support her result, on the other hand, are shaded, obscured, minimized, or even omitted. Moreover, even some facts that support the result may be omitted because the author of the opinion did not consider their relevancy. As a result, the world depicted in judicial opinions lacks much of the subtlety and complexity of the real world.¹⁹¹

The foregoing limitations on the judicial process support the argument that "small doctrinal adjustments . . . will prove ineffective because they do not consider the systems of power and knowledge within which all interpretive acts take place."¹⁹² Although I concede this difficulty as a general proposition, I nevertheless retain a reconstructionist aspiration. I perceive the explicit call for the consideration of power embedded in unconscionability doctrine as an opportunity to begin reconstructing a legal system cognizant of and responsive to power dynamics.

In subpart (4) below, I suggest how this opportunity may be exploited. I demonstrate the possibilities for an in-depth analysis of power through application of my power model. I use the model to analyze the power relationships in two well-known unconscionability cases: *In re Baby M*¹⁹³ and *Williams v. Walker-Thomas Furniture Co.*¹⁹⁴ This analysis, although constrained by

sources of power and to discourage totally enfranchised persons from contracting with persons who lack some characteristic of *enfranchisement power*.

190. Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 387 (1989).

191. Thus, Ross concludes, "we have known for some time that opinions are, in part, stories." *Id.*

192. See, e.g., Delgado, *supra* note 10, at 823.

193. 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

194. 350 F.2d 445 (D.C. Cir. 1965).

the world making of the courts that heard the two cases, reveals that at least bargaining power sometimes can be analyzed meaningfully within the current doctrinal framework. The model allows consideration and even confrontation of the systems of power.

3. *The Analysis of Power in Unconscionability Cases*

Because unconscionability doctrine requires courts to examine power, courts have been forced to develop and apply ideas about interpersonal power. Although most recent cases refer to the general idea of procedural unconscionability, courts' ideas about power vary greatly. Some courts touch on several of the ideas suggested above, although incompletely. Other courts completely ignore power. Still others simplify power so much that, as a practical matter, power is irrelevant. Even those courts that have concluded that unequal bargaining power infected the parties' bargain analyzed the power issues incompletely. I describe and analyze with reference to the power model the doctrinal approaches courts have used in unconscionability cases, using three categories: the Contract of Adhesion Approach, the Knowing Assent Approach, and the Multivariable Approach.¹⁹⁵

a. *The Contract of Adhesion Approach*

The Contract of Adhesion Approach predates the doctrine of unconscionability.¹⁹⁶ The advent of unconscionability, however, has not deterred some courts from continuing to rely on contract of adhesion ideas.¹⁹⁷

The Contract of Adhesion Approach does not require any explicit assessment of power. Rather, the focus is on whether the contract can be classified as a "contract of adhesion."¹⁹⁸ Power, in such cases, is a side issue. Courts applying the Contract of Adhesion Approach hold that a contract is unconscionable only if the party has no alternative to obtain a particular necessity other than to accept the standard form contract that

195. Some courts have not considered power as an issue. *See, e.g.,* *Sherman v. Lunsford*, 44 Wash. App. 858, 723 P.2d 1176 (1986) (no discussion of power even though the party claiming unconscionability had accepted the contract out of a desperate need to prevent a huge economic loss).

196. *See, e.g.,* *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

197. *See, e.g.,* *In re Estate of Szorek*, 551 N.E.2d 697, 700 (Ill. App. Ct. 1990).

198. *See, e.g.,* *Milligan v. Big Valley Corp.*, 754 P.2d 1063, 1067 (Wyo. 1988).

the other party offers.¹⁹⁹ Typical examples of such contractors include public utilities,²⁰⁰ common carriers,²⁰¹ and hospitals.²⁰² In traditional political terms, this approach can be seen as more or less conservative. By restricting relief to only the most obvious and excessive problems (*e.g.*, contracts for necessities between an individual and monopolies), courts reflect a fear of over-inclusion, a fear that freedom of contract otherwise would be impaired.

The Contract of Adhesion Approach has been applied in a wide variety of circumstances. For example, courts have ruled against consumers when the subject matter of the contract was not deemed a necessity, so that protection by the law of unconscionability was deemed unnecessary. *Milligan v. Big Valley Corporation*²⁰³ is typical. In *Milligan*, the plaintiff's decedent entered into a contract with a ski resort to participate in a ski race.²⁰⁴ The contract contained a "release of claim" that purported to absolve the defendant of all potential liability for any injury to the decedent.²⁰⁵ After the decedent died in the race, the plaintiff sued, alleging that the defendant ski resort's negligence caused the death and the clause was unenforceable as against public policy.²⁰⁶

The court rejected the plaintiff's claim and enforced the exculpatory clause.²⁰⁷ It reasoned that the contract was not unenforceable as a contract of adhesion because (1) the decedent had a choice not to race, (2) racing is not a necessity, and (3) the decedent therefore had reasonable alternatives to participating in the race.²⁰⁸ The court noted that the contract was presented on a "take-it-or-leave-it" basis, but held this fact irrelevant.²⁰⁹

This holding seems to ignore the very issue that the court

199. See, *e.g.*, *In re Estate of Szorek*, 551 N.E.2d at 700.

200. *Albuquerque Tire Co. v. Mountain States Tel. & Tel. Co.*, 697 P.2d 128, 131 (N.M. 1985).

201. *Milligan*, 754 P.2d at 1066; *Anderson v. Union Pacific R.R.*, 790 P.2d 438, 441 (Kan. Ct. App. 1990).

202. *McRand, Inc. v. Van Beelen*, 486 N.E. 2d 1306, 1314 (Ill. App. Ct. 1985).

203. 754 P.2d 1063 (Wyo. 1988).

204. *Id.* at 1064.

205. *Id.* at 1064-65.

206. *Id.*

207. *Id.* at 1069.

208. *Id.* at 1067-68.

209. *Id.* at 1067.

purports to be analyzing: The ski resort's "take-it-or-leave-it" statement suggests that the decedent had no other choice but to assent to the defendant's proposed contract. To put this idea in terms of the model, this statement indicates that the defendant possessed significant *compact power*. The court also did not consider that the decedent was an individual dealing with a corporation (which suggests a disparity in *resource social custom power*) or that the clause was phrased in legalese²¹⁰ (which suggests a disparity in *discourse power* because the decedent was a ski instructor by trade²¹¹). Moreover, the contract released the defendant from liability even for personal injury or property damage claims unrelated to the race. The contract provided that the decedent released the defendant from liability for all claims of any kind "sustained . . . during my stay at . . . [defendant's resort]."²¹² The unconscionability issue, therefore, appears to be somewhat more complicated than the court suggests.²¹³

Some courts take an opposite route in applying the Contract of Adhesion Approach. These courts hold that the contract is not unconscionable unless it was presented on a "take-it-or-leave-it" basis and there was no opportunity to bargain.²¹⁴ For example, in *Albuquerque Tire Company v. Mountain States Telephone and Telegraph*,²¹⁵ Albuquerque Tire had contracted with Mountain States for a listing in Mountain States' yellow pages.²¹⁶ The contract limited Mountain States' liability for breach or negligence to return of the money paid for the advertisement.²¹⁷ When Mountain States negligently listed a U-Haul business' phone number under the listing for Albuquerque Tire, Albu-

210. *See id.* at 1064-65 (using terms such as "in consideration of," "release and discharge," "any and all legal claims or legal liability of any kind, nature and description," "save and hold harmless").

211. *Id.* at 1065.

212. *Id.* For a similar case and court analysis involving a minor, see *Jones v. Dresel*, 623 P.2d 370, 374-75 (Colo. 1981) (finding no procedural unconscionability even given the additional fact that the injured party was a minor at the time the contract was made (*age social custom power*)).

213. The result in *Milligan* may stem, in part, from the importance of the ski industry to the Wyoming economy. A finding of unconscionability or that the contract is one of adhesion would have potential ramifications for the entire industry.

214. *See Albuquerque Tire Co. v. Mountain States Tel. & Tel. Co.*, 697 P.2d 128, 131 (N.M. 1985) (quoting *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 882, 27 Cal. Rptr. 172, 185, 377 P.2d 284, 297 (1962)).

215. 697 P.2d 128 (N.M. 1985).

216. *Id.* at 129 (1985).

217. *Id.* at 129-30.

querque Tire sued for breach of contract.²¹⁸

The court concluded that the contract was not one of adhesion because there was no express evidence, such as failed attempts to bargain, that Albuquerque Tire could not have negotiated the terms of the contract.²¹⁹ Mountain States, however, possessed a monopoly with respect to yellow pages,²²⁰ which suggests it possessed both *resource social custom power* and *prestige social custom power*. Also, the contract was a standard form contract prepared by Mountain States (*discourse power*).²²¹ Finally, Mountain States was a much larger company than Albuquerque Tire,²²² which is additional evidence of Mountain States' greater *resource social custom power*. Although the court's recitation of the facts is incomplete, these facts alone suggest that Albuquerque Tire probably had little or no real opportunity to bargain. Consequently, the court's conclusion that Albuquerque Tire failed to prove inability to bargain is suspect.

b. The Knowing Assent Approach

The Knowing Assent Approach is closely aligned with the Contract of Adhesion Approach in the sense that both approaches are conservative in political orientation. Under the Knowing Assent Approach, bargaining power does not matter; all that matters is "reality of assent."²²³ This idea can be attributed to the reference in comment 1 to UCC Section 2-302 that "[t]he principle is one of prevention of . . . unfair surprise."²²⁴ Courts applying this approach hold that there is no unconscionability if "the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting."²²⁵

218. *Id.* at 129.

219. *Id.* See also *In re Estate of Szorek*, 551 N.E.2d 697 (Ill. App. Ct. 1990) (holding that a contract between a woman plaintiff and a bank that required her to pay the bank's attorney's fees in any action between her and the bank could not be a contract of adhesion because the plaintiff did not object to the terms and could have gone to another bank).

220. *Albuquerque*, 697 P.2d at 132.

221. *Id.* at 131.

222. See *id.* at 129, 132.

223. See generally Dalton, *supra* note 34, at 1037 (citing RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1979)).

224. U.C.C. § 2-302 cmt. 1 (1995).

225. *Weaver v. American Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971). Interestingly, although the *Weaver* court stated that the crucial issue was the idea of informed con-

*Wyatt v. Dishong*²²⁶ applies the Knowing Assent Approach. *Wyatt* involved a covenant not to compete in a contract between two physicians, one the employer and the other the employee.²²⁷ When the employee left and established a practice nearby, the employer sued, seeking to enforce the covenant by injunction.²²⁸ The employee defended on the basis that, among other things, the clause was unconscionable.²²⁹ The court rejected this argument, holding that there was no procedural unconscionability because both parties were health professionals and the employee knew about the clause when he signed the contract (the covenant had been called to the employee's attention when the contract was made).²³⁰

The case contains many facts that the court could have used to assess the parties' relative power, perhaps enough to conclude that the procedural unconscionability requirement was met by a showing of gross inequality of bargaining power. First, the parties were in an employer-employee relationship,²³¹ indicating that the employer likely possessed *formal authority social custom power* and *resource social custom power* over the employee. Second, although the facts are somewhat murky on this point, it appears that the employer drafted the contract, including the clause at issue (*discourse power*).²³² Third, the employee was much newer to the field and business of medicine,²³³ suggesting a likely disparity in the parties' *information power* and *expert power*. Fourth, over the course of the parties' contractual relationship, the employer substantially reduced the employee's sal-

sent, the court also devoted a substantial part of its opinion identifying inequalities in the parties' power. *Id.* at 145-46 (noting Weaver's lack of education, his employment in mostly laborer jobs, the fact that he signed the agreement without reading it because an American Oil employee told him to do so, and the fact that American Oil drafted the contract).

226. 469 N.E.2d 608 (Ill. App. Ct. 1984).

227. *Id.* at 609.

228. *Id.*

229. *Id.* at 610. The employee also argued that the covenant not to compete was an unreasonable restraint of trade, arguing that the temporal and special limitations were overbroad. *Id.* The court treated the unreasonable restraint of trade argument and the unconscionability argument as separate grounds on which a covenant not to compete may be found unenforceable. *Id.* at 610-11.

230. *Id.*

231. *Id.* at 609.

232. *See id.* at 609-10.

233. *Id.* at 609.

ary twice, and the employee accepted these reductions.²³⁴ These salary reduction interactions and the unusually large breadth of the clause (five years within a fifty-mile radius)²³⁵ indicate that the employer's *formal authority social custom power* and *resource social custom power* over the employee were particularly weighty.

The court's analysis in *Jones v. Johnson*²³⁶ differs slightly from that of the *Wyatt* court. *Jones* reflects somewhat of a hybrid of the Contract of Adhesion Approach and the Knowing Assent Approach. *Jones*, a woman facing foreclosure of her home, entered into a contract with a man named Johnson.²³⁷ Johnson acquired title to her home by promising to assume Jones' loan and by agreeing to pay her delinquent charges and attorney's fees.²³⁸ Jones agreed to continue to live in the house and to pay Johnson \$179 per month in rent, the exact amount of the monthly mortgage payment.²³⁹ Jones defaulted; Johnson evicted her, and Jones sued, claiming the contract was unconscionable.²⁴⁰ The court held that procedural unconscionability exists when there is an "absence of meaningful choice and where lack of education or sophistication results in no opportunity to understand the terms of the agreement."²⁴¹ The court concluded that the contract was not procedurally unconscionable, citing both Contract of Adhesion ideas and Knowing Assent ideas:

Johnson explained the terms of the transaction to Jones. There is no claim she was coerced or browbeaten by Johnson to sign the documents. Jones had an opportunity to seek advice about the transaction but did not do so. All the evidence indicates that she freely and voluntarily signed the documents and had a free choice not to do so. Also, there were alternatives available to her. She could have allowed the foreclosure to proceed. . . . Or, she could have attempted to sell the home

234. *Id.* at 610.

235. *Id.* at 609. The clause also involved an exercise of some *discourse power*. It declared that, if the restrictions were deemed excessive, they could be revised to include the "maximum reasonable restrictions" allowed under Illinois law. *Id.* at 610. This additional provision reflects a dexterity with legal principles that the employee probably did not possess.

236. 761 P.2d 37 (Utah Ct. App. 1988).

237. *Id.* at 38.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 39.

herself²⁴²

Although the court concluded that the contract was not procedurally unconscionable, it noted several facts that might have enriched its analysis of this issue. First, Jones was a woman and Johnson was a man²⁴³ (giving Johnson greater *enfranchisement power*). Second, Jones was unemployed and experiencing financial difficulties, whereas Johnson could afford to pay the delinquencies on her notes, indicating that she lacked and he possessed *resource social custom power*.²⁴⁴ Third, Johnson somehow "learned of the notice of default" on Jones' property and approached Jones with suggestions of methods of avoiding foreclosure.²⁴⁵ These facts suggest that Johnson possessed several vectors of power, including *information*, *expert*, and *discourse power*. *Manipulation power* may have been involved as well, because Johnson clearly wanted Jones to select a particular method of avoiding foreclosure (the one by which he acquired title to her land). His suggestion of multiple methods may have been a ploy to gain her confidence. Finally, Jones apparently possessed only a high school education,²⁴⁶ which also may have increased Johnson's *information power* and *expert power* in his dealings with Jones.

c. *The Multivariable Approach*

The Multivariable Approach involves identifying and applying a number of potential indicia of interpersonal power. Thus, in *Johnson v. Mobil Oil Corp.*,²⁴⁷ the court held that the following factors were relevant in analyzing the relative bargaining power of the parties: age, education, intelligence, business acumen and experience, relative bargaining power (which the court did not define further), who drafted the contract, whether the terms of the contract were explained, whether the terms were negotiable, and whether there were alternate sources of supply for the goods in question.²⁴⁸ A number of courts have added an

242. *Id.* at 40.

243. *Id.*

244. *Id.*

245. *Id.* at 38.

246. *Id.* at 40.

247. 415 F. Supp. 264 (E.D. Mich. 1976).

248. *Id.* at 268. See also *In re "Apollo" Air Passenger Computer Reservation Sys.*, 720 F. Supp. 1061, 1065 (S.D.N.Y. 1989); *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 828 (N.Y. 1988).

additional consideration: whether the other party engaged in "deceptive or high pressured (sales) tactics."²⁴⁹ This approach can be seen as liberal in political orientation. The use of multiple factors for analysis reflects more sympathy for the potential of unequal bargaining power to result in an unequal bargain. Although the breadth of this list of considerations suggests a desire for an in-depth analysis of the power relationship, in many cases, the courts' analyses are quite limited.

In re "Apollo" Air Passenger Computer Reservation System involved a liquidated damages clause in a contract between a travel agency and United Airlines.²⁵⁰ By the terms of the contract, United supplied the agency with a computer system for handling airplane flight reservations in exchange for a specified fee.²⁵¹ The agency's cancellation of the contract subjected the agency to a substantial penalty unrelated in amount to the damages United would suffer from such a cancellation.²⁵² In analyzing the procedural unconscionability issue, the court cited with approval the *Johnson v. Mobil Oil Corp.* list of factors described above.²⁵³ The court held, however, that the contract was not procedurally unconscionable because one other similar system existed in the United States and "[n]othing in the record indicates that the persons negotiating the contract for [the agency] . . . were of an age, education or intelligence such that they could not understand the terms or the import of the contract entered into."²⁵⁴ Thus, the court in "*Apollo*" Air purported to apply a broad spectrum of power variables but, in fact, focused only on the parties' ability to understand the contract and the availability of alternatives—a hybrid of the Contract of Adhesion and Knowing Assent approaches.²⁵⁵ Also, although the court states that the case is "sadly wanting in anything" to sup-

249. See *Gillman*, 534 N.E.2d at 828.

250. 720 F. Supp. at 1061.

251. *Id.* at 1063.

252. *Id.* at 1067.

253. *Id.* at 1065. It is worth noting that "*Apollo*" Air was decided by a federal district court located in New York, whereas *Johnson v. Mobil Oil Corp.* was decided by a district court sitting in Michigan and purportedly applying Michigan law.

254. *Id.* at 1064.

255. Some cases apply all of the power vectors they articulate. See, e.g., *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268-69 (E.D. Mich. 1976) (considering plaintiff's age, education, literacy, the fact that Mobil approached him, and the fact that Mobil's representative did not have the authority to bargain).

port the plaintiff's procedural unconscionability argument,²⁵⁶ some facts the court recited suggest that the resolution of the issue was less obvious. First, United was a large, multimillion dollar international company, whereas the agency was a small individually-owned operation (a huge *resource social custom power* disparity). Second, only two such computer reservation systems were available in the entire United States, United drafted the contract, and United offered it on a take-it-or-leave-it basis.²⁵⁷ These facts suggest a great disparity in the parties' relative *resource social custom power, information power, and discourse power*. While these facts do not compel the conclusion that the contract was procedurally unconscionable, they suggest that the issue was more complicated than the court stated.²⁵⁸

The majority of cases applying the Multivariable Approach adopt some, but not all, of the *Johnson v. Mobil Oil Corp.* considerations. Typically, these courts identify three or four factors that evidence the parties' relative power, such as the manner in which the contract was entered into, the parties' education, their understanding of the contract's terms, and whether the key terms were in fine print.²⁵⁹

Able Holding Company v. American District Telegraph arose out of a contract between an amusement park and a fire prevention system company for the installation of a fire prevention system.²⁶⁰ The contract included a clause, which the amusement park contended was unconscionable, that limited the fire prevention company's liability for breach to the greater of ten percent of the annual charge or \$250.²⁶¹ The court defined procedural unconscionability in terms of bargaining power, holding that the factors to be considered were the manner in which the

256. 720 F. Supp. at 1064.

257. *Id.*

258. *Gillman* involved a similar incongruity between a court's articulation of numerous power considerations and its analysis of only a few. See *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 828 (N.Y. 1988) (finding no inequality of bargaining power with respect to a term in fine print on the back of a contract between a large international bank and an individual because the individual (1) had time to read the contract, (2) could have consulted an attorney, and (3) had business experience).

259. *Abel Holding Co. v. American Dist. Tel.*, 350 A.2d 292, 304 (N.J. Super. Ct. Law Div. 1975), *aff'd*, 371 A.2d 111 (N.J. Super. Ct. App. Div. 1977). See also *Ahern v. Knecht*, 563 N.E.2d 787, 792 (Ill. App. Ct. 1990); *H. Jon Geis, P.C. v. Landau*, 458 N.Y.S.2d 1000, 1003 (N.Y. Civ. Ct. 1983).

260. 350 A.2d at 295.

261. *Id.* at 296.

contract was entered into, the parties' education, their understanding of the contract's terms, and whether the key term was in fine print.²⁶²

The court held that there was no procedural unconscionability,²⁶³ reasoning that there were fourteen competing alarm services listed in the phone book, the fire protection service company did not prevent bargaining, and the amusement park had fire insurance to protect itself.²⁶⁴ The court also emphasized the importance of freedom of contract and of not allowing parties out of contracts they did not read.²⁶⁵

The following facts make the court's analysis of the power issue seem significantly oversimplified: (1) two people owned the amusement park, whereas the fire prevention system company was large, national, and, in prior litigation, had been determined to have engaged in monopolistic conduct in violation of antitrust law; (2) the fire prevention system company approached the amusement park immediately after the park had suffered damage from an earlier fire; (3) the parties did not discuss terms; and (4) the amusement park owners neither fully read the contract nor "shopped around" for alternative fire prevention systems.²⁶⁶ Thus, the court ignored the fire prevention company's substantial *information, expert, manipulation, and discourse power*. Furthermore, the court did not consider the amusement park owner's likely diminished *personal qualities power*. In short, the fire prevention company possessed substantially greater power than did the amusement park owners. Therefore, the court's conclusion that there was no procedural unconscionability is debatable.

H. Jon Geis, P.C. v. Landau involved a claim for \$3,500 arising out of a contract for psychological counseling services.²⁶⁷ Although the *Landau* court listed only "the experience and education of the party claiming the contract to be unconscionable . . ." ²⁶⁸ as factors to consider, the court actually considered sev-

262. *Id.* at 304.

263. See also *Haspel v. Rollins Protective Serv., Inc.*, 490 So. 2d 530 (La. Ct. App. 1986) (addressing whether a clause similar to that in *Abel* is unconscionable, and concluding that it is not).

264. 350 A.2d at 303, 305.

265. *Id.*

266. *Id.* at 302-03.

267. 458 N.Y.S.2d 1000 (N.Y. Civ. Ct. 1983).

268. *Id.* at 1003.

eral other power vectors and concluded that there was sufficiently unequal bargaining power between the parties.²⁶⁹ The court considered Dr. Geis' doctorate degree, his many years of practice, his association with a psychological institute as a supervisor, and Ms. Landau's poverty.²⁷⁰ These facts evidence Geis' superior *information power, expert power, formal authority social custom power, personal association social custom power, personal qualities power, and resource social custom power*. The court, however, emphasized that Landau was divorced during the course of the therapy; she felt "awful" and "strangled" by Geis, clinging to him "as the expert" with his encouragement while he repeatedly assured her not to worry about her growing debt to him.²⁷¹ These facts raise issues of possible disparity in the parties' relative *personal qualities power, expert power, manipulation power, and reference power*. Furthermore, the court did not mention the possible *enfranchisement power* implications of the fact that Geis was a man and Landau was a woman.²⁷² Nevertheless, the court's opinion in *Landau* recognized and considered many facts bearing on the parties' relative power and, based on the information provided, reached an appropriate result.

*Associated Press v. Southern Arkansas Radio Company*²⁷³ involved an acceleration clause in a contract between a radio station and a news service.²⁷⁴ The radio station argued that the clause, which was particularly harsh, was unconscionable.²⁷⁵ The court agreed, citing four reasons: (1) the radio station had not read the contract; (2) no other such services were available to the radio station; (3) the contract was a preprinted form; and

269. *Id.*

270. *Id.*

271. *Id.* at 1003-05.

272. See also *Ahern v. Knecht*, 563 N.E.2d 787, 792-93 (Ill. App. Ct. 1990) (ignoring the male-female power issues but considering not only the power implications of the noncomplaining party's greater knowledge and expertise but also the defendant's feelings of intimidation and the plaintiff's use of high-pressure sales techniques in deciding contract was unconscionable). But see *York v. Georgia-Pacific Corp.*, 585 F. Supp. 1265, 1277 (N.D. Miss. 1984) (finding no unconscionability even though the party claiming unconscionability was suffering from a major depressive episode). *Ahern* and *Landau* can be contrasted with the over-simplified bargaining power analysis of the trial court in *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988), analyzed in depth below. See *infra* notes 301-346 and accompanying text.

273. 809 S.W.2d 695 (Ark. Ct. App. 1991).

274. *Id.* at 696.

275. *Id.* at 697.

(4) the radio station was already in default under the terms of the contract at the time the contract was signed.²⁷⁶ Other facts support the court's implicit conclusion that there was a power imbalance between the parties: (1) the news service was one of only two such services in the entire nation, whereas a married couple owned and operated the radio station²⁷⁷ (indicating a possible disparity in the parties' *resource social custom power*); (2) the husband never finished college²⁷⁸ (which may have created imbalances in the parties' relative *status social custom power, information power, expert power, reference power, and personal qualities power*); and (3) the wife and husband represented themselves in the negotiations, whereas a large, well-known law firm represented the news service.²⁷⁹ The involvement of the law firm suggests a power disparity in the areas of *resource social custom power* (the news service could afford attorneys, whereas the couple could not) and *discourse power* (the attorneys probably had superior linguistic skills, contract drafting skills, and negotiating skills). The attorneys also may have enjoyed some *prestige social custom power* to the extent that attorneys working for large law firms enjoy such power.

Less obvious sources of power that probably were present but were not discussed in the court's opinion include the news service's more extensive experience and knowledge regarding such contracts (indicating *information power* and *expert power*) and the news service's likely *perceived trustworthiness power* because of the societal perception that news organizations perform a quasi-public service.

4. *The Power Model As a Tool for Analyzing Procedural Unconscionability*

I selected the facts of two very different, but well-known unconscionability cases—*Williams v. Walker-Thomas Furniture Company*²⁸⁰ and *In re Baby M*²⁸¹—to demonstrate, in greater

276. *Id.*

277. *Id.* at 695.

278. *Id.* at 696. There are no facts indicating the wife's educational background, an omission that itself may be a discourse about male power and social validation of men and social invalidation of women.

279. *Id.*

280. 350 F.2d 445 (D.C. Cir. 1965).

281. 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

depth, how the model can be used to enrich unconscionability power analysis. This Part does not purport to analyze or describe what the courts actually said about the parties' relative power; rather, this Part uses the facts of these cases as a springboard for application of the power model. Thus, this Part of the Article reads the cases as a text or story and attempts to analyze the power ramifications of the facts stated by the courts that heard these cases.

a. *Williams v. Walker-Thomas Furniture Company*²⁸²

Williams, generally regarded as the seminal unconscionability case, involved a series of household goods installment contracts between a woman, Williams, and a furniture store, Walker-Thomas.²⁸³ The contracts contained a "dragnet clause," a provision that entitled Walker-Thomas to hold a security interest in all goods Williams purchased during her multi-year relationship with Walker-Thomas until Williams paid off all of the items.²⁸⁴ Shortly after purchasing a stereo from Walker-Thomas, Williams defaulted on her payments.²⁸⁵ Walker-Thomas then sought to replevy all of the items that Williams ever had purchased from Walker-Thomas.²⁸⁶ Williams sued to have the clause deemed unconscionable and lost in the trial court, which denied her unconscionability claim without considering its substance.²⁸⁷ On appeal, the court of appeals remanded the case to the court below to consider the possible application of the doctrine of unconscionability.²⁸⁸ Accordingly, no published court analysis of the procedural unconscionability issues in the case exists. The fame of the case and the interesting story told in the opinions, however, make the case ripe for analysis in accordance with the power model suggested above.

Application of the power model reveals that the power between the parties was substantially skewed towards Walker-Thomas. First, Williams was separated from her husband, was

282. 350 F.2d 445 (D.C. Cir. 1965).

283. *Id.* at 447. See also *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 915 (D.C. Cir. 1964) (the lower court's opinion).

284. See 350 F.2d at 447.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 450.

raising seven children on her own, had limited education, and was on public assistance.²⁸⁹ As a woman and a single parent, Williams possessed less *enfranchisement power* and *resource social custom power* than Walker-Thomas.²⁹⁰ Her lack of employment means she had less *status social custom power*. It also may suggest that the Walker-Thomas employees with whom she dealt had *reference power* as well, although the two opinions do not provide sufficient information to assess whether Williams desired to be like the Walker-Thomas employees.

Second, there appear to be many indications in the facts that Walker-Thomas possessed vastly superior *information* and *expert power*. The contracts appear to have been drafted by a person with significant business and legal experience, such as an attorney, using legal and business vernacular throughout, including such terms as "hereafter," "pro rata," and "periodical installment payment."²⁹¹ The use of this terminology also enhanced Walker-Thomas' *discourse power*.

In contrast, Williams' poverty and lack of education suggest that she possessed little business or legal experience with which to analyze the transactions into which she was entering. Even her choice to enter into the transaction—a purchase of a \$514 stereo on a monthly welfare check of \$218²⁹²—suggests some flaws in her economic judgment. Finally, although Williams possessed little information and expertise regarding Walker-Thomas' business, Walker-Thomas knew exactly with whom it was dealing. The reverse side of the stereo contract listed the name of Williams' social worker and her \$218-per-month stipend from the government.²⁹³ Consequently, Walker-Thomas must have known that Walker-Thomas represented the only means by which Williams could acquire household goods. At least, Walker-Thomas clearly knew its bargaining adversary better than she knew Walker-Thomas. This knowledge gave Walker-Thomas additional *information power*.

The contract between Walker-Thomas and Williams con-

289. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 915 (D.C. Cir. 1964).

290. Of course, Williams' wealth, such as it was, was Williams' primary source of power over Walker-Thomas. She was a source of profit for Walker-Thomas.

291. 350 F.2d at 447.

292. 198 A.2d at 916.

293. *Id.*

ferred significant power on Walker-Thomas. The contract described the transaction as a "lease," rather than a sale.²⁹⁴ On its own, this term has three significant power vector ramifications. First, there is no evidence that Williams considered the transaction as anything other than what it appeared to be, a sale; hence, Walker-Thomas was engaging in an exercise of some *manipulation power*. Second, Walker-Thomas' understanding that the contract purported to be a lease, rather than a sale, gave Walker-Thomas *information power*. Third, this attempt to exercise control over the nature of the transaction was an exercise of *discourse power*.²⁹⁵

Walker-Thomas' greatest source of power appears to have been its *discourse power*. The contract's use of the term "lease" and of legal and business terminology conferred *discourse power* on Walker-Thomas. The clause at issue in *Williams* provided:

[T]he amount of each periodical installment payment to be made by (purchaser) to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by (purchaser) under such prior leases, bills or accounts; and all payments now and hereafter made by (purchaser) shall be credited pro rata on all outstanding leases, bills and accounts due the Company by (purchaser) at the time each such payment is made.²⁹⁶

In short, title to every purchase, new and old, remained in Walker-Thomas until Williams made full payment on all items. This clause had significant power ramifications.

The clause, which even the Court of Appeals described as "rather obscure,"²⁹⁷ is a commentary on Walker-Thomas' superior *information* and *discourse power*. It conferred *discourse power* on Walker-Thomas because only Walker-Thomas understood it. It also conferred *discourse power* by communicating that Walker-Thomas was in charge. Furthermore, the clause conferred *discourse power* by reinforcing and illustrating that Walker-Thomas understood the business world in ways Williams

294. 350 F.2d at 447.

295. It is not at all clear that Walker-Thomas' attempt to elevate form over substance in defining the transaction would have succeeded had the issue been litigated. See generally U.C.C. § 9-102 (1996) (indicating that the provisions of Article 9 apply to a contract creating a security interest in personal property "regardless of [the contract's] form").

296. 350 F.2d at 447 (emphasis added).

297. *Id.*

did not. In fact, the evidence indicates that (1) Williams misunderstood her rights under the contracts, (2) she did not read the actual contract documents, and (3) the contract documents were never explained to her.²⁹⁸

Other sources of *discourse power* to Walker-Thomas were Walker-Thomas's drafting of the contract, the length of the contracts,²⁹⁹ the length of the clause at issue, and the use of very fine print in the clause.³⁰⁰ Clearly, Walker-Thomas controlled the agenda and scope of the parties' discussions.

These facts and others detailed below also demonstrate that Walker-Thomas exercised *manipulation power*. The unusual circumstance of Williams agreeing to pay so much for a stereo suggests the exercise of such power. Walker-Thomas' use of excessively complicated terminology in the key paragraph, Williams' lack of understanding of the contract, and the lack of explanation support this thesis. The possibility seems almost a certainty in light of the fact that: (1) most of Williams' purchases were made at her home, (2) the contracts were signed "in blank," with the key terms filled in later by Walker-Thomas, (3) the paragraph at issue, providing for pro-rated payment of purchases she made, was in "extremely fine print," and (4) she was not provided with copies of any of the contracts.³⁰¹ It appears that Walker-Thomas deliberately kept Williams in the dark about the contracts she was making to prevent her from making a reasoned decision. Clearly, had the trial court analyzed the procedural unconscionability issue, it would have concluded that there was a gross disparity in the parties' relative bargaining power.

b. In Re Baby M

In Re Baby M is the famous case arising out of a surrogate parenting contract between Mary Beth Whitehead and William and Elizabeth Stern.³⁰² Whitehead agreed to be impregnated by William Stern through artificial insemination, and William Stern

298. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 915 (D.C. Cir. 1964).

299. The contract documents were six inches thick. *Id.*

300. *Id.*

301. *Id.*

302. 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

agreed to pay Whitehead \$10,000.³⁰³ Accordingly, Whitehead was inseminated and carried Baby M to term.³⁰⁴ After Baby M was born, Whitehead realized she did not want to part with Baby M and the lawsuit ensued.³⁰⁵ The trial court held, in pertinent part, that the contract did not violate public policy and was not unconscionable.³⁰⁶ The trial court also terminated Whitehead's parental rights, finding that Baby M's best interests would be served by giving custody to the Sterns.³⁰⁷ The New Jersey Supreme Court held, however, that the contract was illegal and violated public policy.³⁰⁸ The court also held that the trial court improperly terminated Whitehead's parental rights³⁰⁹ and failed to consider adequately Whitehead's visitation rights.³¹⁰ Finally, the court affirmed the trial court's conclusion that Baby M's best interests would be served by having her remain with the Sterns.³¹¹ The New Jersey Supreme Court did not address the unconscionability issue.

Although the New Jersey Supreme Court ultimately did not resolve the case based on unconscionability, the issue remains an interesting one. The two opinions of *In Re Baby M* identify a large number of facts that could have been used to analyze the complex power relationship between the Sterns and Whitehead. Application of the power model reveals that the balance of power tilted significantly in favor of the Sterns. Even where Whitehead possessed power, the Sterns had substantial offsetting power.

As a man, Mr. Stern possessed gender *enfranchisement power*. Furthermore, from the facts as a whole, the Sterns probably possessed greater social class *enfranchisement power* than did

303. *In re Baby M*, 537 A.2d 1227, 1265-69 (N.J. 1988). Courts refer to such contracts as "surrogate parenting contracts." See, e.g., *In re Baby M*, 525 A.2d at 1137. A surrogate parenting contract is defined as a contract between a man and a woman or a couple and a woman that calls for the woman, hereinafter the "gestator," to be "artificially inseminated or implanted with a fertilized egg, carry the child to term and, after delivery, relinquish all parental rights and give the child to its natural father who was, of course, the sperm donor." *Id.*

304. *In re Baby M*, 537 A.2d at 1236.

305. *Id.* at 1236-38.

306. 525 A.2d at 1159-60.

307. *Id.* at 1170.

308. 537 A.2d at 1240-50.

309. *Id.* at 1252.

310. *Id.* at 1261-63.

311. *Id.* at 1258.

Whitehead.³¹² The Sterns also possessed much more *social custom power* than did Whitehead. The Sterns possessed more *age social custom power*; they were in their forties, whereas Whitehead was in her twenties.³¹³ In addition, the Sterns also possessed *formal authority, prestige, and norms and values social custom power*, which Whitehead lacked. The Sterns had doctoral degrees (Mrs. Stern also had a medical degree), whereas Whitehead never graduated from high school.³¹⁴ These facts suggest that the Sterns not only had greater education status, but also had power from their titles (“doctor”), which conferred *norms and values social custom power, prestige, and formal authority*. In contrast, Whitehead, who was not working outside her home, had only ever worked for a pizza-deli and her brother’s delicatessen.³¹⁵ Further, the related norm of deference to medical doctors conferred additional power on Mrs. Stern.

It might be argued that a different social norm, in favor of women not working outside the home, conferred power on Whitehead. However, this social norm actually may be a source of disempowerment to Whitehead or, at least, not a particularly efficacious source of power. People who do not work outside the home and therefore depend on spouses for financial support tend to lack *resource social custom power* and *prestige social custom power*. Finally, Whitehead testified that she was motivated to become a surrogate by the Sterns’ *responsibility oughtness social custom power* (the idea that one should help those who need help). Whitehead testified that “she was motivated to join the (surrogacy) program in the hopes of ‘giving the most loving gift of happiness to an unfortunate couple.’”³¹⁶

The parties’ relative *resource social custom power* is much more complex. It appears each party possessed a resource the other wanted; Whitehead possessed the childbearing capacity that the Sterns wanted, and the Sterns possessed the wealth that Whitehead lacked. No doubt Whitehead’s ability to carry the

312. It is difficult, without additional information, to reach a certain conclusion regarding the parties’ relative social class. The parties’ disparate incomes, educational achievements, career, and life histories (Whitehead married at sixteen, whereas the Sterns married while in graduate school, 525 A.2d at 1138, 1140) are significant evidence of a social class difference.

313. 525 A.2d 1128, 1138, 1140 (N.J. Super. Ct. Ch. Div. 1987).

314. *Id.*

315. *Id.* at 1140-41.

316. *Id.* at 1142.

Sterns' future child conferred significant power on Whitehead. However, the Whiteheads had fairly grave financial problems. They declared bankruptcy a few years before the parties entered into negotiations, and, by the time the suit was filed, were in default on two mortgages.³¹⁷ Also, Mr. Whitehead had held seven different jobs in the prior thirteen years and relied on unemployment compensation at least once as his sole source of income.³¹⁸ Although the New Jersey Supreme Court rejected the idea that this contract involved an exploitation of the poor by the rich, the New Jersey Supreme Court suggested the parties' disparate wealth played a part.³¹⁹ The court also suggested that a woman's need for money may make her assent to a surrogacy contract less than voluntary.³²⁰ It seems likely that Whitehead's ability to maximize her *resource social custom power* probably was inhibited by her lack of other power sources, particularly her relative lack of *information, expert, personal qualities, and discourse power*. On balance, the Sterns had greater useable *resource social custom power*.³²¹

The Sterns clearly possessed greater *expert* and *information power*. Whitehead possessed some pertinent knowledge and experience; she had carried two of her own children, had attempted to become a surrogate on one prior occasion, and had consulted with an attorney regarding that prior attempt.³²² The Sterns, however, possessed even greater pertinent knowledge; therefore, Whitehead's knowledge was not a source of significant and efficacious *information power*. As a medical doctor, Mrs. Stern had greater depth and breadth of technical knowledge regarding pregnancy and childbirth than Whitehead.

Evidence of Mrs. Stern's greater *information* and *expert power* can be found in the events following contract formation and successful impregnation of Whitehead.³²³ During the course

317. *Id.* at 1140-41.

318. *Id.*

319. 537 A.2d 1227, 1249 (N.J. 1988).

320. *Id.* at 1241.

321. Another commentator might conclude that, given the Sterns' strong desire for a child and need for a surrogate to carry that child, Whitehead possessed at least as much *resource social custom power* as the Sterns possessed.

322. 525 A.2d at 1140, 1142.

323. Of course, postformation events are of only limited relevance to the parties' pre-formation power relationship. However, they do give clues of operations of power present at the time of contract formation.

of the Baby M pregnancy, Mrs. Stern “*insisted* that Mrs. Whitehead undergo amniocentesis, take a prescription pharmaceutical . . . and take certain precautions when Mrs. Whitehead reported an elevation in blood pressure”³²⁴ The court’s use of the word “insisted” and the fact that the parties’ relationship “deteriorated” after these events³²⁵ suggests that the Sterns’ will overcame any disinclination on the part of Whitehead. There is also evidence that Whitehead did not understand the benefits she was to receive nor the risks she was assuming under the contract,³²⁶ suggesting that Whitehead’s *information power* was limited.

Whitehead’s consultation with an attorney did not confer much power on her. She consulted with an attorney only because the surrogacy program required it; and she did not consult with an attorney in connection with her contract with the Sterns.³²⁷ In any event, by the terms of the contract, the Sterns were responsible for paying any attorney Whitehead consulted.³²⁸ Consequently, Whitehead may have logically concluded that any attorney she consulted would not necessarily act solely with her best interests in mind. Moreover, Whitehead’s threat to take Baby M out of the country and the fact that she disappeared with Baby M for 87 days³²⁹ indicate Whitehead’s lack of faith in the legal system.³³⁰ Finally, the Sterns’ greater wealth and business experience also resulted in their greater financial and money management *information power*.

The Sterns’ personal qualities were also a source of power for the Sterns over Whitehead. The Sterns’ educational and career achievements bespeak a significant amount of determination, ambition, and drive. The trial court also found that the Sterns were mentally healthy and had close friendships and neighbors.³³¹ In contrast, the trial court found that Whitehead

324. 525 A.2d at 1143-44 (emphasis added).

325. *Id.*

326. *Id.* at 1142.

327. *Id.* at 1142-43.

328. *Id.* at 1160.

329. *Id.* at 1145.

330. On the other hand, at Whitehead’s request, the attorney did negotiate some minor changes in the terms of Whitehead’s first surrogacy contract. *Id.* at 1142.

331. *Id.* at 1140, 1167. *Personal qualities power* is socially constructed. The suggestion that the Sterns possessed greater *personal qualities power* merely reflects that the Sterns possessed more of those qualities that society tends to value.

was suffering from one or more emotional problems (one expert witness testified her problem was so severe that she suffered from an emotional disorder) and that her husband was an alcoholic.³³²

It is worth noting that the suggestion by the trial court and some of the expert witnesses that Whitehead had emotional problems may have been the product of significant social construction. First, as the New Jersey Supreme Court indicates, Mrs. Stern's fears of pregnancy substantially exceeded the actual risk of harm; the risk that pregnancy would have caused her blindness or paraplegia was minimal, according to medical authorities.³³³ Thus, her decision not to bear children could be seen as reflecting some neurosis on her part. Likewise, Mr. Stern's fervent desire "to continue his bloodline"³³⁴ could be viewed as self-obsessed. The fact that neither Stern was diagnosed with an emotional disorder may reflect the Sterns' class affiliations with the psychologists and psychiatrists evaluating the parties. Moreover, as the supreme court states, "Mrs. Whitehead was rather harshly judged . . . by some of the experts."³³⁵ The New Jersey Supreme Court argues that her actions were not so irrational in light of her experience: she was told that she was a bad mother and had to part with a child to whom she had become attached.³³⁶ Thus, some of the Sterns' *personal qualities power* may have stemmed from the fact that their neuroses were of a type sanctioned by mental health professionals, whereas Whitehead's neuroses were not.

The Sterns may have used *manipulation power* in their dealings with Whitehead. Although the contract describes Mrs. Stern as the "infertile wife," the Sterns do not appear to have disclosed or explained the significance of Mrs. Stern's multiple sclerosis. The Sterns certainly did not disclose that the fears that led Mrs. Stern to forgo child-bearing were based on minimal medical risks. Thus, the Sterns used their *manipulation power* to induce Whitehead to confer *oughtness social custom power* on them.

Perhaps the Sterns' most significant source of power was

332. *Id.* at 1141, 1150, 1153.

333. 537 A.2d 1227, 1235 (N.J. 1988).

334. *Id.*

335. *Id.* at 1259.

336. *Id.*

their *discourse power*. Before Whitehead ever met the Sterns, she was given a message that the prospective parents, and not she, were in control of the agenda. First, Whitehead learned of the surrogacy program from a newspaper advertisement,³³⁷ which read, in part, "SURROGATE MOTHER WANTED. Couple unable to have child willing to pay \$10,000 fee and expenses to carry *husband's* child"³³⁸ This advertisement communicated two things: (1) others had set the fee at \$10,000,³³⁹ and (2) the child unquestionably would be the husband's.

The structure of the parties' relationship as employer and employee was recapitulated in the process by which the parties were brought together. The Sterns were given resumes ("biographical data") regarding potential "candidates" and attempted to schedule "interviews" with candidates.³⁴⁰ The use of a contract, particularly a form contract,³⁴¹ also suggests an employment relationship and therefore is a discourse about Whitehead's lack of power. Taken together, these structural matters evidence that the Sterns, not Whitehead, controlled the agenda and setting for the parties' interactions.

Likewise, the terms and language of the contract were sources of *discourse power* to the Sterns. By the terms of the contract, in exchange for \$10,000 plus payment of medical bills and other related expenses,³⁴² Whitehead endured psychological testing and relinquished all rights to any child, to control the course of her pregnancy, to terminate the pregnancy because of birth defects, and to assess the wisdom of undergoing amniocentesis.³⁴³ Whitehead also expressly assumed the risks of pregnancy and childbirth.³⁴⁴

In short, for a relatively small sum of money, Whitehead assumed all the risk and the Sterns held all the control. The mandatory psychological testing and amniocenteses were designed to give the Sterns *information power* over Whitehead,

337. 525 A.2d 1128, 1162 (N.J. Super. Ct. Ch. Div. 1987).

338. *Id.* (emphasis added).

339. Whitehead never disputed the amount, even though amicus later characterized it as "so low as to be *unconscionable*." *Id.* at 1160.

340. *Id.* at 1142.

341. *Id.*

342. These terms are an almost perfect recapitulation of standard employment contracts, salary plus medical insurance.

343. 525 A.2d at 1142.

344. *Id.*

and, more importantly, communicate that Whitehead was the only party about whom fitness was a relevant concern. Given that Whitehead was to supply half of the biological make-up of the child, had Whitehead possessed any power, the contract might have contained a clause subjecting the Sterns to psychological testing before Whitehead would allow them to raise her child. By subjecting only Whitehead to testing, the contract communicated that the Sterns were in control and conferred additional power on them.

Finally, the contract language communicated a power message slanted toward the Sterns. In accordance with standard terminology, the contract referred to Whitehead as "Surrogate," rather than "Mother," "Biological Mother," or "Birth Mother"; and referred to Mr. Stern as "Natural Father," rather than "Sperm Donor."³⁴⁵ These language choices communicate a number of things about the parties' power. The choice of the word "Surrogate" not only ignored the prospective child's biological make-up entirely, but also objectified Whitehead by deflating the significance of her role to that of a "stand-in." The term "Surrogate" must be contrasted with Mr. Stern's title, "Natural Father," especially in light of the fact that Mrs. Stern was going to be primarily responsible for child care.³⁴⁶ Taken together, the message is unmistakable: Mr. Stern matters, but Whitehead is merely a tool brought in to solve a problem. This choice of language, therefore, was a source of power, a means by which power was imposed, and a recapitulation of the parties' power relationship.³⁴⁷

c. *Summary: Application of the Power Model to Unconscionability Analysis*

The question of whether procedural unconscionability infected a particular contractual relationship is a complex one. Analysis of *Williams* and *Baby M* reveals that power operates in

345. 537 A.2d 1227, 1265-70 (N.J. 1988). The contract referred to Mrs. Stern as the "Infertile Wife," 525 A.2d at 1162, which may be a discourse about Mrs. Stern somehow being blamed for her inability to safely bear children. This issue is beyond the scope of the Article.

346. 525 A.2d at 1148.

347. Terms of a contract may confer power by establishing the boundaries within which the parties are interacting. This possibility is especially likely here, where Whitehead previously had seen and negotiated a virtually identical contract before she met the Sterns.

human relationships in multifarious and often unseen ways. Power can be inscribed in a word, an advertisement, a title, and wealth. It even may exist in the possession of acceptable neuroses.

Courts have been slow to recognize and confront the actual operation of power in the world. Instead, courts continue to wed themselves to formulations of procedural unconscionability of only minimal substance. Courts that limit procedural unconscionability to contracts for necessities between individuals and monopolies (Contract of Adhesion Approach) or to bargains not knowingly assented to (Knowing Assent Approach) miss the issue altogether. Even courts applying the Multivariable Approach ignore the most important operations of power, those not obvious or observable.

The parties themselves may recognize obvious operations of power, such as commercial strength (*resource social custom power*). The model described above, however, allows both parties and courts to perceive the operation of other, less visible but equally important kinds of power. It is not always easy to recognize the operation of power vectors such as *enfranchisement power*, *social custom power*, *reference power*, *perceived trustworthiness power*, *personal qualities power*, *manipulation power*, and *discourse power*. Thus, the above model operates like a microscope; it reveals information otherwise invisible.

Using this tool, parties and courts have the information they need to reach better results. Parties can arm themselves with *information power* derived from recognizing power assertions of the persons with whom they deal. Courts can use the model to achieve better results. In short, the model can improve how courts and bargaining parties assess contractual power imbalances that might produce unfair bargains.

B. Arbitration as a Means of Dispute Resolution

1. Introduction

For several years, commentators, courts, and others have enthusiastically praised the idea of ADR in all of its forms.³⁴⁸ Some, including myself, however, have questioned the value of

348. See, e.g., Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67; Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV.

one or more forms of ADR.³⁴⁹ In an earlier Article, I catalog the criticisms that have been made regarding ADR in general and arbitration in particular, and add my own criticisms.³⁵⁰

Edward Brunet argues that all forms of ADR, including arbitration, erode the guidance function of laws.³⁵¹ Brunet also argues that ADR lacks the essential qualities and procedures necessary for "quality decision making."³⁵²

Brunet's thesis and anecdotal evidence is all we have to assess the efficacy of arbitration as a means of dispute resolution. Arbitration occurs in private.³⁵³ Only the parties attend, there is no court reporter, and the arbitrator's conclusions of law and fact are final and not reviewable on appeal.³⁵⁴ There is no way

424 (1986); Alan S. Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005 (1993).

349. See, e.g., Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Delgado et al., *supra* note 70, at 1388-89; Grillo, *supra* note 62; Richard Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 14, 1994, at 53; Michael Hunter Schwartz, *From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration*, 22 W. STATE U. L. REV. 1 (1994).

350. Schwartz, *supra* note 349, at 13-24. I argue that arbitration's deficiencies include: (1) inadequate claim and defense disclosure, (2) insufficient exchange of evidence, (3) lack of evidentiary limits on the presentation of the parties' cases, (4) lack of qualifications, control, or oversight of arbitrators, (5) loss of the right to a jury trial, (6) ability of arbitrators to create their own evidence, (7) loss of the efficiency benefits of consolidation and party joinder, (8) greater potential for bias, (9) loss of the value to society from the creation of precedent, (10) lack of legal standards, and (11) lack of review of arbitral results. *Id.* Ultimately, I conclude that some of these deficiencies cannot be remedied at all, and that those deficiencies that can be remedied can be fixed only by sacrificing the asserted benefits of arbitration. *Id.* at 35.

351. See Brunet, *supra* note 349, at 23.

352. *Id.* at 2-26, 33-35. A recent article in the *Los Angeles Times* describes the arbitration practices of Kaiser Foundation Health Plan. Michael A. Hiltzik & David R. Olmos, *'Kaiser Justice' System's Fairness is Questioned*, L.A. TIMES, Aug. 30, 1995, at A1. The article describes what California lawyers call "Kaiser Justice." Kaiser, perhaps the largest user of arbitration services in California, opens an estimated 700 medical malpractice arbitration cases each year. *Id.* at A12. Kaiser and its attorneys keep close tabs on the decisions of arbitrators who have sat on their cases. Furthermore, some arbitrators have heard more than twenty cases involving Kaiser. *Id.* Critics argue that the volume of Kaiser's cases gives arbitrators a business incentive to decide cases in favor of Kaiser. *Id.* The possibility that such an incentive exists is supported by an Alameda County trial court judge's conclusion that the entire system by which Kaiser conducts its medical malpractice arbitrations is "fraudulent, unconscionable and corrupt . . . in general." *Id.* at A21. Interestingly, according to the *Times*, Kaiser arbitrations actually take longer to complete than court trials. *Id.* at A12. Kaiser's practices support Brunet's assertion that ADR produces poor-quality decisions.

353. Rau, *supra* note 348, at 2029.

354. See Schwartz, *supra* note 349, at 22-23.

to test the quality of arbitrators' decisions.

Consequently, the *process* of arbitration needs examination. Application of the above-described power model to the arbitration process reveals that the concerns about arbitration stem mostly from power and empowerment deficiencies of the arbitration process. Arbitration greatly inflates the arbitrator's power, while greatly deflating the participants' power.

In some cases, this distortion of power may be irrelevant; the only potential for harm stems from the parties' experience of the power imbalance. A person who experiences a power imbalance may become depressed, develop a sense of learned helplessness, and abuse others less powerful than herself.³⁵⁵ The lack of restraints on arbitrators also creates a substantial risk of undesirable results, and increases the likelihood that arbitrators will act on prejudice.³⁵⁶ At a minimum, Delgado and his colleagues' observations about bias in ADR lend credence to Brunet's fear that arbitrators may make poor decisions and Richard Reuben's concern that arbitrators make decisions based on their own economic self-interest and desire to obtain return business.³⁵⁷

2. *Past Scholarly Analysis of Power in Arbitration*

There has been little or no explicit attempt to analyze power as it bears on arbitration. A few commentators, however, have raised concerns that have power ramifications.

Owen Fiss' oft-cited *Against Settlement* discusses the issue of power explicitly.³⁵⁸ Fiss argues that those who possess less power due primarily to a lack of economic resources select "settlement," including arbitration, because they possess less power.³⁵⁹ Delgado and his colleagues also confront some power issues as they bear on all forms of ADR, including arbitration.³⁶⁰ They argue that the lack of restraints on ADR decision makers stems from the informality and intimacy of ADR, and the lack of overt references in ADR processes to social values such as fair-

355. See *supra* notes 81-86 and accompanying text.

356. Delgado et al., *supra* note 70, at 1388-89. The lack of restraints allows the "human propensity to prejudge and make irrational categorizations" to flourish. *Id.*

357. See, Reuben, *supra* note 349, at 54.

358. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

359. *Id.* at 1073-78.

360. Delgado et al., *supra* note 70.

ness and equality.³⁶¹ This concern recognizes the deficiencies in the *social norms and values social custom power* restraints on ADR decision makers.

Although Fiss and Delgado et al. have considered some general power ramifications of ADR, the specific power ramifications of the arbitration process have not been addressed. The power model described in Part III of this Article offers some different and unique insights into arbitration as a means of dispute resolution.

3. *The Power Model Applied to Arbitration as a Means of Dispute Resolution*

This subpart addresses two questions: (1) What can the power model tell us about arbitration as a means of dispute resolution? and (2) To what extent, if any, does the arbitration process empower its users? The answer to both questions appears to be that arbitration, perhaps uniquely among all forms of dispute resolution, tends to confer virtually unchecked power on the arbitrator while disempowering the parties. Moreover, most of the commentators' criticisms of arbitration described above derive from the power, empowerment, and disempowerment ramifications of the arbitration process.

At the outset, it is worth noting that there are power and empowerment issues regarding arbitration that are unrelated to the power and empowerment of the arbitrator and the parties.³⁶² The process and progress of the recent arbitration explosion has systemic power implications. The vast increase in the criticism of court adjudication can be seen as the dynamite that has caused the arbitration explosion. The court system has responded to the threat to its dominance by defining and confining the solution—arbitration (or, more generally, ADR).³⁶³ This process communicates a message: genuine reform of the legal system is not needed; arbitration (ADR) will solve our problems. In fact, at-

361. *Id.* at 1387-89. In contrast, in adjudication, social values of fairness and equality are evoked by the flag, the courtroom setting, and the judge in her robe.

362. As the Kaiser experience demonstrates, arbitration clauses often are imposed on less powerful persons by more powerful others such as Kaiser. See Hiltzik & Olmos, *supra* note 352, at A12 (stating that Kaiser "mandates" arbitration).

363. Schwartz, *supra* note 349, at 22, 35.

torneys and judges increasingly serve as arbitrators.³⁶⁴ Thus, the increased use of arbitration to resolve disputes can be seen as the means by which attorneys and judges have preserved their power by controlling the societal response to the threat posed by criticism of court adjudication.

4. *Vectors of Power in the Arbitration Process*

Social custom power plays a large role in the arbitration process. The arbitrator derives *social custom power* from various sources. First, the arbitrator's title and status as decision maker confer *prestige social custom power* and *formal authority social custom power*.

Surprisingly, arbitrators' *formal authority social custom power* may exceed that of judges. The power of judges in court adjudication is limited by several forces: (1) precedent, (2) appellate review, (3) written opinions, (4) competency review, and (5) selection and re-election processes. Some of these limits transfer power to the parties, who can challenge the judge's decisions by appeal and challenge a judge's competency by complaining to the appropriate state agency. These sources of *formal authority social custom power* and *resource social custom power* are not particularly efficacious; however, they do confer some power to the parties.

The foregoing limits on judges' power either do not apply to an arbitrator or apply only on a very limited basis. First, arbitrators are not required to follow precedent; in fact, both commentators and courts express a sentiment that arbitrators should *not* follow precedent but, rather, should follow their own sense of natural justice.³⁶⁵ The arbitrator's sense of natural justice is either no standard at all for decision making or is an extremely limited standard. The standard confers virtually unlimited discretion (and therefore power) on the arbitrator.

Second, appellate review of arbitration is extremely limited.

364. See generally Louis J. Weber, *Court-Referred ADR and the Lawyer-Mediator: In Service of Whom?*, 46 SMU L. REV. 2113, 2115-16 (1993).

365. See *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 11, 832 P.2d 899, 904 (1992); Korn, *supra* note 348, at 102. See also *Fairview Hosp. Ass'n v. Pacific Bldg. Serv. & Hosp. & Inst. Employees Union Local No. 113*, 64 N.W.2d 16, 30 (Minn. 1954); *Flood v. Caron*, 441 A.2d 733, 735 (N.H. 1982); *Hoboken Mfrs.' R.R. Co. v. Hoboken R.R. Warehouse & Steamship Connecting Co.*, 27 A.2d 150, 155 (N.J. Super. Ct. Ch. Div. 1942), *aff'd*, 31 A.2d 801 (N.J. 1943).

In most jurisdictions, an appellate court may overturn an arbitration decision only on a showing of fraud, corruption, or undue means.³⁶⁶ Appellate courts do not review the arbitrator's conclusions of fact or law, her interpretation of contract, or her application of law to fact, no matter how egregious an error may be.³⁶⁷ This source of power for the arbitrator is a source of disempowerment for the parties. The arbitrator is not fettered by the threat of review (more *formal authority social custom power* for the arbitrator), and the parties know they cannot challenge the arbitrator's decision (less *formal authority social custom power* to the parties).³⁶⁸

The foregoing sources of *formal authority social custom power* disempower the parties in an unexpected way. In court adjudication, the presence of legal standards and the threat of appellate review combine to give some predictability to the result. Case results, of course, depend on factors such as the indefiniteness of precedent and social policy and the problems of proof, including witness credibility and reliable documentation. However, precedent does influence the parties in their settlement decision making. In arbitration, the parties lack this source of *information power*.

Third, unlike a judge, an arbitrator need not explain the reasons for her decision.³⁶⁹ In fact, the American Arbitration Asso-

366. See, e.g., *Moncharsh*, 3 Cal. 4th at 21-22, 832 P.2d at 911. See also *Ahtna, Inc. v. Ebasco Constructors, Inc.*, 894 P.2d 657, 661 (Alaska 1995); *Fischer v. Guaranteed Concrete Co.*, 151 N.W.2d 266, 270 (Minn. 1967); *Graber v. Comstock Bank*, 905 P.2d 1112, 1115 (Nev. 1995); *Bailey & Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex. Ct. App. 1987); *Boyd v. Davis*, 127 Wash. 2d 256, 897 P.2d 1239, 1244 (1995) (Utter, J., concurring); *Riverton Valley Elec. Ass'n v. Pacific Power & Light*, 391 P.2d 489, 500 (Wyo. 1964).

367. See, e.g., *Moncharsh*, 3 Cal. 4th at 21-22, 832 P.2d at 911; *Columbine Valley Constr. Co. v. Board of Directors, Roaring Fork Sch. Dist.* RE-1J, 626 P.2d 686, 695 (Colo. 1981); *O & G/O'Connell Joint Venture v. Chase Family Ltd. Partnership No. 3*, 523 A.2d 1271, 1281 (Conn. 1987); *Graber*, 905 P.2d at 1116. See also Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 366-67 (1995).

368. The finality of arbitral awards distinguishes arbitration from mediation as a form of dispute resolution. Although mediation awards cannot be subjected to appellate review, a mediator's recommendations are subject to approval by each of the parties. Thus, unlike the parties to an arbitration, the parties to a mediation retain some power over their fate, the power to say "no."

369. See, e.g., *Sapp v. Barenfeld*, 34 Cal. 2d 515, 522, 212 P.2d 233, 239 (1949); *Riverton*, 391 P.2d at 500. See generally Lynn Katzler, Comment, *Should Mandatory Written Opinions Be Required in All Securities Arbitrations?: The Practical and Legal Implications to the Securities Industry*, 45 AM. U. L. REV. 151, 164-66 (1995).

ciation (AAA) tells its arbitrators that they should *not* explain their decisions in order to insulate their decisions from review.³⁷⁰ This factor creates another freedom from restriction for the arbitrator, which increases her *formal authority social custom power*. The lack of scrutiny and restriction on the arbitrator's decision, combined with the privacy and informality of arbitration, not only increases the likelihood that the arbitrator will indulge her biases and prejudices,³⁷¹ but also decreases the parties' *formal authority social custom power* and *resource social custom power*.

Fourth, arbitrators have no established ethical obligations, and there is no existing process for reviewing the competency of arbitrators or investigating complaints.³⁷² Moreover, there is no requirement that a written record of an arbitral hearing be made. In fact, arbitrators are required and encouraged to make sure the disputes before them remain secret.³⁷³ Therefore, the only existing check on arbitrator honesty is the arbitrator herself.³⁷⁴ Thus, the parties have no true outlet for their complaints and suffer a concomitant loss of their already limited *formal authority social custom power* and *resource social custom power*.

Fifth, although the power to select an arbitrator is a unique source of *formal authority social custom power*, that power is not as efficacious as it first appears. Not only does this power cease once the selection is made, but also the parties' choice of an arbitrator often is limited. If the parties' contract does not specify a method of selecting an arbitrator, the judge will select one for them.³⁷⁵ If the parties have adopted the AAA's rules, a very common provision in contractual arbitration clauses, selection of arbitrators is particularly truncated. The AAA selects the arbitrator in matters involving less than \$50,000.³⁷⁶ In matters involving more than \$50,000, the AAA sends each party a short

370. Rau, *supra* note 348, at 2028 n.85.

371. See *supra* notes 331-333 and accompanying text.

372. See Reuben, *supra* note 349, at 56-57.

373. See generally Phillip Rothman, *Psst, Please Keep it Confidential: Arbitration Makes it Possible*, 49 DISP. RESOL. J., Sept. 1994, at 69.

374. Arbitrators are expected to self-monitor conflicts of interest. Reuben, *supra* note 349, at 55.

375. See, e.g., CAL. CIV. PROC. CODE § 1281.6 (West 1994); FLA. STAT. ANN. § 682.04 (West 1990); IOWA CODE ANN. § 679A.3 (West 1987); MASS. GEN. LAWS ANN. Ch. 251, § 3 (West 1988); OR. REV. STAT. § 36.320 (1995); WASH. REV. CODE ANN. § 7.04.050 (West 1992).

376. AMERICAN ARB. ASS'N CONSTR. INDUS. ARB. RULES § 54(a), at 19 (1993).

list from which to choose their arbitrator.³⁷⁷ The AAA makes no mention of a right to refuse all of the arbitrators.³⁷⁸ These facts are particularly significant because there are no legally required qualifications to be or hold oneself out as an arbitrator.³⁷⁹ Consequently, the arbitrator selection process actually may be a source of disempowerment for the parties because their choices are either very limited or nonexistent.

Norms and values social custom power also plays an important and complex role in the power ramifications of arbitration. The arbitrator gains power because the informality and secrecy of arbitration limit the effectiveness of the usual constraints that norms and values place on a decision maker. As Delgado et al. argue, arbitrators are more likely to prejudge and to be biased, racist, or sexist than are judges or juries.³⁸⁰ Moreover, unlike a judge, an arbitrator takes no oath.³⁸¹ From a power standpoint, these facts indicate arbitrators possess greater power than judges because arbitrators are not restrained by social values and norms and arbitrating parties possess less power than they would have had if they had resorted to court adjudication.³⁸²

Like a judge or jury, an arbitrator likely is perceived by the parties as trustworthy. The lack of social restraint suggested by Delgado et al. implies that, while the arbitrator possesses significant *perceived trustworthiness power*, the parties may lack the *information power* to know that the arbitration process itself fosters arbitrator bias.

Arbitrators possess a substantial amount of *information power*. In many arbitrations, the arbitrator possesses relevant knowledge of the industry or trade that is the context for the dispute.³⁸³ In fact, the arbitrator may be perceived as an expert in the field that is the subject of the parties' dispute. The fact that the parties desire this expertise does not change the fact that

377. *Id.* § 13, at 9.

378. *See, e.g., id.*

379. *See, e.g.,* Robinson v. Superior Ct., 35 Cal. 2d 379, 387, 218 P.2d 10, 16 (1950).

380. *See* Delgado et al., *supra* note 70, at 1388-89.

381. *See, e.g.,* 6 Cal. Jur. § 36, at 77 (3d. ed. 1988).

382. This issue is one of degree. As Gabel and Harris argue, the formality of adjudication legitimizes the systematic repression of those who lack power by causing them to consider themselves beneath those who possess power. Gabel & Harris, *supra* note 69, at 372-73.

383. Rau, *supra* note 348, at 2029.

it diminishes a usual source of party empowerment present in court adjudication, *expert power*.

Moreover, the arbitrator can obtain additional information without any participation by the parties, a source of power that a judge lacks. In adjudication, the parties control the flow of information to the decision maker. In contrast, at least in California, an arbitrator may conduct an independent investigation of the facts, outside the presence of the parties and their counsel.³⁸⁴ The arbitrator also may consult with technical experts of her choosing³⁸⁵ and seek advice on legal issues from a disinterested attorney.³⁸⁶

These sources of power can supplement the arbitrator's already extensive *discourse power* because the arbitrator is engaged in a form of agenda-setting. In addition, the arbitrator, like a judge, sets the scene for the parties' hearing. She controls the parties' and attorneys' conduct by her intermediate rulings and decisions, and she may even possess a limited contempt power.³⁸⁷ She controls the number of arbitral hearings, in addition to the duration and progress of each day of the hearing.³⁸⁸ Unlike a judge, the arbitrator also may control the physical positioning of the parties, the formality of the proceedings, the manner in which evidence is presented (*e.g.*, by narrative or by question and answer), whether the parties and witnesses swear an oath, and even the location of the arbitral hearing.³⁸⁹

Like a judge, the arbitrator rules on evidentiary issues. However, unlike a judge, the arbitrator may admit evidence that would be barred under current legal standards.³⁹⁰ This discretion, widely exercised in arbitral hearings, also confers *discourse*

384. See *Canadian Indem. Co. v. Ohm*, 271 Cal. App. 2d 703, 708-09, 76 Cal. Rptr. 902, 905 (1969). But see *Fred J. Brotherton, Inc. v. Kreielsheimer*, 83 A.2d 707, 709 (N.J. 1951); *Goldfinger v. Lisker*, 500 N.E.2d 857, 864 (N.Y. 1986).

385. See, *e.g.*, *Twin Lakes Reservoir & Canal Co. v. Platt Rogers, Inc.* 147 P.2d 828, 833 (Colo. 1944); *Gord v. F.S. Harmon & Co.*, 188 Wash. 134, 61 P.2d 1294, 1297 (1936).

386. *Griffith Co. v. San Diego College for Women*, 45 Cal. 2d 501, 506-07, 289 P.2d 476, 479 (1955). See also *Litman v. Holtzman*, 149 A.2d 385, 390 (Md. 1959).

387. See CAL. CIV. PROC. CODE § 1282.6 (West 1994).

388. See, *e.g.*, *id.* § 1282.2(a).

389. A judge possesses a crucial source of power that an arbitrator lacks, direct access to *force power*. See generally *supra* note 94 and accompanying text. The arbitrator can obtain access to force only if a judge becomes involved.

390. See, *e.g.*, CAL. CIV. PROC. CODE § 1282.2(d) (West 1994); *O & G/O'Connell Joint Venture v. Chase Family Ltd. Partnership No. 3*, 523 A.2d 1271, 1279 (Conn.

power on the arbitrator. Interestingly, it both confers and reduces the parties' *discourse power*. On the one hand, the parties are not limited by evidence law. On the other hand, the lack of standards reduces predictability and, hence, control. Even confidential or privileged information may be disclosed, contrary to the parties' wishes.³⁹¹

Another source of information and discourse disempowerment of the parties stems from the fact that they cannot compel each other to disclose claims, defenses, witnesses, or evidence until the day of the hearing, when the arbitrator's subpoena power is least efficient. In addition, arbitration law requires no discovery in any form.³⁹² In fact, in California, if the amount of the claim is less than \$50,000, neither party has to disclose the name or nature of any witnesses' testimony, including both percipient and expert witnesses.³⁹³ The lack of disclosure is a possible source of empowerment to a party inclined to hide information; however, each party can withhold key information. The lack of disclosure disempowers the parties by stripping them of *information power*. It also contributes to a decrease in the parties' *formal authority social custom power* to settle their dispute because they cannot assess adequately the efficacy of their contentions.

Consequently, the parties learn they have virtually no source of power or empowerment in arbitration. This fact creates a risk that the parties' normal *reference power* and *personal qualities power* may be diluted through the process of learned helplessness.³⁹⁴ This result seems likely because the lack of power may surprise the parties, who may enter the arbitration process believing that arbitration will empower them perhaps even more than would court adjudication. Their participation in arbitration, therefore, may reduce their confidence in the accu-

1987); *Belanger v. Matteson*, 346 A.2d 124, 137-38 (R.I. 1975), *cert. denied*, 424 U.S. 968 (1976). See generally *Hayford & Peeples*, *supra* note 368, at 375-76.

391. Schwartz, *supra* note 349, at 15.

392. *Drinane v. State Farm Mut. Auto. Ins. Co.*, 606 N.E.2d 1181, 1183 (Ill. 1992); *Hendler & Murray P.C. v. Lambert*, 511 N.Y.S.2d 941, 942 (N.Y. App. Div. 1987). See generally Brunet, *supra* note 349, at 12-13, 33-34 (noting the lack of significant discovery in all forms of ADR and criticizing the very limited exchange of information allowed in connection with arbitration).

393. CAL. CIV. PROC. CODE § 1282.2 (West 1994).

394. See *supra* notes 81-85 and accompanying text.

racy of their perceptions.³⁹⁵

5. *Summary: Application of the Power Model to Arbitration*

Arbitration skews the power relationship in unexpected ways. My concern with this power distortion is twofold. First, the lack of restraint on arbitrators increases arbitration's potential for harm. The risk of arbitration is that unchecked, excessively powerful arbitrators will use their power to favor those who already possess power in our society. In other words, cases may be decided based on the arbitrators' bias or the incentive to decide cases in such a way as to maximize the possibility of return business. The privacy of arbitration makes these risks particularly disturbing. We can hypothesize that arbitrators reach poor, biased, and unprincipled results, but we cannot test our hypothesis.

Second, these concerns are likely to be unknown to parties when they agree to be bound by arbitration. Kaiser's patients probably believed they would be treated better in arbitration. They may have assumed that arbitration is better because it is faster and cheaper than court adjudication. What parties to arbitrations often find, however, is alienation, bewilderment, and a sense of running around in circles. The circle begins with the idea that court adjudication is too expensive and favors those with greater power in society. It continues with the suggestion that ADR, particularly arbitration, may be better. Finally, it returns to the beginning with the reality that arbitration is no better than adjudication and may actually be worse.

V. CONCLUSION

The doctrine of unconscionability and the assessment of arbitration as a method of dispute resolution seem almost completely unconnected.³⁹⁶ Unconscionability is a doctrinal principle, requiring analysis of specific, case-by-case facts to resolve specific disputes. The assessment of arbitration is a question of system analysis requiring consideration of standards by

395. There are no *personal qualities power* and *reference power* issues endemic to the process of arbitration. *Manipulation power* is relevant only on a case-by-case basis. Finally, *force power* is rarely relevant in arbitration.

396. The only obvious connection between the two is that an arbitration clause may be a product of gross inequality of power between one party who wants such a clause and another who does not.

which dispute systems can be measured and a determination of whether arbitration is an effective process for resolving disputes.

Unconscionability law and the assessment of arbitration can be linked, although in a somewhat unexpected way. Procedurally unconscionable contracts and arbitration procedures present problems with process that can produce problems with result. Unconscionability doctrine is a response to a concern with a specific type of bad result—unfair contracts. Courts of equity, then the drafters of the *Restatement of Contracts*, and, finally, the drafters of the UCC responded to this concern by developing doctrine that allows courts to consider the fairness of bargains. The notion of procedural unconscionability³⁹⁷ reflects a belief that unfair bargains usually are the product of unfair bargaining processes. Similarly, authors like Brunet, Fiss, Rueben, and Delgado argue that arbitration may produce bad, unfair, or biased results. This Article suggests that the undesirable results produced by arbitration are the product of an unfair process, a process that greatly inflates the decision maker's power while deflating the parties' power. Taken together, unconscionability doctrine and the insights into arbitration offered in this Article suggest that distortions of power in a process may produce distorted results.

The purpose of this Article has been to expose the vectors of power to close examination. In addition, this Article demonstrates the relevance of those vectors to the operation of legal doctrine and to the assessment of dispute resolution procedure. In so doing, the importance and pervasiveness of power is revealed. Power clearly matters.

We also can see the benefit of an in-depth, multivector model of power. In their contracts casebook, Professors Crandall and Whaley tell law students that, “[u]nconscionability is a wild card doctrine in our law . . . [and] . . . unconscionability has been attacked as meaningless, *untamable*, [*and*] *dangerous*.”³⁹⁸ The language Crandall and Whaley chose—“wild,” “untamable,” “dangerous”—is too visceral to ignore. The image is one of a wild animal roaming the streets, to be feared and guarded against.

397. See *supra* notes 185-187 and accompanying text.

398. THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 785 (2d ed. 1993) (emphasis added).

Why is unconscionability perceived as being so threatening? The fear cannot stem from unconscionability's focus on bad bargains; courts of equity have refused to enforce bad bargains for years.³⁹⁹ An answer may lie within the concept of power itself. As Foucault suggests, power is the continuation of force by other means.⁴⁰⁰ Power, in other words, maintains and reifies itself. As long as the consideration of power is an exception to a general discourse that favors preserving the existing system of contract, and as long as the few unconscionability cases that explicitly address power do so superficially, there is no danger to the existing social structure.

A discourse about the hegemony and prevalence of power—in contract making, dispute resolution, and other phases of human interaction—also can be seen as dangerous and untamable, at least dangerous to current distributions of power in our society. It allows us to recognize that contracts and arbitration are part of an overarching institution through which power pervades our lives. It affords us the opportunity to confront that institution and ask whether another way might work better. For these reasons, I have proposed this model. Electrical power became a tool for human benefit once it was understood; an understanding of the vectors of human power may not light up a room, but it might illuminate power operations otherwise invisible and, thereby, challenge the existing social structure.

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

400. Foucault, *supra* note 9, at 89.