

**DRAFT – DO NOT QUOTE OR CITE WITHOUT AUTHOR PERMISSION****Bargaining Power in Contract Theory**  
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Intuitively, the concept of “bargaining power” is easy. A party with more bargaining power gets a better deal than a party with less; the corporate Goliath gets what it wants from the helpless consumer. The conundrum is that beyond this general conception, we have no real idea what to do about this phenomenon. Certainly, there is no shortage of analysis about the core meaning of the concept. Courts and commentators have engaged in a broad-ranging debate over whether the state should intervene to “correct” contracts between strong and weak parties, how much judicial intervention should occur, and whether unavoidable power disparities in the bargaining context delegitimize contract law as an appropriate regime for many, if not all, private orderings.<sup>2</sup> In general, analyses of bargaining power have largely focused upon the regulation of individual cases, questions of whether to tell Goliath how big a sword he may bring to the battlefield or how many stones David must have for his sling. At the end of the day, however, the legal conception of inequality of bargaining power may be more useful for defining the boundaries of contract law on a macro level and identifying whether certain transaction types are

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<sup>2</sup> See *infra* Part II (surveying theoretical approaches to bargaining power in contract law). This Article acknowledges the debate over the relationship and even the distinction between private law and public law. See, e.g., Ernest Weinrib, *THE IDEA OF PRIVATE LAW* 4 (1995) (arguing for confining social goals such as efficiency or public welfare to public law while building and maintaining the internal consistency of private law); E. Weinrib, *The Juridical Classification of Obligations*, in *THE CLASSIFICATION OF OBLIGATIONS* 40 (Peter Birks ed. 1997) (noting relation between public law statutory or regulatory interventions into private law such as labor contracts has never been fully resolved); Simon Deakin, *Private Law, Economic Rationality and the Regulatory State*, in *THE CLASSIFICATION OF OBLIGATIONS* 296 (Peter Birks ed. 1997) (arguing that private law systems can best be understood in conjunction with public law statutory or regulatory rules); cf. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350-51 (1982) (arguing that basic distinctions fundamental to liberal ideal, such as distinction between public and private, have declined to “decrepitude”). At the same time, however, I am not concerned with the boundaries between public law and private law so much as the relationship between enforceable promises and bargaining power. While the notion of private agreements – the idea that two parties can agree within a sphere of private autonomy to arrange their respective rights and obligations – clearly requires a distinction between the public and the private, the focus of the inquiry is on the use of bargaining power disparities to both identify enforceable promises and to justify judicial or legislative interference with those promises.

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suited more for public intervention or private orderings than for specifying when courts should intervene in individual contracts.

Contract law cannot ignore bargaining power. The concept is too real, too intuitively obvious, and – if ignored – too destructive of the legitimacy of contract as a mechanism for regulation of private orderings. Unchecked power in the bargaining context soon becomes indistinguishable from naked coercion and undermines both the consent of the weaker party and the legitimacy of the resulting bargain.<sup>3</sup> In other words, we know that some parties have a greater ability to determine the outcome of a bargaining process than others – generally because we all know the feeling of getting totally screwed on a deal. In most cases, the imbalance remains within a zone of tolerance and compromise that transacting parties accept as a *de minimis* cost of “playing the game.” When power disparities exceed that tolerance, contract law must regulate that exercise of raw, personal power or lose the support of foundational concepts of consent and volition. Given that universal understanding, any contract regime that fails to curb at least the most extreme abuses of bargaining power asymmetries will soon be replaced by an alternative regime that leaves the participants feeling better about their transactions, even if it merely replaces one bargaining inequality with another, better hidden one.

On the other hand, bargaining power is such a complex and dynamic phenomenon that legal decisionmakers generally lack the resources and ability to assess the parties’ real power

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<sup>3</sup> The formal myth of contract on which this principle is grounded is that each negotiating party is a rational individual actor operating within a generally equalized landscape of bargaining capacity. *See, e.g.,* Jan Narveson, *Consumers’ Rights in the Laissez-Faire Economy: How Much Caveat for the Emptor?* 7 CHAPMAN L. REV. 181, 188-89 (2004) (“Transactions in the business society are voluntary. \* \* \* Both agents . . . are in the marketplace because they have interests, wants, desires and values that they hope to satisfy by their market activities.”); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 797 (1983) (“Contract law is centrally concerned with voluntary exchange and, although exchange is by no means limited to the market, our law of contracts tends to treat the impersonal market transaction as the paradigm of all exchange relationships.”).

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relation and intelligently assign appropriate legal consequences.<sup>4</sup> Legal decisionmakers primarily use the doctrine of inequality of bargaining power – and the contract law subdoctrines that explicitly or implicitly incorporate bargaining power such as unconscionability, duress, undue influence, the parol evidence rule and public policy<sup>5</sup> – to regulate the contest between contracting parties and ensure a relatively equalized landscape of bargaining capacity.<sup>6</sup> The problem is that there is substantial disagreement over the meaning and legal import of bargaining power and no clear agreement about appropriate legal standards for determining whether a party has superior or inferior bargaining power.<sup>7</sup> Even if legal decisionmakers were intellectually and technically competent to resolve these issues, courts and commentators further jam up the works by disagreeing over the appropriate responses to perceived power asymmetries between

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<sup>4</sup> See *infra* notes \_\_ through \_\_ and accompanying text.

<sup>5</sup> See *infra* notes \_\_ through \_\_ and accompanying text.

<sup>6</sup> Of course, this classical contract doctrine that competent parties “stand on an equal footing” with one another absent fraud, duress, mistake, incapacity, or some other defect in contract formation does not mean that every bargainer has equal bargaining power. Every contract and bargain involves some disparity in the ability of the parties to get what they want, and courts and legislatures have often recognized explicitly that inequality of bargaining power, standing alone, is generally insufficient to justify state intervention into private agreements. See, e.g., U.C.C. § 2-302, cmt. 1 (“The principle [of unconscionability] is one of the prevention of oppression and unfair surprise and not the disturbance of allocation of risks because of superior bargaining power); *Addams v. John Deere Co.*, 774 P.2d 355 (Kan. App. 1989) (unequal bargaining power, without more, does not justify overturning contract). But, as discussed *infra*, each party must possess some bargaining power to be able to participate in private orderings through contract. Absent some minimal quanta of legally cognizable bargaining power on both sides of a transaction, there can be no contract. See *infra* notes \_\_ through \_\_ and accompanying text.

<sup>7</sup> See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 199-223 (2005) (surveying contract doctrines in which bargaining power disparities explicitly and implicitly affect judicial analysis, including unconscionability, public policy, contract interpretation, the parol evidence rule, and consideration). For example, courts identify multiple transactional characteristics, such as whether the apparently weaker party lacked meaningful alternatives, could not negotiate terms of the contract, or operated under necessity, as indicating an inequality of bargaining power. See *id.* at 201-213 (citing, inter alia, *Deminsky v. Arlington Plastics Machinery*, 638 N.W.2d 331, 342-43 (Wis. Ct. App. 2001) (purchaser of plastic recycling machinery did not lack bargaining power because he could have bought from other manufacturers or walked away from the deal altogether); *Pardee Construction Co. v. Superior Court*, 123 Cal.Rptr.2d 288, 294 (Cal. Ct. App. 2002) (homebuyers lacked bargaining power where developer occupied different economic status and was “the developer of hundreds of homes in the master plan development.”)). Alternatively, other courts depend upon party characteristics such as “wealth, business sophistication, education or knowledge, race, gender, ‘size’ of the parties, monopoly power, and consumer status” to identify bargaining power disparities. *Id.* at 200.

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contracting parties.<sup>8</sup> Consequently, legal doctrines of inequality of bargaining power are a modern form of the Gordian Knot in which subtle rational answers may prove counterproductive.

This Article concludes that a legal conception of bargaining power, regardless of its utility in deciding individual cases, nonetheless serves an important function in distinguishing contract from other regimes to regulate promissory obligations. On a macro level, removed from individual cases, bargaining power is the cover charge to the exclusive club of contract law. Where both parties to a transaction possess some ability to affect the outcome of their transaction, they may take advantage of the relatively flexible and unregulated regime of private contract. If one party lacks bargaining power – as in cases of duress and coercion – or even if that party has real bargaining power but legal decisionmakers cannot consistently and credibly identify and assess that power – as with intrafamily gifts – the parties cannot make promises that are enforceable as contracts. Instead, their transaction gets bounced to one of many alternative venues, such as labor law, tort, promissory estoppel, criminal law or property, in which the bargaining process and even the terms of their interaction are subject to steadily greater degrees of public regulation. At this macro level, bargaining power provides both a positive and normative explanation for why some promises are enforceable in contract and others are regulated under relatively more intrusive public orderings.

This Article begins with a brief analysis of the differences between the practical and the legal concepts of bargaining power.<sup>9</sup> Although these conceptions of power overlap and inform

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<sup>8</sup> See *infra* notes \_\_ through \_\_ and accompanying text.

<sup>9</sup> This Article is the second in a series of investigations into the nature of power disparities in the bargaining context and responses of legal decisionmakers to such disparities. In the opening article – *Inequality of Bargaining Power*, – I explore in depth the response of courts to perceived bargaining power disparities within American contract law. See Barnhizer, *supra* note 7, at 199-223. In particular, I compare judicial attempts to assess and assign legal consequences to such disparities with practical responses of parties involved in real world power relationships. This Article continues that analysis by first reviewing academic positions regarding the appropriate role of bargaining power in contract law. While most of this debate has focused upon whether bargaining power disparities justify state intervention

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each other in many ways,<sup>10</sup> the distinction is critical for determining the appropriate legal responses to power disparities. In its most practical sense, bargaining power operates between parties in the real world. It informs the processes of negotiation, deal-making, leverage, influence and coercion that invests nearly every relation between independent actors with a complex and dynamic contest for the balance of power and advantage in the relation.

But bargaining power also is a special legal concept that has particular meaning and function within the idealized universe of legal concepts. In that domain, bargaining power doctrines reflect courts' and legislatures' attempts to assign legal consequences to perceived bargaining power relationships just as in any other formalized "gaming" context playing out within a set of rules adapted to that specific environment.<sup>11</sup> Within this legal context, the notion

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into private contracts and the proper scope of that intervention, I ultimately suggest that a legal conception of inequality of bargaining power may be most useful on a macro level in determining whether particular transaction types are best regulated under contract doctrine or under some alternative regime. A third piece, currently in progress, analyzes the origins of the modern legal doctrine of inequality of bargaining power.

<sup>10</sup> See, e.g., Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1092 (1935) ("Bargaining power exists only because of government protection of the property rights bargained, and is properly subject to government control."); Robert Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 149-54 (1935) (noting similarity between political power exerted by state against individuals subject to its jurisdiction and economic powers asserted between private individuals).

<sup>11</sup> The difference between the practical and the legal conceptions of bargaining power is analogous to the relationship between real armed conflict and war-based strategy games such as chess, go, Stratego, and Risk. Cf. Barnhizer, *supra* note 7, at 172-73 (noting relationships and differences between chess and military conflict, particularly in regard to availability of information to each side about opponent's assets and abilities); Emma Young, *Chess! What is it good for?*, THE GUARDIAN, March 4, 2004, at 8, available at <http://www.guardian.co.uk/life/feature/story/0,13026,1161128,00.html> (last visited August 17, 2005) ("Unlike a battle commander, who may have incomplete intelligence about his opponent's level of weaponry or location of munitions depots, one chess player can always see the other's pieces, and note their every move."). Just as games cannot replicate the informational asymmetries between real battlefield opponents, courts and legislatures attempting to assign legal consequences to bargaining power asymmetries are severely constrained by the wholly artificial nature of their enterprise. Legal decisionmakers lack both time and resources to investigate power relations on a case by case basis and to identify sources and forms of bargaining power that depend upon deception, perception, subjective preferences by the parties, and a host of other unquantifiable factors. In many situations, the parties themselves may be unaware of their real power relationship, making post hoc analyses by courts or legislatures absurd. Moreover, power is a dynamic phenomenon that may change radically at any time in the parties' relationship. While all of these factors mean that the parties will have varying abilities to

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of bargaining power takes on additional core meanings. In some cases, bargaining power is constitutive of contract itself.<sup>12</sup> A bargain can occur if, and only if, both parties are legally perceived to have the quality called bargaining power. Thus, for example, fraud and duress both can be described as negating the victim’s bargaining power.<sup>13</sup> In other situations, such as unconscionability, a lack of bargaining power may justify public refusal to enforce bargains if one of the parties is deemed to have too much bargaining power or to have somehow misused that power, even if the other party possessed sufficient power to play in the contracting game.<sup>14</sup>

With this foundation, Part II surveys the two principal academic positions on the role of bargaining power within contract law. The first and most common approach holds that disparities of bargaining power between contracting parties justify judicial interference in that contract relationship, particularly where the “stronger” party is perceived to have abused its bargaining position. In essence, courts act as referees for private bargaining games and call fouls for both flagrant violations and more undefined actions such as “unsporting conduct.” The second, less common, approach suggests that bargaining power is not a useful concept for regulating contractual relationships and assessing contractual obligations within the judicial system. According to this view, attempts to regulate something as dynamic, complex, and amorphous as “bargaining power” give the referee the power to change the basic rules of the game in the middle of play. Alternatively, interventions on the basis of bargaining power merely mask arbitrary corrections that, while potentially assisting individual parties in the short term, still support the ubiquitous inequalities inherent in the market-based regime of contract.

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cause each other to conform with preferred outcomes throughout their interaction, a legal response to bargaining power asymmetries cannot replicate that actual power relation except by coincidence.

<sup>12</sup> See *infra* notes 62 - 73 and accompanying text.

<sup>13</sup> See *Lloyd’s Bank Ltd. v. Bundy*, 1975 Q.B. 326, 339 (C.A. 1974) (Lord Denning) (observing that inequality of bargaining power is the common thread that runs through defenses to contract such as duress, unconscionability and undue influence).

<sup>14</sup> See *id.*

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In Part III, this Article asserts that the concept of bargaining power is valuable for identifying enforceable promises on a macro level. At the level of individual cases, bargaining power is so complex and dynamic that it may not provide a coherent basis for distinguishing between agreements that should be enforced and those subject to public intervention. But on a doctrinal and theoretical level, the ability of legal decisionmakers to recognize bargaining power on a systemic basis can define both positively and normatively spheres of activity private orderings should be relatively free of public interventions. Courts implicitly recognize many transaction types in which the parties typically have sufficient bargaining power to conclude an enforceable agreement without substantial state interference.<sup>15</sup> Similarly, courts and legislatures implicitly identify numerous transaction types involving systemic bargaining power deficiencies, thus justifying state policing of the interaction.<sup>16</sup> In conclusion, Part IV demonstrates through the

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<sup>15</sup> Primarily, such cases comprise two situations. First, courts and legislatures often explicitly recognize that one of the parties suffers from a bargaining power disparity but enforce the agreement anyway. *See, e.g.*, U.C.C. § 2-302 cmt. 1 (“The principle [of the doctrine of unconscionability] is one of the prevention of oppression and unfair surprise *and not of disturbance of allocation of risks because of superior bargaining power.*”) (emphasis added); *Addams v. John Deere Co.*, 774 P.2d 355, 359 (Kan. App. 1989) (“[M]ere disparity of bargaining strength, without more, is not enough to make out a case of unconscionability. Just because the contract I signed was proffered to me by Almighty Monopoly Incorporated does not mean that I may subsequently argue exemption from any or all obligation: at the very least, some element of deception or substantive unfairness must presumably be shown.”). Second, the vast majority of contracts are performed without state intervention. *See* Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 311 (2005) (“And, of course, most contracts are performed in full . . . .”); Avery Weiner Katz, *Informality as a Bilateral Assurance Mechanism*, 98 MICH. L. REV. 2554, 2568 (2000) (same). In bargaining power terms, contracts will be performed without resort to state enforcement mechanisms either (1) where the bargaining power disparity is so great that the weaker party has no real choice but to perform; or (2) where each party possesses sufficient power to ensure the other’s performance. Within this framework, state enforcement mechanisms are just another source of power for the bargaining parties. *See, e.g.*, Robert Hale, *supra* note 10, at 149-50 (1935) (observing that private actors may employ coercive power of the state to compel contract performance through threat that state will impose penalties and sanctions for non-performance).

<sup>16</sup> *See, e.g.*, National Labor Relations Act of 1935, 29 U.S.C. § 151 (2000) (congressional findings that inequality of bargaining power between employers and employees harms interstate commerce); *Ocean Accident & Guarantee Corp. v. Industrial Comm’n of Az.*, 257 P. 644, 645 (Az. 1927) (“Our enlightened modern thought realizes that an equality of bargaining power between two such unequal parties is impossible, and has attempted to equalize the balance through the labor unions and state regulation of industry; but old ideas die hard, and the pathways of progress are strewn with the fragments of legislation designed for this purpose but

examples of gift and promissory estoppel that the presence or absence of legally cognizable bargaining power justifies and defines the boundaries between these two models of private and public orderings.

## **I. CONCEPTIONS OF BARGAINING POWER**

Bargaining power comprises both a practical, real phenomenon and a legal concept under which courts and legislatures respond to perceived power imbalances between bargaining parties. The practical phenomenon of bargaining power exists independent of law – in the Hobbesian state of nature<sup>17</sup> bargaining power is unlimited in that an actor may employ any means at his or her disposal to achieve a preferred outcome in an exchange relationship.<sup>18</sup> But the practical phenomenon also is informed by legal responses to perceived power relationships that alter existing relationships by lending the power of the state to one party or the other. Likewise, the legal concept of bargaining power responds to perceived power relationships by creating iconic representations of those relationships and then assigning legal implications to those perceptions. The problem of bargaining power and its function in contract law – i.e., whether and how courts should intervene to “correct” perceived power disparities – arises directly from the dynamic interplay between these two concepts.

### **A. PRACTICAL CONCEPTIONS OF BARGAINING POWER**

The real phenomenon of bargaining power is the interplay of the parties’ actual power relationship in an exchange transaction. On this practical level, bargaining power is a complex

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wrecked on the insistence of court after court that the state must not interfere with the ‘free right of contract.’”)

<sup>17</sup> See THOMAS HOBBS, *LEVIATHAN* 183-88 (C.B. MacPherson ed., Penguin Books 1985) (1651) (describing hypothetical state of nature).

<sup>18</sup> See *id.* at 162 (“To this war of every man against every man, this also is consequent: *that nothing can be unjust.* \* \* \* It is consequent also to the same condition that there can be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man’s, that he can get; and for so long as he can keep it.”) (emphasis in original); cf. Thomas Scanlon, *Promises and Practices*, 19 *PHILOSOPHY & PUB. AFF.* 199, 201-202 (1999) (analyzing morality of lying promises and bargaining in state of nature).



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and dynamic concept that comprises a nearly infinite number of sources and forms, and that can change radically at any time throughout the parties' relationship based upon party behavior and external factors. The law of contract rarely deals directly with this conception of bargaining power.<sup>19</sup> Rather, it is negotiation and bargaining theory that deal primarily with analyzing the causes of successful bargaining outcomes and how the parties involved in the bargaining process may identify, measure and manipulate their respective power to achieve preferred outcomes to that process.<sup>20</sup>

As used here, "bargaining power" refers to the exercise of power in the specialized relationship of the bargain. A party has bargaining power if she has the ability to effect intelligently a preferred outcome in a bargaining relationship.<sup>21</sup> This definition is necessarily broad – the sources of bargaining power are potentially infinite and depend entirely upon the parties' situation from moment to moment.<sup>22</sup> Bargaining power may range from the ability to

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<sup>19</sup> See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 48 (2000) ("How concerned should a negotiator be – especially one with superior bargaining power – that pursuing an advantage in a contract will result in a court finding that the agreement is unconscionable? Our best answer: some but not much."); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9.40 at 372-74 (4th ed. 1998) ("Superior bargaining power is not in itself a ground for striking down a resultant contract as unconscionable.").

<sup>20</sup> See Adler & Silverstein, *supra* note 19, at 13-20 (analyzing sources of bargaining power and techniques for increasing bargaining power); Bruce Kahn, *Applying the Principles and Strategies of Asian Martial Arts to the Art of Negotiation*, 58 ALB. L. REV. 223, 234-35 (1994-1995) (suggesting application of Asian martial arts principles to improve ability to control and influence outcome of business negotiations); Barbara J. Flick, *Negotiation Theory and the Law of Collective Bargaining*, 38 U. KAN. L. REV. 81, 86-99 (1989-1990) (evaluating negotiation tactics and strategy in context of NLRA obligation to bargain in good faith); R. Hanson Lawton, *Negotiating from Strength: Advantage Derived from the Process and Strategy of Preparing for Competitive Negotiation*, 14 PEPP. L. REV. 839, 851-60 (1986-1987) (surveying strategies and tactics for achieving superior results in law student mock negotiation contests).

<sup>21</sup> Cf. Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAVIORAL SCIENTIST 149, 150 (1983) (defining "negotiating power" as the ability to affect favorably another party's decision).

<sup>22</sup> See DENNIS H. WRONG, *POWER: ITS FORMS, BASES AND USES* 10 (1979) ("Asymmetry [in power relations] exists in each individual act-response sequence, but the actors continually alternate the roles of power holder and power subject in the course of their interaction.").

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refuse to transact (and thus withhold benefits that the other party desperately needs)<sup>23</sup> to the mere ability to impose costs upon the other party.<sup>24</sup>

The primary difficulty with studying bargaining power is the inherent malleability of the term. As Robert Dahl observed, “power” may be impossible to analyze because it is not a single “Thing,” but rather many different things collected together under a single, overbroad term.<sup>25</sup> While *power* generally refers to an ability to cause another to act in a way that generates a preferred outcome for the party with power, the sources and forms of power are nearly limitless. Identification and assessment of power often borders on the metaphysical.<sup>26</sup> For example, power may arise from a party’s psychology,<sup>27</sup> ability to deceive,<sup>28</sup> personal charisma and ability to motivate and organize groups of individuals toward a common goal,<sup>29</sup> strategic outlook,<sup>30</sup> and

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<sup>23</sup> See John C. Harsanyi, *Measurement of Social Power, Opportunity Costs, and the Theory of Two-person Bargaining Games*, in POLITICAL POWER: A READER IN THEORY AND RESEARCH 226, 232-33 (1969) (analyzing power relationship between blackmailer and victim and noting that because each party has the ability to make the other party worse off by walking away from the deal neither side has absolute power over the other); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 102 (3d ed. 1986) (noting that buyer in competitive market can reject terms offered on take-it-or-leave it basis to seek more attractive terms from other sellers); see also *Deminsky v. Arlington Plastics Mach.*, 638 N.W.2d 331, 342-43 (Wis. Ct. App. 2001) (“Moreover, Image could have elected to simply not expand its business to take on the new snow fence processing operation if a suitable machine was not available at a price and on terms it deemed acceptable.”).

<sup>24</sup> See YORAM BARZEL, *A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE* 4 (2002).

<sup>25</sup> See Robert Dahl, *The Concept of Power*, in POLITICAL POWER: A READER IN THEORY AND RESEARCH 79, 79 (Roderick Bell, et al. eds. 1969) (“[A] Thing to which people attach many labels with subtly or grossly different meanings in many different cultures and times is probably not a Thing at all, but many Things . . .”).

<sup>26</sup> Nietzsche’s concept of the “will to power,” for example, illustrates the metaphysical baggage that accompanies the study of power. Cf. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* §§ 36 & 259 (1886), reprinted in *THE PHILOSOPHY OF NIETZSCHE* 421-23, 577-78 (Helen Zimmern trans. The Modern Library ed.) (1927) (describing “Will to Power” as motive force behind all “organic functions” and “active force” and arguing that the Will to Power – the impulse “to grow, to gain ground, attract to itself and acquire ascendancy” – is characteristic of all living individuals and organizations).

<sup>27</sup> See Jeffrey I. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 447-48 (1994) (exploring proposition that social class stratification perpetuates a greater sense of entitlement in persons occupying higher social strata that in turn leads them to demand better contract outcomes than persons occupying lower social strata).

<sup>28</sup> See DAVID BARNHIZER, *THE WARRIOR LAWYER* 237-246 (1997).

<sup>29</sup> See JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* 38-40 (1983) (identifying “personality, property, and organization” as “the ultimate sources of power”); but see Adler & Silverstein, *supra* note

the willingness to use or the desire to obtain personal power.<sup>31</sup> Such forms of power are real and promote the ability to affect the outcomes of social interactions. On the other hand, bargaining power also may be based upon psychological illusions and deceptions (including self-deceptions), and an apparent position of power may evaporate if it is challenged or tested.<sup>32</sup> At the same time, however, these forms and sources of power are difficult to assess accurately outside controlled settings, if at all.

Power may also be difficult to study because some sources and forms are so obvious that they distract from sources of power that are more subtle or less easily proved. Legal and non-legal observers recognize qualities such as superior information,<sup>33</sup> wealth,<sup>34</sup> organizational size,<sup>35</sup> education<sup>36</sup> and business sophistication as sources of power.<sup>37</sup> Often, these factors do give rise to

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19, at 8 (“Although the ability to persuade and inspire is an important element of power, the critical test of power is whether one’s goals can be met even when charm and persuasiveness prove inadequate to the task.”).

<sup>30</sup> See BARNHIZER, *supra* note 28, at \_\_ (using military strategy theories of Sun Tzu and Miyamoto Musashi to emphasize importance of strategic thinking to win legal and negotiation contests).

<sup>31</sup> See NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 9 (Luigi Ricci, trans.) (Random House, Inc. ed. 1950) (“[M]en must be either caressed or else annihilated; they will revenge themselves for small injuries, but cannot do so for great ones; the injury therefore that we do to a man must be such that we need not fear his vengeance.”); ROBERT GREENE, *THE 48 LAWS OF POWER* 107-113 (1998) (discussing importance of ruthlessly crushing conquered enemies and citing examples of Napoleon, Mao Tse-Tung, and Empress Wu of seventh century China) (quoting, inter alia, MACHIAVELLI, *supra*).

<sup>32</sup> See R.H. TAWNEY, *EQUALITY* 212 (1931) (suggesting that power only exists so long as the weaker party gives credence to the threats of the stronger party).

<sup>33</sup> See Narveson, *supra* note 3, at 189 (discussing importance of information in protecting party interests in consumer transactions); ROGER FISHER, ET AL., *GETTING TO YES* 105 (2d ed. 1991) (“The more you can learn of [the other side’s] alternatives, the better prepared you are for negotiation.”).

<sup>34</sup> See Brook Overby, *Contract in the Age of Sustainable Consumption*, 27 J. CORP. L. 603, 615 (2002) (noting that the “assumption of equal bargaining power and equitable distribution of resources between contracting parties . . . raises serious concerns when issues of race, gender, wealth disparity and other questions of American inequality are thrown into the mix”); HENRY DEMAREST LLOYD, *WEALTH AGAINST COMMONWEALTH* 9-13 (Prentice Hall, Inc. 1963) (1894) (early muckraking polemic about concentration of wealth in business trusts and monopolies resulting in inordinate power to control American economy and politics); BERTRAND RUSSELL, *POWER: A NEW SOCIAL ANALYSIS* 129-33 (1938) (analyzing power relations between wealth, business organizations, labor organizations and political forces).

<sup>35</sup> See Garvin, *supra* note 15, at 306-308 (noting that size of small businesses places them closer to consumers in terms of financial resources and ability to absorb risk compared to large businesses).

<sup>36</sup> See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (noting relevance of party's "obvious education or lack of it" to whether party lacked meaningful alternatives to

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power – a large army often is more powerful than a small one; a large sophisticated business offering credit on complex terms in a standard form contract often is more powerful than an unsophisticated consumer buying a first house. The problem is that these sources of power are so obvious that observers miss more subtle sources and forms of power. A smaller army may defeat a larger force if it can take advantage of terrain, tactics or better logistics,<sup>38</sup> while unsophisticated consumers may shop elsewhere, *en masse*, if they perceive sellers as abusing market power.<sup>39</sup> A realistic definition of power must therefore account for both the obvious and the subtle, recognizing that power is a highly situational phenomenon with many inputs that may change from moment to moment.<sup>40</sup>

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entering contract); *Ahern v. Knecht*, 563 N.E.2d 787, 792-93 (Ill.App. 1990) (noting disproportionate bargaining power between air conditioner repairman and middle-aged woman who was lacked knowledge of technical requirements for air conditioner repair).

<sup>37</sup> See Barnhizer, *supra* note 7, at 166-72 (surveying commonly acknowledged sources of power).

<sup>38</sup> The Greek victories against vastly superior Persian forces at Thermopylae and Marathon demonstrate the power of tactics, strategy and use of terrain that will permit a small force to overcome a larger. At Thermopylae, At the Battle of Marathon in 490 B.C., for example, the Persians outnumbered the Greek forces by an order of magnitude, and yet the Greek forces claimed a decisive victory by maintaining discipline and taking advantage of Persian overconfidence:

Miltiades had but eleven thousand men; the Persians had ten times as many. \* \* \* To reach and lean his flanks on two brooks running to the sea, Miltiades made his center thin, his wings strong, and advanced sharply on the enemy. As was inevitable, the deep Persian line easily broke through his centre. But Miltiades had either anticipated and prepared his army for this, or else seized the occasion by a very stroke of genius. There was no symptom of demoralization. The Persian troops followed hard after the defeated centre. Miltiades caused each wing to wheel inwards, and fell upon both flanks of the Persian advance, absolutely overwhelming it, and throwing it back upon the main line in such confusion as to lead to complete victory.

THEODORE A. DODGE, *GREAT CAPTAINS: THE ART OF WAR IN THE CAMPAIGNS OF ALEXANDER, HANNIBAL, CAESAR, GUSTAVUS ADOLPHUS, FREDERICK THE GREAT, AND NAPOLEON* 5-6 (1889) (Barnes & Noble, Inc. ed. 1995).

<sup>39</sup> See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 617 (1982) [hereinafter Kennedy, *Motives in Contract*] (noting irony that despite judicial characterizations of automobile buyers as “helpless in the face of gigantic bargaining opponents . . . [t]hose helpless buyers have somehow induced a proliferation of seller warranty experiments, and then more or less destroyed the auto industry by their preference for foreign cars.”).

<sup>40</sup> See Adler & Silverstein, *supra* note 19, at 11-12 (2000) (“Power’s complexity stems no doubt from its highly situational nature—even slight changes in a setting may substantially affect the underlying power dynamics.”).

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Likewise, while the term “bargain” has a specialized meaning within contract law,<sup>41</sup> exactly what constitutes a bargain relationship is unclear.<sup>42</sup> Practically, as my two- and four-year-old daughters have demonstrated in anticipation of Christmas and birthdays, a gift or gift promise<sup>43</sup> may be subject to just as much negotiation and bargaining as an arm’s-length commercial agreement.<sup>44</sup> Similarly, promissory estoppel may involve an exchange that resembles either gift or bargain.<sup>45</sup> But the power relationship in the gift and promissory estoppel contexts is the same power relationship at issue in the contractual context. Consequently, the term “bargaining power” as used here specifically denotes the power relationship between parties in any exchange relationship, and is not limited solely to transactions that fall within traditional definitions of contracts.<sup>46</sup>

Negotiation theorists, such as Fisher and Ury,<sup>47</sup> have identified bargaining power as a tool to be employed in the negotiation process, not a fixed quality of one of the parties.<sup>48</sup> In other words, among those most concerned with identifying the mechanics of agreement creation,

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<sup>41</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 3 (“A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.”).

<sup>42</sup> See, e.g., Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 157 (1988-89) (“Anthropological, sociological and psychological studies of gifts all suggest that gifts and bargains are alike exchanges, differing only in that bargains involve the exchange of commodities, while gifts may involve the exchange of noncommodities such as status, obligation, ‘psychic reward’ or the like.”).

<sup>43</sup> Although the common law usually distinguishes the delivery of a gift (which creates an enforceable property right in the donee) from a promise to make a gift (which is generally unenforceable under contract law), I have used these terms interchangeably to capture the sense in which even the promise of a gift may create valuable social expectations in the donee. See also Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 823-24 (1997) [hereinafter Eisenberg, *World of Contract*] (adopting same convention).

<sup>44</sup> See Baron, *supra* note 42, at 157.

<sup>45</sup> Compare *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898) (explicitly characterizing grandfather’s promise to give \$2000 to granddaughter upon which granddaughter relied in quitting employment as a gift promise and holding promise enforceable because of granddaughter’s detrimental reliance) with *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 273-74 (Wis. 1965) (holding that promisee who engaged in numerous acts of reliance upon franchisor’s promises to sell promisee grocery franchise on favorable terms could recover under theory of promissory estoppel).

<sup>46</sup> See *infra* notes 49-60 and accompanying text (analyzing exchange and power relationships in gift and promissory estoppel transactions).

<sup>47</sup> See ROGER FISHER, ET AL., *GETTING TO YES* 97-106 (2d ed. 1991) (describing development of alternatives to negotiated agreement as source of bargaining power and as tool for negotiation).

<sup>48</sup> See *id.*

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formation and surplus distribution, power is something for the parties to control, use and change. Thus, great bargaining power is only one factor in forming the terms of the agreement.<sup>49</sup> Fisher and Ury readily concede that there will be situations involving an apparently absolute disparity of bargaining power.<sup>50</sup> In those situations, no amount of bargaining by the “weaker” party can cause the stronger party even to come to the bargaining table, much less affect the terms of the parties’ interaction.

But such cases likely are rare (particularly in a culture attempting to operate under the Rule of Law and regulating extremes of personal and institutional power) and are not likely to provide facts upon which realistic analogies can be based.<sup>51</sup> In the vast majority of circumstances (indeed, perhaps in *all* circumstances) both parties possess options for improving their bargaining power.<sup>52</sup> Moreover, the contest of power that occurs during negotiation itself will affect the parties’ respective bargaining positions throughout the process. A cooperative outcome

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<sup>49</sup> See Adler & Silverstein, *supra* note 19, at 16-19 (observing that “[disproportionately greater power on the part of one party in a negotiation often reduces the likelihood of a favorable outcome for the powerful party . . . .]”); Nina Burkardt, et al., *Power Distribution in Complex Environmental Negotiations*, 7 J. PUB. ADMIN. RES. & THEORY 247, 268-69 (1997) (observing that balanced power correlated with successful negotiations while power imbalance correlated with minimally successful negotiations).

<sup>50</sup> See FISHER, ET AL., *supra* note 47, at 97 (suggesting that while negotiation strategies cannot overcome all power disparities, they can protect against making bad bargains and assist in maximizing resources to obtain preferred outcomes).

<sup>51</sup> While apparent absolute bargaining power asymmetry cases may make good fodder for first-year final exam questions, in the real world contracts between individuals dying of thirst in the desert (*see* Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv. L. Rev. 741, 754-63 (1982) [hereinafter Eisenberg, *Bargain Principle*] (using example of party dying in the desert as apparent absolute bargaining power disparity)) or even contracts for rescue between salvors and sinking ships (*see* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEG. Stud. 83 (1983) (developing economic model to predict when law should intervene to encourage rescues)) are not likely to have significant application to more mundane situations in which the choices are not as stark as life or death. *Cf.* Karl N. Llewellyn, *Our Case Law of Contract: Offer and Acceptance II*, 48 YALE L. J. 779, 785 (1939) (“[I]t is not safe to reason about business cases from cases in which an uncle became interested in having his nephew see Europe, go to Yale, abstain from nicotine, . . . [or] the idiosyncratic desires of one A to see one B climb a fifty-foot greased flagpole or push a peanut across the Brooklyn Bridge.”). And, even in those cases of apparent absolute necessity, the rescuer is unlikely to extract all wealth from the rescuee. *See* Harsanyi, *supra* note 23, at 232-33 (arguing that blackmailer does not have complete power to extract wealth from victim).

<sup>52</sup> FISHER, ET AL., *supra* note 47, at 178 (arguing that even where “the resource balance is one-sided \* \* \* there are almost always resources and potential allies that a skilled and persistent negotiator can exploit, at least to move the fulcrum, if not ultimately to tip the balance of power the other way.”).

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that maximizes the joint surplus, for example, also makes the parties interdependent and vulnerable in future performances and dealings.<sup>53</sup>

The practical conception of bargaining power also includes power relations generated by the background legal, social, political and economic system within which the parties interact.<sup>54</sup> The property regime within which parties bargain, for instance, defines the bargaining power of the parties in that it allows property owners more or less power to refuse to convey that property to another.<sup>55</sup> Without that overlay of legal property rights – backed by the state’s resources and capacity for legitimized violence – the physically powerful simply take what they want. Similarly, the legal system’s response to flaws in contract formation that dramatically undercut one party’s ability to bargain – as in cases of fraud, duress and undue influence – will affect the relative bargaining power of the parties.<sup>56</sup> Thus, any legal response to perceived power

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<sup>53</sup> See Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 601, 595-96 (1974) (discussing interrelatedness and vulnerability of contracting parties in relational contracting models); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2010-2011 (1987) (“As investments [in repeated short-term contractual relations] mount, each party becomes vulnerable to strategic demands by the other when the contract is periodically renegotiated” creating incentives for “parties to restrict themselves mutually by a long-term contract.”);

<sup>54</sup> See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 625 (1943) [hereinafter Hale, *Bargaining, Duress and Economic Liberty*] (free market society creates inequality of distribution and therefore inequality of bargaining power); Warren J. Samuels, *The Concept of ‘Coercion’ in Economics*, in WARREN J. SAMUELS ET AL., *THE ECONOMY AS A PROCESS OF VALUATION* 141 (1997) (“At an extremely high level of abstraction . . . , one can perceive that the economy by its very nature is a condition or process of generalized, existential coercion quite independent of any other, more specific connotation or facet of coercion . . .”).

<sup>55</sup> See Hale, *Bargaining, Duress and Economic Liberty*, *supra* note 54, at 604 (noting that state protection of property rights creates bargaining power in property owner to refuse to bargain absent sufficient inducement to part with property);

<sup>56</sup> Thus, for example, consumer protection legislation, labor law, unconscionability doctrine, family law, and other state regulations of the terms of contracts that parties may adopt all directly affect the bargaining power relations of the parties. Following Judge Skelly Wright’s approval of an unconscionability defense at common law in *Williams v. Walker-Thomas Furniture Co.* (and the concurrent adoption of various consumer protection statutes), the power of Walker-Thomas Furniture Co. to exact allegedly onerous security terms – and the power of local consumers to accept such terms at any price – was drastically limited. See Eben Colby, Comment, *What did the doctrine of unconscionability do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 646-660 (Winter 2002) (analyzing impact of *Williams* decision and later consumer protection legislation on business practices of Walker-Thomas Furniture Company).

disparities will generate a new balance of real power that may itself require later legal interventions.

**B. LEGAL CONCEPTIONS OF BARGAINING POWER**

In contrast to the practical phenomenon of bargaining power, courts and legal theorists have constructed a legal doctrine of bargaining power that attempts to identify bargaining power asymmetries between parties and assign legal consequences to that observed power relationship. This doctrine operates on multiple levels. First, inequality of bargaining power serves as a general moral principle or primary rule<sup>57</sup> that the state should intervene to correct contracts formed under inequalities of bargaining power.<sup>58</sup> In this sense, the doctrine of inequality of bargaining power is akin to freedom of contract or equitable principles against enforcing unjust contracts. Just as freedom of contract doctrine generally suggests that private parties should have the freedom to arrange their mutual affairs without state intervention to control the terms of their agreement, the legal doctrine of inequality of bargaining power works on a general, pre-legal level as a moral claim against enforcing promises that may have been forced upon a weaker party by a stronger party.

Second, the legal doctrine of inequality of bargaining power also works as an explicit or implicit element within many contract sub-doctrines. Courts explicitly analyze power asymmetries in the context of unconscionability, public policy, and forum selection clauses,

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<sup>57</sup> See H.L.A. Hart, *The Concept of Law* 89-91 (1961) (describing primary rules as commonly shared beliefs or rules of obligation among relatively homogenous societies that are static and enforced by social pressure); Eric A. Posner, *The Decline of Formality in Contract Law*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 68-69 (F.H. Buckley, ed. 1999) (relating formalist critiques of unconscionability doctrine as requiring “direct application of a moral theory, rather than the application of second-order rules).

<sup>58</sup> See W. DAVID SLAWSON, *BINDING PROMISES* 23 (1996) (“A lack of bargaining power in one or both parties is a reason for limiting their freedom of contract, their contracting power, or both.”); Roberto Mangabiera Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 563, 629 (1983) (“[A] contract may be voided for economic duress whenever a significant inequality of bargaining power exists between the parties.”).



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among others. Implicitly, inequality of bargaining power informs judicial analysis in application of the parol evidence rule,<sup>59</sup> rules of interpretation, consideration,<sup>60</sup> and many other doctrines. In each of these cases, legal decisionmakers should, but often do not, make some inquiry into the actual bargaining power relation between the parties. But problematically, this assessment occurs post hoc, not only after the parties have crafted their litigation stories but also after the parties are well-removed from the complex interplay of power that created the bargain at issue. Given that the parties themselves likely did not fully understand their power relation even at the moment of contracting, the task of legal decisionmakers attempting to respond to that relation seems nigh impossible.<sup>61</sup>

This legal conception of bargaining power is further complicated by the multiple approaches to the phenomenon within legal scholarship further complicate the legal conception of bargaining power.<sup>62</sup> Broadly, courts and commentators analyze bargaining power as either constitutive of the institution of contract (in the sense that contract cannot exist without the power to bargain)<sup>63</sup> or destructive (in the sense that disparate bargaining power permits the

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<sup>59</sup> See Michael A. Lawrence, Comment, *The Parol Evidence Rule in Wisconsin: Status in the law of Contract, Revisited*, 1991 WIS. L. REV. 1071, 1095 (1991) (“the parol evidence rule does not apply in situations involving a disparity in the bargaining position or expertise of the parties.”); Robert Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, \_\_ (1972) (analyzing empirical data suggesting courts are more likely to permit parol evidence if party offering parol evidence possessed weak bargaining power).

<sup>60</sup> See Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1095 (1935) (noting disparity between consideration and value received is possible only in cases of mistake or inequality of bargaining power).

<sup>61</sup> See Barnhizer, *supra* note 7, at 169 (“[P]erceptions of power – by the parties themselves or in a post hoc judicial analysis – will rarely match the reality of the parties interaction.”).

<sup>62</sup> See *infra* Part II (analyzing competing approaches to role of inequality of bargaining power in contract doctrine); see also Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 195 (2003) (noting “Legal economists have reacted to the phenomenon of this realism [about power] characteristically and understandably – they have ignored it. For the most part, economic thinking has no place for the concept of power.”).

<sup>63</sup> Cf. Duncan Kennedy, *Motive in Contract*, *supra* note \_\_, at 577.

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stronger party to impose its preferred terms upon the weaker).<sup>64</sup> In the constitutive sense, without bargaining power there can be no bargain relationship because the parties are incapable of engaging in something that would be accepted by observers as a “bargain” or a “contract.” This conception of bargaining power is constitutive of contract and bargain relationships because it is the *sine qua non* of those relationships and is akin to the legal notion of “capacity.”<sup>65</sup> A party must have bargaining power to engage in the legal relation called “bargain.” If a party has bargaining power, then he or she may enter into a bargain with another party who also possesses bargaining power.<sup>66</sup> If either party lacks this quality of bargaining power, it will be impossible to create a legally enforceable bargain.<sup>67</sup>

The legal notion of bargaining power also comprises a separate conception of bargaining power as a quality that permits a party with greater bargaining power to “impose” contract terms

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Exceptions to the enforcement of agreements made for cases of fraud, duress and incapacity are constitutive of the model of free contract. \* \* \* To claim that freedom of contract doesn’t take into account unequal bargaining power or possible monopoly of information or the congenital folly of some types of contracting parties is just wrong. Allowance for these situations is part of the very definition of the institution.

*Id.*

<sup>64</sup> Thus, courts often analyze transactions for the purchase of certain goods or services by apparently weaker parties from apparently stronger parties under a different set of standards than ordinarily applies in business to business contracts. *See* Phillip Bridwell, Note, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, \_\_\_ (2003) (“[C]ourts classify certain items as ‘necessary adjuncts of daily life’ or as ‘rights’ and then subject the contracts associated with these terms to a different standard of review to determine whether they are unconscionable.”). Similarly, various contract doctrines, such as the parol evidence rule and the contra proferentum rule of interpretation, are applied differently depending on the relative bargaining power and status of the parties. *See* Childres & Spitz, *supra* note 59, at \_\_\_ (noting relation between bargaining power, status and application of parol evidence rule).

<sup>65</sup> *Cf.* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions I*, in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 50-51 (Walter Wheeler Cook ed. 1923) (distinguishing legal concept of “power” as the legal ability to effect volitionally a change in a given legal relation from related term “capacity,” which “denotes a particular group of operative facts, and not a legal relation of any kind.”).

<sup>66</sup> *Cf. id.*

<sup>67</sup> *See* W. DAVID SLAWSON, *BINDING PROMISES* 23-24 (1996) (noting “bargaining power is also necessary in an absolute sense”).

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upon the other party, thereby interfering with or even destroying the underlying consent.<sup>68</sup> In this sense, both parties have the necessary bargaining power to contract,<sup>69</sup> but the disparity itself still somehow interferes with the weaker party's ability to conclude a bargain. Unless the parties' respective quanta of bargaining power are in parity, one of them will get her way and force the other to accept terms to which he would rather not agree.<sup>70</sup> The destructive notion of bargaining power is a fundamental interference in the volitional underpinning of the contract relationship. At extremes, bargaining power that interferes with a party's ability to exercise consent, agreement, will or some other characterization of the volitional nature of an interaction changes that interaction from contract to not-contract.

These two legal visions of bargaining power<sup>71</sup> are in tension. The impositional conception of bargaining power as a phenomenon that interferes with the ability of parties to

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<sup>68</sup> See, e.g., *Little v. Auto Stiegler, Inc.*, 130 Cal.Rptr.2d 892, 897 (Cal. 2003) (describing adhesion contract as imposing terms upon weaker party, who is left only with choice to accept or reject terms); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-67 (Haw. 1996) (“[T]he terms of the [adhesion] contract are imposed upon the weaker party who has no choice but to conform.”); cf. E. ALLEN FARNSWORTH, *CONTRACTS* §7.16 (4th ed. 2004) (suggesting that judicial imposition of terms court deems parties would have accepted had they foreseen contractual gaps is “naive” in light of fact that parties could have chosen unjust term “because of the greater bargaining power of one of the parties.”).

<sup>69</sup> For example, many courts analyzing unconscionability questions under the two-pronged procedural/substantive unconscionability analysis note that these elements operate on a continuum or sliding scale. The more procedural unconscionability – determined in part by bargaining power disparities – the less substantive unconscionability is necessary to support a finding of unconscionability. Necessarily, this sliding scale implicitly supports state intervention into contracts where both parties have the requisite degree of bargaining power to engage in contracting generally, but the relative power disparity produces procedural unconscionability.

<sup>70</sup> See *WRONG*, *supra* note 22, at 10 (observing ability of party with greater power to achieve preferred outcomes in interaction with weaker party).

<sup>71</sup> There is a third possibility – “bargaining power” merely describes the outcome of the parties' interaction. If one party appears to have obtained more than half of the contractual surplus or to have obtained unfair or unjust terms, then the result can be explained in terms of greater bargaining power. See, e.g., Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 974-75 (1984) (“An employer can therefore be said to possess an inequality of bargaining power when he is able to appropriate more than half the surplus, while the employee can be said to possess inequality of bargaining power if he can appropriate more than half the surplus.”). This conception of bargaining power, however, is not useful in analyzing the role of bargaining power and bargaining power disparities in contract law for two reasons. First, it obviates the role of party responsibility for the outcome of the bargain. Specifically, there are few bargaining relationships in which a party could not improve his or her bargaining power. This is true whether the power relationship is viewed as a zero-sum game (see, e.g., *id.*

bargain means that contract and bargaining can only occur in a narrow field of relations where the parties' relative bargaining power is in parity.<sup>72</sup> Outside of that narrow field, contract cannot work and courts and legislatures must regulate the parties' interaction. In contrast, the constitutional conception of bargaining power as just a necessary pre-requisite for a bargain suggests that as long as both parties possess some quanta of bargaining power they can conclude a bargain. This constitutional conception of bargaining power reflects the perception that most, if not all, bargains involve bargaining power disparities<sup>73</sup> and that courts should intervene only where those bargaining power disparities become so severe that they interfere in some way with the parties' ability to contract.

## **II. THE ROLE OF BARGAINING POWER DISPARITIES IN CONTRACT LAW AND THEORY**

The constitutive and impositional conceptions of bargaining power affect scholarly approaches to the question whether perceived inequalities of bargaining power justify judicial and legislative intervention into private agreements. Contract theorists divide roughly into two camps on the question of the legal consequences that should be assigned to relative disparities of

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(describing bargaining between employer and employee as attempt by each to appropriate a greater share of the contractual surplus)) or as a cooperative venture in which an increase in one party's bargaining power may be accompanied by an increase in both the other party's power and in the available contractual surplus (*see, e.g.*, FISHER, ET AL., *supra* note 47, at 10-11 (proposing negotiation paradigm premised upon cooperative bargaining that attempts to produce win-win outcomes for both parties)). Second, it is not testable outside a laboratory. If all that matters is whether one of the parties "wins," the model fails to explain the cooperative negotiation paradigm or the relational contracting model in which the parties' reservation prices and the contractual surplus are not only not known at the time of contracting but also are not knowable because the parties' post-contractual interaction itself will affect the amount of surplus to be divided.

<sup>72</sup> See John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 12 TUL. L. REV. 42, 62 (1937-38) [hereinafter Dawson, *Economic Duress*] ("An exact equality in economic power, and in knowledge, judgment, and experience could scarcely be expected in all types of legal transactions."); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT 2* (1993) ("[M]arket economies depend on significant degrees of inequality to give effective reign to individual incentives, upon which their efficient functioning is critically dependent, and thus may generate higher degrees of inequality than traditional or command economies.").

<sup>73</sup> See SLAWSON, *supra* note 67, at 24-26 (in modern market economy "very large proportion of all contracts made are between producers and consumers" and producer almost always has greater bargaining power because of superior information about product).

bargaining power between contracting parties. The interventionist argument tends to focus (usually implicitly) upon the impositional notion of bargaining power and holds that a relative inequality of bargaining power between contracting parties justifies judicial intervention into the parties' relationship. Where the apparently stronger party is deemed to have "abused" its bargaining power – through fraud, duress, overreaching, simple unfairness or other evidences of power asymmetry – the agreement must be set aside or its terms rewritten to better reflect what the parties would have agreed to if they had roughly equal bargaining power.

At the other end of the spectrum, the non-interventionist argument leans toward the constitutive notion of bargaining power. So long as disparities of bargaining power do not interfere with a party's capacity or competence to bargain, mere inequality of bargaining power does not justify judicial or legislative intervention. For proponents of this approach, bargaining power disparities in the contract relationship are either not suitable for judicial analysis or simply fail to communicate a meaningful or coherent legal concept.

**A. INEQUALITY OF BARGAINING POWER AS A JUSTIFICATION FOR INTERVENTION IN PRIVATE AGREEMENTS**

In many ways, the issue of inequality of bargaining power for the interventionist school is merely a subchapter in broader questions of the extent to which contract law should be organized under principles of freedom of contract.<sup>74</sup> For many interventionists, inequality of bargaining

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<sup>74</sup> In analyzing whether inequality of bargaining power can justify judicial or regulatory intervention into contracts, I have specifically avoided the larger debate over private autonomy, freedom of contract, and public regulation of private orderings. The broader topic of the normative and positive value of freedom of contract as an organizing principle for contract law has generated substantial scholarly interest since the term was first acknowledged in the late-nineteenth century. *See* *Sharpe v. Whiteside*, 19 F. 156, 166 (E.D. Tenn. 1883) (first judicial mention of "freedom of contract"); Roscoe Pound, *Liberty of Contract*, 18 *Yale L.J.* 454, 455 (1908-09) (arguing that "freedom of contract" was a jurisprudential invention of late-nineteenth century). *See generally* P.S. ATYIAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979) (surveying historical origins and decline of freedom of contract as organizing principle for contract relations in English law); *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley, ed.) (1999) (arguing that despite numerous judicial and legislative limitations on certain types of contractual relations, most core contract doctrine continues to operate under freedom of contract as an

power is a direct critique of principles of freedom of contract. This critique takes two forms – (1) an historical argument that modern contracting (as opposed to some earlier, simpler time) must recognize individual and systemic bargaining power disparities and (2) arguments that reject freedom of contract as an organizing principle in favor of an alternative norm such as fairness, redistributive paternalism or efficiency.

**1. Historical Arguments for Intervention on the Basis of Inequality of Bargaining Power**

In its historical form, the interventionist argument acknowledges that freedom of contract may have existed and worked as an organizing principle for a different or simpler time in which parties contracted from positions of relatively equal power. The historical argument preserves freedom of contract and private autonomy either as the dominant paradigm subject to exceptions for bargaining power disparities,<sup>75</sup> or as an exception itself to a new contract regime based upon recognition and regulation of systemic inequalities of bargaining power. But the primary thrust of the historical argument remains that the traditional rules of contract law developed to regulate the dominant form of commercial relations at some time in the past.<sup>76</sup> In “modern times,” however, the freedom of contract model requiring courts to abstain from interference in private

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organizing principle). Even a cursory review of the literature generated in the debate over “just how much inequality we must tolerate in the name of individual autonomy” (*see Kennedy, Motives in Contract, supra* note 39, at 624 (1982)) is beyond the scope of this paper. Rather, this inquiry focuses on inequality of bargaining power as one specific critique, among many, of freedom of contract as an organizing principle of contract law.

<sup>75</sup> Thus, in the earlier *Lochner*-era of private autonomy and freedom of contract, courts did limit the parties’ private autonomy where one of the parties lacked the ability to protect his or her own interests. *See Jane P. Mallor, Unconscionability in Contracts between Merchants*, 40 SW. L. J. 1065, 1066 (1986) (surveying history of unconscionability doctrine and noting that equity courts historically protected classes of people deemed “easily duped” from unfair contracts); Arthur Allen Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 556-57 (1967) (same); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 Pa. L. Rev. 931, 950 (1969) (noting that courts often assumed flaws in contract formation where one party was weak, illiterate, or elderly).

<sup>76</sup> *See Barry J. Reiter, The Control of the Contract Power*, 1 OX. J. LEG. STUD. 347, 373 (1981) (arguing that contract law arose from a certain commercial context and may not work well outside that context).

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agreements no longer “works for” or “fits” the dominant model of commercial arrangements.<sup>77</sup> Instead modern contracting is characterized by inequality of bargaining power between the parties, fatally undermining the presumption of equality that underlies freedom of contract.<sup>78</sup>

The historical argument begins with the premise that contract law in the seventeenth, eighteenth and nineteenth centuries developed in response to the commercial needs of an economy in which “small traders and artisans competed for customers”<sup>79</sup> and contractual arrangements were negotiated piecemeal between parties of roughly equal bargaining power.<sup>80</sup> Within this context, each party – so long as he was competent – possessed the ability to negotiate terms and protect his own interests in the exchange.<sup>81</sup> The final contract negotiated in this fashion could be said to represent a true “meeting of the minds” in which both parties willed to be bound to the mutual enterprise and had full opportunity to become aware of its requirements and risks.<sup>82</sup> In light of this expression of the parties’ wills, courts were reluctant to intervene in private agreements.<sup>83</sup>

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<sup>77</sup> See Spanogle, *supra* note 75, at 950. “Historically, it seems that when contract law did not protect the expectations of a significant segment of the public, there was agitation for change. The record of such agitation extends at least from the introduction of quasi-contractual concepts to the present truth-intending legislation.” *Id.*

<sup>78</sup> See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 Colum. L. Rev. 94, 118-21 (2000) [hereinafter Kennedy, *Will Theory*] (describing historical critique of freedom of contract and will theory of contract as suited for “yeoman society” and agrarian culture, but in “modern, interdependent, urban, industrial, organizational society, there was unequal bargaining power or no ‘real freedom,’ etc.”).

<sup>79</sup> See A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 LOY. L. A. INT’L & COMP. L.J. 455, 457 (1992); see also Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 70 B.U. L. REV. 1, 23 (1999) (analyzing classical paradigm of contract, freedom of contract, and laissez faire ideology); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 950-51 (1974) (describing transition from exchange as primary function of contract before nineteenth century to contract as a mechanism for “ensuring an expected return” during the nineteenth century).

<sup>80</sup> See Horwitz, *supra* note 79, at 918-19 (“[W]here things have no ‘intrinsic value,’ there can be no substantive measure of exploitation, and the parties are, by definition, equal. Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory.”).

<sup>81</sup> [cite]

<sup>82</sup> This formulation, of course, came to represent the will theory of contract under which contract enforcement was deemed justified because it gave effect to the actual wills of the parties as represented in their mutual agreement. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575

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The industrial revolution brought about dramatic changes, not just in the means of production,<sup>84</sup> transportation,<sup>85</sup> and capital markets,<sup>86</sup> but also in business structure,<sup>87</sup> social and economic relations,<sup>88</sup> and the pace and means of conducting business.<sup>89</sup> With the consolidation of capital, transportation, manufacturing, and numerous other industrial sectors into a few large entities, economic relations shifted from models based upon horizontal contracting between relative economic and social equals to a new paradigm within which large firms acquired great economic, social and political power<sup>90</sup> and appeared to use that power to exploit their suppliers, their employees, and their customers.<sup>91</sup>

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(1932-33) (“According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect.”).

<sup>83</sup> Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943) (“Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.”).

<sup>84</sup> See JONATHAN HUGHES & LOUIS P. CAIN, *AMERICAN ECONOMIC HISTORY* 327-338 (6th ed. 2003) (analyzing factors in growth of American heavy industry between Civil War and World War I); HENRY BAMFORD PARKES, *THE UNITED STATES OF AMERICA: A HISTORY* 397 (3d ed. 1968) (noting changes in industrial methods resulting from scientific and technological development following civil war).

<sup>85</sup> See HUGHES & CAIN, *supra* note 84, at 275 (noting railroads grew from 30,000 miles of track in 1860 to over 350,000 miles of track by 1910); RICHARD C. OVERTON, *PERKINS/BUDD: RAILWAY STATESMEN OF THE BURLINGTON* 3, 6, 71 (1982) (charts noting 28,789 miles of track in 1859; 60,301 miles in 1871; 197,237 miles in 1901; and 254,037 miles in 1916).

<sup>86</sup> See HUGHES & CAIN, *supra* note 84, at 380-82 (describing development of financial and capital markets in late nineteenth and early twentieth centuries).

<sup>87</sup> It often is suggested that the modern business corporation developed as the dominant business form in the late nineteenth and early twentieth centuries, and that this development – with the concomitant loss of intimacy of economic relations between small providers, their employees, and their customers – drove the need for standardized contracting and loss of bargaining power. See Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L. J. 117, 120-25 (1992).

<sup>88</sup> See Mark Petit, Jr., *Freedom, Freedom of Contract, and the ‘Rise and Fall’*, 79 B.U. L. REV. 263, 299-305 (1999) (relating increasing labor / capital conflicts in closing decades of 19th century and responsive developments in contract doctrine).

<sup>89</sup> See Teeven, *supra* note 87, at 125 (“Mass distribution of goods and services required mass produced, stereotyped contract forms to handle high volume, impersonal transactions.”).

<sup>90</sup> [cite – muckrakers, etc.]

<sup>91</sup> See Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE UNIV. L. REV. 1, 9 (2004) (“The principles of individualism and the market were found wanting when tested against the circumstances of lack of personal choice in an imperfect world, concentrations of



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As the pace and complexity of transacting in this new economy increased, “[t]he development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable – the standardized mass contract.”<sup>92</sup> With this new contracting paradigm, sophisticated business firms drafted and imposed their preferred contract terms upon parties with less bargaining power and in turn had other firms’ standard terms imposed upon themselves by more powerful entities with whom they sought to do business.<sup>93</sup> Standardized terms permitted firms to replace individually negotiated contractual arrangements with a uniform contract pool against which they could then assess and manage their business risks.<sup>94</sup>

In light of this and other changes in commercial practice, the concept of freedom of contract based upon conceptions of the parties as autonomous entities with bargaining power sufficiently equal to protect their interests no longer made sense.<sup>95</sup> As one commentator noted, the gap between the theoretical foundations of the freedom of contract regime and the actual practice in the commercial and consumer marketplaces had rendered continued adherence to freedom of contract as an organizing principle increasingly absurd:

“Much of the discussion about ‘equal rights’ is utterly hollow. All of the ado made over the system of contract is surcharged with fallacy.”

To everyone acquainted at first hand with actual historical conditions the latter statement goes without saying. Why, then, do courts persist in the fallacy? Why do so many of them force upon legislation an academic

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economic power, and networks of social relations.”); *but see* ATYIAH, *supra* note 74, at 339 (arguing that primary cause of low wages for workers in early industrial revolution was the low productivity of early industrial economies, which produced less surplus for which workers and employers could bargain).

<sup>92</sup> Kessler, *supra* note 83, at 631.

<sup>93</sup> *See id.* (“Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly . . . or because all competitors use the same clauses.”); *see also* Karl N. Llewellyn, *What Price Contract? -- An Essay in Perspective*, 40 YALE L. J. 704, 748-51 (1931) (“Overwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass relationships.”).

<sup>94</sup> *See* Kessler, *supra* note 83, at 631 (noting importance of uniform contract terms for calculation and exclusion of risk by repeat sellers).

<sup>95</sup> [cite]

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theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals – as if they were farmers haggling over the sale of a horse?<sup>96</sup>

Thus, W. David Slawson, for example, argues consistently that there must be a clean distinction between the “old” and the “new” models of contract.<sup>97</sup> The old model is that given final form by Holmes<sup>98</sup> and Williston<sup>99</sup> - objective manifestations of mutual assent as represented in the parties’ words or conduct in a formalized dance of offer, acceptance and consideration. The “new” model, in contrast, explicitly accounts for disparities in bargaining power.<sup>100</sup>

For Slawson, the new model of contract must recognize “the changed conditions of contracting”<sup>101</sup> and that contract practice has changed fundamentally since the late 19th century.<sup>102</sup> First, business organizations increasingly sought to manage risk by use of standard form contracts, thereby also reducing the cost of contracting among similar transaction types.<sup>103</sup> Second, the rate of contracting and the need to engage in numerous contracts each day to obtain the necessities of life increased.<sup>104</sup> Third, Slawson observed that modern commercial activity gives rise to more numerous and more complex legal implications than under the old model of

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<sup>96</sup> Pound, *supra* note 74, at 454 (citing *Adair v. United States*, 208 U.S. 161, 175 (1908)).

<sup>97</sup> See, e.g., SLAWSON, *supra* note 67, at 26-32; W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 23-25 (1984) (analyzing “changed conditions of contracting”) [hereinafter Slawson, *The New Meaning of Contract*].

<sup>98</sup> See, e.g., OLIVER WENDELL HOLMES, *THE COMMON LAW* 309 (1881) (arguing for objective theory of assent to govern formation of enforceable contracts).

<sup>99</sup> For an insightful analysis of Williston’s jurisprudence, see generally Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

<sup>100</sup> See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1184-86 (1983) (describing traditional model of contract expounded by Williston); GRANT GILMORE, *THE DEATH OF CONTRACT* 14-17 (1974) (surveying classical model of contract law described as the “Holmes-Williston construct”).

<sup>101</sup> See SLAWSON, *supra* note 67, at 23-25.

<sup>102</sup> See *id.* at 23 (noting social changes relating to contracting behavior have been underway for over a century).

<sup>103</sup> See *id.* at 24.

<sup>104</sup> See *id.*

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contract.<sup>105</sup> Slawson’s fourth changed condition justifying the new model of contract is the “increased presence of mass commercial communications” that create a set of commonly shared expectations among consumers about the way a wide range of goods and services are supposed to perform.<sup>106</sup>

Combined, these conditions undermine the foundations of freedom of contract upon which the old model was based.

Although the four changed societal conditions are presumably the immediate social causes of the new meaning of contract, the conditions, together with the new meaning, can also be seen as causes and aspects of the decline of the extreme individualism that was characteristic of our society in the late nineteenth and early twentieth centuries. \* \* \* The expression of this attitude in contracts law was that every contract was an outcome of a struggle between parties in which each took every possible advantage of the other. If one party bound himself to terms he never read or did not understand, this was his choice, and the law, within broad limits, did nothing to excuse him from the risks he had supposedly voluntarily assumed.<sup>107</sup>

This loss of individualism, for Slawson, means that parties are now more interconnected and dependent upon each other and thus owe each other different duties than under a strict regime of freedom of contract.<sup>108</sup> These duties under the new contract law should reflect the inequalities of

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<sup>105</sup> See *id.* (“Products today are more complicated, which means that more things can go wrong with them, and the consumer is less able to prevent or repair these problems. Even more importantly, the law that applies to transactions has both increased and become more difficult for the average person to understand.”).

<sup>106</sup> See *id.* at 25.

<sup>107</sup> *Id.* at 28.

<sup>108</sup> Slawson also suggests that the new meaning of contract would have come about even without the aforementioned changed social conditions and concomitant decline of individualism and rise of interdependence. For Slawson, the old model of contract would also eventually have failed because of a fundamental internal inconsistency: “Under the old meaning, a contract is the parties’ manifestations of mutual assent, but, at the same time, it is supposed to fulfill their reasonable expectations.” Slawson, *The New Meaning of Contract*, *supra* note 97, at 29. It is likely that Slawson overstates his case on this point, though. The normative argument that contracts are supposed to fulfill the parties’ reasonable expectations – outside of common law rules against fraud, duress, mistake, undue influence, public policy and similar defects in the contracting process – appears itself to depend upon the parties’ expectations as shaped by the law. But those expectations themselves are formed from communications to the parties – to use Slawson’s formulation – of the qualities of law as a product and what parties can reasonably expect from that product. If the law continually signals to parties that their contracts will be enforced – absent a

bargaining power that exist between consumers and producers in modern commercial transactions.<sup>109</sup>

## **2. Justice, Equity and Economic Efficiency as Justifications for Intervention on the Basis of Unequal Bargaining Power**

In contrast to the historical argument, which implicitly acknowledges that freedom of contract may work in some circumstances, many interventionists argue that the existence of gross disparities of bargaining power on a systemic scale indicates that freedom of contract and private autonomy are flawed as a paradigm for regulating private orderings. Consequently, many interventionists argue instead for a new ordering principle for contract recognizing that inequalities of bargaining power generate fairness, equity, or morality concerns that demand judicial or legislative intervention.

Barry Reiter, for example, has argued explicitly that freedom of contract and market principles fail to reflect real societal needs and interests and do not account for systemic bargaining power deficiencies suffered by certain types of contract parties (e.g., consumers) and in certain contexts (e.g., “markets with substantial information asymmetries”).<sup>110</sup> Reiter challenges that “contract as an organizing principle in society – the market – has a limited role” and that contract and market principles fail to recognize important societal interests in protecting interests and individuals who lack power in the market context.<sup>111</sup> While freedom of contract and

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recognized defect in formation – even if they are unfair or hard bargains, that communication should powerfully shape the expectations parties have for the law.

<sup>109</sup> See *id.* at 28-31 (suggesting courts and commentators will eventually accept new meaning of contract that ameliorates extreme individualism and enforces parties’ reasonable expectations for contract terms).

<sup>110</sup> See Reiter, *supra* note 76, at 366-67.

<sup>111</sup> *Id.* at 348-53 (“[M]arket theory simply did not take enough account of social values other than those concerned with efficiency and (measurable) net gains.”). Reiter identifies several situations involving market failures and, implicitly, disparities of bargaining power that produce socially unacceptable contract terms:

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market principles may work in some situations,<sup>112</sup> courts and legislatures should develop criteria for intervention where bargaining power asymmetries produce contract terms that are socially unacceptable.<sup>113</sup>

Similarly, Larry DiMatteo has presented the freedom of contract paradigm as a flawed description of what courts actually do in response to perceived inequality of bargaining power.<sup>114</sup> Courts have always employed subdoctrines of contract law to protect parties from bad or unfair or inequitable bargains.<sup>115</sup> DiMatteo ultimately argues that principles of justice and equity require a contract regime to incorporate a strong equitable or fairness component to enforce the substantive justice between contracting parties.<sup>116</sup> For DiMatteo, the notion of freedom of contract is a facade that hides the fact that courts do police inequalities of bargaining power and contractual unfairness.<sup>117</sup> Thus, bargaining power disparities, because they upset notions of

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[M]arkets populated by fly-by-night operators unaffected by market pressures; markets in transition; and markets where the individuals likely to be harmed are too diffuse or too inarticulate to be able to secure legislated solutions. They tend to involve individuals too weak to compete effectively and those who would prey upon them in the market; or individuals taken by surprise by deficient performance in the context of a market where information is underproduced or is likely to be processed in an inadequate fashion.

*Id.* at 363.

<sup>112</sup> Reiter suggests that judicial or legislative limits on contract power will be less important (and thus requiring less public intervention) in contracts between commercial entities than in contracts between commercial entity and a consumer. *See id.* at 366-67 (“I would expect that the notion of control should have far less play in commercial cases than it has in consumer and family contract cases.”).

<sup>113</sup> *See id.* at 363.

<sup>114</sup> *See* LARRY A. DIMATTEO, *EQUITABLE LAW OF CONTRACTS: STANDARDS AND PRINCIPLES* 173-75 (2001) (“The ideology of freedom of contract in which adequacy of consideration is discarded contradicts the courts’ praxis for avoiding the enforcement of unfair exchanges.”).

<sup>115</sup> *See id.* at 174; *see also* Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 *NEW ENG. L. REV.* 265, 295-96 (1998-99) (noting that courts continued to investigate covertly the fairness of exchanges even after the development of consideration doctrine purportedly prohibited inquiry adequacy of the consideration).

<sup>116</sup> *See* DIMATTEO, *supra* note 114, at 285-90.

<sup>117</sup> *See* DiMatteo, *supra* note 115, at 354-55 (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 581 (1971)).

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fairness in an exchange, in themselves justify intervention.<sup>118</sup> Such interventions do not fix flaws in an underlying regime of freedom of contract, but rather to implement a wholly different conception of contract based upon equity and fairness of exchange.

A third model for justifying intervention on the basis of inequality of bargaining power rests on conceptions of economic efficiency. Anthony Kronman, for example, has argued in favor of expressly paternalist interventions to correct power imbalances and market inefficiencies.<sup>119</sup> Using the example of implied warranties of habitability in residential lease contracts,<sup>120</sup> Kronman argues that paternalist interventions making such warranties non-disclaimable in fact promote economic efficiency.<sup>121</sup> Permitting the parties to bargain over the warranty makes sense if both have equal information regarding the premises, or at least if the landlord is not intentionally withholding information about habitability to deceive the unwary lessor into waiving the warranty.<sup>122</sup> Because the informational asymmetry in residential lease cases is often great, however, Kronman argues there is a significant danger that the landlord will have a greater incentive to induce the tenant's waiver of the warranty through fraud.<sup>123</sup>

Given the difficulty of proving fraud in such cases, Kronman posits that it may be economically efficient to impose a standard warranty of habitability to counteract the

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<sup>118</sup> See DIMATTEO, *supra* note 114, at 174.

<sup>119</sup> See Kronman, *supra* note 3, at 765 (explaining “paternalistic limits on contractual freedom . . . by considerations of economic efficiency and distributive fairness, . . . by the idea of personal integrity, and . . . by the familiar, though poorly understood, notion of sound judgment.”).

<sup>120</sup> See *id.* at 767. Kronman describes the implied warranty of habitability as an implied representation by the landlord that there are no latent conditions in the leased premises that would render those premises uninhabitable. See *id.*

<sup>121</sup> Kronman acknowledges the standard economic argument that a judicially imposed warranty would appear to reduce the parties' ability to maximize their welfare by shifting the risk of non-habitability to the party most able to bear that risk. See *id.* “What appears indefensible from an economic point of view is the decision to make a standard term like the warranty of habitability non-disclaimable, for this can make a difference only where the parties would agree to waive the warranty if they could, and in every case of this sort, the prohibition against waiver seems to reduce the parties' welfare.” *Id.* at 767.

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* at 769-70.

information asymmetry that will almost always exist between landlords and tenants for residential leases.<sup>124</sup> Although Kronman’s efficiency argument addresses only one specific source of bargaining power deficiencies – informational asymmetry between seller and buyer – he posits a distributionist ethic to justify intervention for a broader conception of inequality of bargaining power.<sup>125</sup>

## **B. ARGUMENTS AGAINST INTERVENTION ON THE BASIS OF INEQUALITY OF BARGAINING POWER**

The non-interventionist argument rejects bargaining power disparities as a sufficient justification for public intervention in private agreements. But the reasons for rejecting inequality of bargaining power as a justification for intervention vary widely. Economic arguments, for example, suggest intervention itself creates inefficient outcomes, or because bargaining power disparities are not inherently inefficient. Other approaches argue that inequality of bargaining power is incoherent, or that inequality of bargaining power is inherently too complex, inconsequential or driven by emotional concerns for courts to achieve fair or just results.

### **1. Economic Arguments against Inequality of Bargaining Power as a Basis for Intervention**

Judge Richard Posner’s economic analysis of duress, monopoly and bargaining power concludes with “the general question whether the concept of unequal bargaining power<sup>126</sup> is fruitful, or even meaningful.”<sup>127</sup> In economic terms, there is no meaningful basis for regulating

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<sup>124</sup> *See id.*

<sup>125</sup> *See id.* at 772-73. Specifically, for social goods such as “minimally decent housing,” Kronman argues that courts should intervene explicitly to correct the imbalance of bargaining power by shifting control of the societal resource from the stronger party to the weaker. *See id.*

<sup>126</sup> Posner’s understanding of bargaining power – both its forms and sources – is essential for synthesis of his argument. In many respects, Posner appears to accept that bargaining power is constitutive of contract and inequalities of bargaining power can negate assent, rather than a means of allocating contractual surplus or obtaining more favorable contract terms. *See POSNER, supra* note 23, at 102 (“It is an easy step from the observation that there is no negotiation to the conclusion that the purchaser lacked a free choice and should therefore not be bound to its terms.”).

<sup>127</sup> *See id.* at 104.

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contractual behavior on the basis of unequal bargaining power. First, although it is “tempting” to analogize take-it-or-leave-it adhesion contracts to duress, Posner dismisses the conclusion that the lack of negotiation indicates a lack of free choice that negates assent to the bargain.<sup>128</sup> Rather, standard form contracts minimize contracting costs, including the costs of negotiation, the costs of managing individualized risks, and the costs of monitoring employees, all of which are likely to be high for sellers.<sup>129</sup> While it is possible that sellers could use standard form contracts to attempt to impose unfavorable terms on weaker buyers, Posner suggests that such tactics cannot work (at least in the long term) if there is competition because “competition forces sellers to incorporate in their standard contracts terms that protect the purchasers.”<sup>130</sup>

Where some competition opens the possibility for dickering or shopping by buyers, the polar cases of perfectly competitive markets and monopoly-controlled markets both eliminate the possibility of negotiation in any form by the buyer. In perfectly competitive markets, buyers cannot shop or negotiate for better terms because every seller will be selling at or near its marginal costs and cannot offer better terms than any other seller and still make a profit.<sup>131</sup> And

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<sup>128</sup> See *id.* at 102 (“It is an easy step from the observation that there is no negotiation to the conclusion that the purchaser lacked a free choice and therefore should not be bound by onerous terms.”).

<sup>129</sup> See *id.* at 102; see also M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 364-366 (1976) (observing that standard form contracts are used “in countless contexts where no significant degree of market concentration exists.”). “The fact that . . . a supplier’s products are offered on a take-it-or-leave-it basis is evidence not of market power but of a recognition that neither producer- nor consumer-interests in aggregate are served by incurring the costs involved in negotiating separately for every transaction. The use of standard forms is a totally spurious proxy for the existence of market power.” Trebilcock, *supra* at 364.

<sup>130</sup> POSNER, *supra* note 23, at 102; but see Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (arguing that bounded rationality of buyers will lead providers to compete on contract terms salient to buyers such as price, but offer sub-optimal or inefficient non-salient terms in standard form contracts); Stephen Choi & Mitu Gulanti, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 993-96 (2004) (empirical analysis suggesting that changes to standardized contract terms occur slowly following interpretive shock such as judicial invalidation or reinterpretation of contract term).

<sup>131</sup> See POSNER, *supra* note 23, at 102 (arguing that competitive sellers will offer more and more attractive terms “until the terms are optimal” and that “[a]ll the firms in the industry may find it economical to use standard contracts and refuse to negotiate with purchasers.”).



in cases of monopoly, “there is no reason to expect the terms (such as seller’s warranties or the consequences of the buyer’s default) to be different under monopoly from what they would be under competition; the only difference that is likely is that the monopolist’s price will be higher.”<sup>132</sup> A third case of purported bargaining power disparities requiring regulation – the use of fine print and confusing terms to obscure onerous provisions – is analytically a species of fraud and should be regulated as such.<sup>133</sup> And finally, in cases of status-based characteristics such as poverty that are said to give rise to inequalities of bargaining power, Posner argues that many apparently oppressive terms in fact minimize costs for the apparently weaker parties.<sup>134</sup>

## **2. Standards-based Arguments against Inequality of Bargaining Power as a Basis for Intervention**

A common critique of inequality of bargaining power as a legal concept is that it is costly, difficult, or even impossible to apply meaningful standards to assess the relative bargaining power of the parties. Commentators and courts typically assess the presence or absence of bargaining power on the basis of four primary criteria: (1) bargaining behavior (e.g., use of standardized forms presented on a take it or leave it basis, use of hard bargaining tactics, etc.); (2) seller characteristics such as monopoly status, size and sophistication; (3) buyer characteristics such as poverty, education and gender; and (4) transactional characteristics such as necessity or a shortage of the subject matter. Although these characteristics may indicate bargaining power disparities in some circumstances, in reality they only coincidentally match the actual bargaining power relationship between the parties.

The use of standard form contracts, imposed on a take-it-or-leave it basis by sophisticated firms upon unsophisticated individual consumers, has often been adopted by courts

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<sup>132</sup> *Id.* at 102.

<sup>133</sup> *See id.* at 103.

<sup>134</sup> *See id.* at 103-04.

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as evidence of a lack of bargaining power by the consumer.<sup>135</sup> But the use of standard form contracts can be explained as an economically rational and efficient means of doing business. Standard forms are ubiquitous because they represent the least cost means for repeat sellers to transact with one-shot buyers. Posner, for example, notes that “large and sophisticated buyers, as well as individual consumers, often make purchases pursuant to printed form contracts.”<sup>136</sup> The use of standard form contracts may be consistent with a real disparity of bargaining power,<sup>137</sup> but it is also entirely consistent with good business practices that maximize the contractual surplus available to the parties.<sup>138</sup>

Similarly, seller and buyer characteristics often cited as indicia of superior bargaining power, including wealth, monopoly, business sophistication, education, size or organization, gender, and race likewise cannot accurately define whether one party possesses superior bargaining power. Those characteristics are, in fact, examples of stereotypical judgments operating independently of the actual qualities of individual parties. While observable party characteristics are often useful heuristics on a macro level, they ultimately fail to predict or

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<sup>135</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991) (“[C]ourts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power.”); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 265 (3rd Cir. 2003) (“A contract of adhesion is one which is prepared by the party with excessive bargaining power who presents it to the other party for signature on a take-it-or-leave-it basis.”).

<sup>136</sup> POSNER, *supra* note 23, at 102.

<sup>137</sup> See Kessler, *supra* note 83, at 632 (“Standard contracts are typically used by enterprises with strong bargaining power.”); Korobkin, *supra* note 130, at 1217-18 (arguing that because consumers are boundedly rational decisionmakers, they will rarely generate sufficient information regarding form contracts to force sellers to incorporate efficient terms).

<sup>138</sup> See Trebilcock, *supra* note 129, at 364 (arguing the purpose of standardized contracts reduces costs of transacting for all parties); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 305-315 (reviewing various types of standard form contract terms often attacked as unfair – *i.e.*, add-on, waiver-of-defense, exclusion of consequential damages, due-on-sale, and termination-at-will clauses – and concluding that “the clauses so attacked are, at the time of formation, arguably in the interests of both parties to the agreement.”).

describe the complete and evolving power relation between individual bargaining parties.<sup>139</sup> Thus, monopoly may yield the same contract terms as would conditions of pure competition except for the price, and a party's relatively greater size or market share will not guarantee greater bargaining power in many situations.<sup>140</sup> Stereotypes of the bargaining power possessed by buyers or consumers based upon socio-economic class characteristics are potentially dangerous, both because such stereotypes are often wrong or incomplete,<sup>141</sup> and because of the impact that judicial declarations of powerlessness may have upon members of affected groups.<sup>142</sup> Finally, cases of necessity or shortage of the subject matter in themselves cannot determine

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<sup>139</sup> See, e.g., Leff, *supra* note 75, at 556-57 (1967) (noting courts “seem continually to have taken a kind of sub rosa judicial notice of the amount of power of certain classes of people to take care of themselves, often without too much inquiry into the actual individual bargaining situation.”).

<sup>140</sup> See *supra* note 136 and accompanying text; see also John Dalzell, *Duress by Economic Pressure*, 20 N.C. L. REV. 237, 244 (1941) (noting “the corporate Goliath might [be] . . . quite at the mercy of an unconscionable David in an advantageous position.”).

<sup>141</sup> As Arthur Leff observed, “the typical has a tendency to become stereotypical, with what may be unpleasant results even for the beneficiaries of the judicial benevolence.” See Leff, *supra* note 75, at 556-57; see also Robert A. Hillman, *Debunking Some Myths about Unconscionability: A New Framework for UCC Section 2-302*, 67 CORNELL L. REV. 1, 30-31 (1981) (suggesting status-based standards for bargaining weaknesses may limit judicial flexibility in equitable analyses). Thus, while there will often be cases where stereotypical attributions of bargaining weakness are coincidentally accurate (see, e.g., LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 115-16 (2003) (arguing that women often lack bargaining power and noting that women appear willing to pay substantial premiums to avoid negotiating)), such stereotypes are inappropriate for individualized cases. Such stereotypes are arguably even more inaccurate and subject to abuse in the age of the Internet, which substantially reduces information and shopping costs for many types of contracts. See, e.g., Barnhizer, *supra* note 7, at 219-22 (analyzing potential impact of Internet on consumer bargaining power and noting that increased access to information has caused dynamic changes in consumer information).

<sup>142</sup> That impact may be both practical and psychological. On the practical side, judicial or legislative interventions to protect particular classes against perceived bargaining power abuses may simply increase the costs of contracting for the affected classes. See Leff, *supra* note 75, at 556-57 (questioning with respect to judicial interventions on behalf of English sailors, “What effect, if any, this had upon the sailors is hidden behind the judicial chuckles as they protected their loyal sailor boys, but one cannot help wondering how many sailors managed to get credit at any reasonable price.”); Barnhizer, *supra* note 7, at 228 (noting that stereotypical descriptions of bargaining power on a class or status basis may ignore societal changes strengthening or weakening particular classes over time). On the psychological side, repeated judicial and legislative declarations that members of a particular class lack bargaining power may have a detrimental impact upon how members of that class perceive their own bargaining power in market transactions. See Barnhizer, *supra* note 7, at 217-19 (citing Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-13 (1988) (discussing importance of narrative for reinforcing or challenging prevailing power distributions in society); Yuval Feldman, *Control or Security: A Therapeutic Approach to the Freedom of Contract*, 18 TOURO L. REV. 503, 528 (2002) (arguing that judicial interference in private contracts may have negative psychological impact upon parties)).

bargaining power without analysis of other factors, such as a competitive market for the necessity or the availability of substitutes (including doing without) for scarce goods or services.

**3. Outcome-based Arguments against Inequality of Bargaining Power as a Basis for Intervention**

In addition to the lack of meaningful standards for identifying, assessing and assigning legal consequences to disparities of bargaining power, non-interventionists also argue that the effects of bargaining power disparities are so uncertain that it fails to justify intervention. Duncan Kennedy, for instance, has approved of the use of a doctrine of inequality of bargaining power to effect and legitimate distributionist and paternalist goals but firmly acknowledges that the doctrine “may achieve only randomly good results even when it is used skillfully.”<sup>143</sup> Kennedy’s review of the standards typically used to assess bargaining power – whether the transaction concerns a “public good,” adhesive contract terms drafted by the seller, the seller is a bigger entity than the buyer, the seller is a monopoly, the commodity is a “necessity” or there is a shortage – suggests that intervention to achieve a distributive outcome is only coincidentally likely to achieve that goal.<sup>144</sup>

For example, Kennedy observes that “[n]either the drafting of the terms by the seller, nor the seller’s offering them on a take-it-or-leave-it basis, nor the absolute size of the seller affects the buyer’s power in any sense we should care about.”<sup>145</sup> For Kennedy, not only do these factors fail to provide standards for identifying real power disparities,<sup>146</sup> but also an individual

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<sup>143</sup> Kennedy, *Motives in Contract*, *supra* note 39, at 620-25 (“I want to show that if you just went about finding all the situations that, according to these subtests, represent unequal bargaining power, and in each case imposed on the stronger party the duty the weaker party is asking for in the lawsuit, you would act more or less at random from the point of view of the distributive interests of the beneficiary class (‘buyers’).”).

<sup>144</sup> *See id.* at 616-18 (arguing such factors are only “randomly correlated” with real inequalities requiring judicial intervention).

<sup>145</sup> *Id.* at 616.

<sup>146</sup> Kennedy apparently sees power, or the lack of power, on a rough division between the “weak” and the “strong” and on a slightly more sophisticated status-based hierarchy divided by race, class, gender

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redistribution of societal wealth in favor of the apparently weak party cannot yield long-term redistribution.<sup>147</sup> Thus, a court that intervenes to correct the apparent inequality of bargaining power arising from use of a standard term may help the short-term interests of the parties before it will be just as likely to cause the seller to develop strategies to shift its increased costs to future buyers.<sup>148</sup> Additionally, it is just as likely that consumer perceptions of unfairness will drive changes in contract terms and bargaining practices over time, through measure such as consumer protection legislation or substitution of alternative goods or services.<sup>149</sup>

Similarly, Roberto Unger, in his seminal article, *The Critical Legal Studies Movement*,<sup>150</sup> employs the doctrine of inequality of bargaining power in his trashing of contract law but ultimately does not accept bargaining power disparities as justifications for judicial interventions in individual cases. According to Unger, interventions on the basis of bargaining power asymmetries merely represent covert attempts to preserve the market-based regime that underlies contract.<sup>151</sup> Inequalities of bargaining power do not justify intervention into individual contracts

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and region. *See id.* at 572 (discussing distributive motives and power imbalances on basis of weak and strong parties) and 578 (discussing “inequalities all around us, both between racial, class, sexual and regional groups and within those groups.”).

<sup>147</sup> *See id.* at 616.

<sup>148</sup> *See id.*

<sup>149</sup> *See id.* at 617 (“It is ironic that pathbreaking cases like *Henningsen v. Bloomfield Motors* justified compulsory terms for auto warranties by emphasizing that the customer was helpless in the face of gigantic bargaining opponents. Those helpless buyers have somehow induced a proliferation of seller warranty experiments, and then more or less destroyed the auto industry by their preference for foreign cars.”). For a detailed analysis of the dynamic changes in warranty offerings and increased shopping ability of consumers in the Internet era, see Barnhizer, *supra* note 7, at 219-22.

<sup>150</sup> Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 629-33 (1983).

<sup>151</sup> *See id.* at 625-26 (“A regime of contract is just another legal name for a market. It ceases to exist when inequalities of power and knowledge accumulate to the point of turning a set of contractual relations into the outward form of a power order.”); 627 (noting family law, labor law, and economic duress as examples of ineffectual surrogates for institutional reconstruction). For example, Unger treats the doctrine of economic duress as merely an ineffectual stopgap measure that only arbitrarily corrects some bargaining power disparities but does not necessarily correct power imbalance perpetuated by a market-based regime:

According to [the doctrine of economic duress] a contract may be voidable for economic duress whenever a significant inequality of bargaining power exists between the parties. Gross inequalities of bargaining power, however, are all too common in the current forms

or even removal of entire classes of contract-like interactions from contract law because such interventions are “confused[] and covert[]” and only arbitrarily correct gross power disparities as “a pattern of unjustifiable distinctions . . . as the alternative to an overbearing and comprehensive intervention.”<sup>152</sup> Rather, Unger concludes that inequality of bargaining power justifies a complete reorganization and transformation of contract law as an institution.<sup>153</sup>

It is difficult to place Kennedy’s and Unger’s critical analysis of bargaining power within the theoretical matrix developed in this paper. On the one hand, both clearly suggest that inequality of bargaining power is incoherent. Although Kennedy convincingly argues that inequality of bargaining power does not produce a coherent and identifiable outcome,<sup>154</sup> he nonetheless asserts that courts should continue to intervene in private contracts on that basis because of the warm feelings and psychological support of distributive impulses created by such interventions.<sup>155</sup> Unger likewise acknowledges that interventions on the basis of bargaining power asymmetries are incoherent, but argues that the ubiquity of such disparities throughout

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of market economy, a fact shown not only by the dealings between individual consumers and large corporate enterprises, but also by the huge disparities of scale and market influence among enterprises themselves. Thus, the doctrine of economic duress must serve as a roving commission to correct the most egregious and overt forms of an omnipresent type of [bargaining power] disparity. But the unproven assumption of the doctrine is that the amount of corrective intervention needed to keep a contract regime from becoming a power order will not be so great that it destroys the vitality of a decentralized decisionmaking through contract.

*Id.* at 629.

<sup>152</sup> *See id.* at 633.

<sup>153</sup> *See id.*

<sup>154</sup> *See also* Eric A Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEG. STUD. 283, 296 (1995) (“Moreover, it is not always true that unequal bargaining power produces contracts different from those produced in a competitive market.”).

<sup>155</sup> *See* Kennedy, *Motives in Contract*, *supra* note 39, at 621 (“Eliminating inequality of bargaining power, as liberals conceive it, has nothing to do with eliminating factual inequalities. \* \* \* It nonetheless gives a very good feeling.”); *cf.* Leff, *supra* note 75, at 527 (describing U.C.C. § 2-302 unconscionability provisions as illustrative of “skewing of legal doctrine that may be caused by an emotional pressure to get a more heartwarming particular result”).

contract law requires a radical redesign of the entire infrastructure of contract.<sup>156</sup> Consequently, while neither position directly supports intervention for individual cases, both clearly envision a macro-level response to perceived power disparities.

### **III. BARGAINING POWER AS CONTRACT THEORY**

The argument over the role of bargaining power in contract law takes place on multiple levels. Whether bargaining power disparities justify public intervention into private agreements must be answered on both an individual level and a macro level, and this dual meaning generates the tension between the interventionist and the non-interventionist arguments.

#### **A. THE ROLE OF BARGAINING POWER AT THE LEVEL OF INDIVIDUAL CASES**

At the level of individual cases, the relative bargaining power of the parties is purely a judicial inquiry. Where the court implicitly or explicitly analyzes the parties' relative power, it attempts to enforce a primary rule<sup>157</sup> against contract terms obtained through abuse of superior bargaining power.<sup>158</sup> This analysis asks whether the individual parties suffered such power asymmetries that a court is justified in refusing to enforce the contract or particular terms.<sup>159</sup> It is a direct inquiry into whether one of the parties inequitably or unfairly abused its power to impose contract terms upon the weaker party.<sup>160</sup>

As the non-interventionists have observed, bargaining power disparities are a problematic justification for direct intervention in individual cases. Regulation of private agreements on the

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<sup>156</sup> See Unger, *supra* note 150, at 633.

<sup>157</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 89-96 (1961) (distinguishing between primary and secondary rules).

<sup>158</sup> Cf. SLAWSON, *supra* note 67, at 23 (“A lack of bargaining power in one or both parties is a reason for limiting their freedom of contract, their contracting power, or both.”).

<sup>159</sup> See Adler & Silverstein, *supra* note 19, at 29 (noting that law establishes limits on both the fairness or equity of contract terms that may be imposed and the methods used to obtain those terms, “premised on the assumption that at some point in the bargaining process, power advantages can produce inequities so pronounced that the law must step in to protect the weak.”)

<sup>160</sup> See DiMATTEO, *supra* note 114, at 174 (describing attempts of English jurists to police directly inequality of bargaining power as an “overarching fairness inquiry”).

basis of perceived inequalities of bargaining power is, at least to some degree, incoherent.<sup>161</sup> The institutional competence of legal decisionmakers limits their ability to identify and assess some types of bargaining power. Bargaining power comes in many forms, ranging from the wholly coercive (e.g., a literal gun to the head) to the markedly subtle (e.g., emotional power between family members).<sup>162</sup> Courts generally lack the resources to assess completely the bargaining power of the parties and often come to the wrong conclusion even if they try. Thus, the legal decisionmaker's assessment of power in individual cases may be impossible given the complexity and dynamic nature of the phenomenon.<sup>163</sup> In this individualized inquiry, judges are like blindfolded individuals asked to describe the essential nature of an elephant by only touching the trunk, body or tail – their narrowed perceptions result in widely varying and entirely inaccurate descriptions.<sup>164</sup>

## **B. THE ROLE OF BARGAINING POWER AT THE LEVEL OF DOCTRINE AND THEORY**

In contrast to the focus upon the impositional nature of bargaining power at the individual level, the macro level response to bargaining power disparities emphasizes the constitutional

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<sup>161</sup> See Kennedy, *Motive in Contract*, *supra* note \_\_, at \_\_ (noting that typical justifications for intervening on the basis of bargaining power disparities – including size and business organization, use of adhesion contracts, necessity, and monopoly – are arbitrary and that even if courts sought to overturn all contracts in favor of the apparently weaker party they would probably get the bargaining power determination wrong).

<sup>162</sup> See Barnhizer, *supra* note 7, at 173-76 (analyzing various forms of power – i.e., real or false, visible or hidden, exercised or unexercised – and noting that while legal decisionmakers may be competent to assess obvious forms of power, subtle forms of power may actually be more important to the parties' outcome).

<sup>163</sup> See, e.g., *id.* at 236.

<sup>164</sup> See *supra* notes 143 through 156 and accompanying text (discussing arguments that intervention on the basis of perceived bargaining power disparities will not produce coherent results). The impact of potential inaccuracies in individual cases would be ameliorated if the common law system of reports and sterilized precedents did not generalize individual power assessments to broad classes of status and transaction type. Although it is likely that judges often exercise discretion to permit or deny such broad stereotypes of power relations (see, e.g., *Adams v. John Deere Co.*, 774 P.2d 355, 360 (Kan. App. 1989) (rejecting bald assertion of unequal bargaining power based upon relative size in favor of nuanced inquiry)), many others continue to employ such standards (see, e.g., *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 173-75, 180-81 (Iowa 1975) (implicitly holding without analysis that owner of fertilizer plant lacked bargaining power in contracting with insurer)). I anticipate that these issues will be the subject of a future article.



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relation of bargaining power and enforceable promises. The macro level of analysis occurs at the level of rules and doctrine. At this level, the legal system must intervene to correct systemic bargaining power disparities. Law – including contract law – functions to remove social interactions from a state of nature in which the strong parties exercise unfettered “raw” personal power. By refusing to sanction promises obtained by threats of violence, deception, or other manifestations of extreme bargaining power disparities, contract law systematizes and regulates the raw power interactions that would otherwise control.

Consequently, while inequality of bargaining power may not be well suited as a standard for judicial intervention in individual cases, the concept may prove helpful in discerning the limits of contract and discriminating between enforceable and unenforceable promises. Specifically, contract law lacks a meta-theory that explains why some promises should be enforced while others are not.<sup>165</sup> Some theorists have attempted to explain the enforceability of contract promises on the basis of certain behaviors that invoke moral obligations that the state should enforce. Charles Fried, for instance, has championed the concept of “promise” as the moral and legal basis of contract.<sup>166</sup> Others, such as Grant Gilmore, have argued that the basis of contract is reliance,<sup>167</sup> or, like Randy Barnett, have suggested a consent-based theory of enforceable promises.<sup>168</sup> While all of these positions are useful for explaining some aspect of

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<sup>165</sup> See ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 36-41 (1996) (surveying contract meta-theories and concluding that “[c]ontract law’s complexity belies the simple conclusion that either private ordering or non-promissory, interventionist principles dominates.”). Ultimately, the project of doing contract theory requires a determination as to what constitutes contract law and what lies outside of it. See STEPHEN A. SMITH, *CONTRACT THEORY* 8-9 (2004) (“[I]t is still necessary to determine which legal rules and decisions are the legal rules and decisions that a theory of *contract* law must explain in order to apply the fit criterion.”). Smith suggests that the distinction between contract and non-contract law should be based upon “consensus.” See *id.* at 9 (“The parameters of contract law, and also the identification of what is central and what is peripheral to contract law, are determined by the consensus of those familiar with the law.”).

<sup>166</sup> See CHARLES FRIED, *CONTRACT AS PROMISE* 17 (1981).

<sup>167</sup> See GILMORE, *supra* note 100, at 70-76.

<sup>168</sup> See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269-70 (1986).

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contract law, no single theory can explain the enforceability or non-enforceability of all promises.

Ultimately, the problem lies not with the theories, but with what they are trying to explain. As Alan Schwartz and Robert Scott observed, “contract law” actually comprises numerous legal relations on which courts and legislatures have imposed exceptions and regulations that intervene in private orderings to varying degrees.<sup>169</sup> While many social relations involve enforceable promises, at some point those relations become so subject to state

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<sup>169</sup> See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 543-45. Rather than attempting to identify a single descriptive or normative theory applicable to the field of what is, in formalist terms, “contract law,” Schwartz and Scott distinguish bodies of law that involve promises but are so subject to state intervention that they can no longer be fairly described as core contract doctrine. See *id.* at 544-45 (describing transactions in which a firm sells to another firm as “the main subject of what is commonly called contract” and noting that sales by firms to individuals or by individuals to firms or other individuals are regulated by other legislative schemes). John Dawson also suggests a similar approach to analyzing the doctrine of consideration, which for Dawson had become so loaded down with extraneous duties such as discharge or modification of obligations and reinforcement of “firm” offers as to distort the core doctrine of consideration. See JOHN DAWSON, *GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED* 197-221 (1980) [hereinafter DAWSON, *GIFTS AND PROMISES*] (discussing primary purpose of consideration doctrine as a bargained-for exchange and arguing other purposes are extraneous).

What happened about a century ago, when Holmes was “inventing” bargain consideration, was that this central idea, which had been familiar in England for more than three hundred years, was overloaded with additional tasks for which it was wholly unsuited. The distortions and evasions that the added functions produced have brought them all into disrepute. The reassuring news is that we have made a good start toward removing these excrescences and could succeed before long in eliminating them altogether. They never were needed, as the experience of France and Germany should indicate.

*Id.* at 198-99. Cf. HOHFELD, *supra* note 65, at 30 (“Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional.”). By identifying the boundaries of a sphere in which a core of contract doctrine works, Schwartz and Scott craft a compelling normative theory that describes the role of the state in regulating private contract. See Schwartz & Scott, *supra*, at 543 (“The theory’s affirmative claim, in brief, is that contract law should facilitate the efforts of contracting parties to maximize the joint gains (the ‘contractual surplus’) from transactions. The theory’s negative claim is that contract law should do nothing else. Both claims follow from the premise that the state should choose the rules that regulate commercial transactions according to the criterion of welfare maximization.”).

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intervention that they can no longer be described as contract.<sup>170</sup> By removing from contract law transaction types characterized by systemic inequalities of bargaining power, courts and legislatures express indirectly the permissible boundaries within which parties may exercise legitimate forms of bargaining power.

This realization – that some legal relations lend themselves to public intervention on a macro level while others may be effectively regulated through a more private ordering regime – illustrates that not all interactions that appear to be promises or contracts are properly so termed. Instead, contract lies within a continuum of interactions ranging from cases where the state regulates virtually all, some, few or virtually none of the bargaining process or terms of the parties' promissory relation. Thus, promises to exchange sexual services for money are regulated

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<sup>170</sup> This continuum of contract and contract-like transactions comprises a wide array of state interventions, ranging from the relatively private “core” contract arrangements between businesses in the pluralist theory envisioned by Schwartz & Scott, through judicial interventions such as good faith and unconscionability, state-mandated substantive terms such as warranties and interest rate caps, state-mandated bargaining procedures, state definitions of property rights, and on to wholly non-contract regimes such as family law. Thus at the level of relatively minimal state interventions the bargaining process between management and organized labor is procedurally and substantively regulated under the NLRA. *See* 29 U.S.C. §§ 157 (guaranteeing employees a right to organize and bargain collectively), 158 (proscribing unfair labor practices by management and labor and requiring labor and management to bargain over “wages, hours, and other terms and conditions of employment”), *see also* Flick, *supra* note 20, at 83-84 (noting that NLRA substantively requires parties to bargain in good faith, consequently limiting the bargaining tactics available during collective bargaining process). Likewise, contracting between consumers and merchants is largely regulated under numerous consumer protection statutes, such as the Truth-In-Lending Act (15 U.S.C. §§ 1601-1667f, Pub.L. 90-321, Title I, May 29, 1968, 82 Stat. 146) (regulating disclosure of terms in credit contracts) the Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301-2312, Pub.L. 93-637, Jan. 4, 1975, 88 Stat. 2183) (regulating warranty disclosure requirements and prohibiting substantive requirements conditioning warranty upon consumer’s purchase of other products or services); state usury statutes (*see, e.g.*, MCL §§ 438.31c, 438.61 (limiting interest rates on certain loan transactions to between 7% and 25%, depending on parties and subject matter)), and state Unfair and Deceptive Trade Practices Acts (*see, e.g.*, MCL §§ 445.903, 445.903a (prohibiting unfair and deceptive trade practices in bargaining process and requiring substantive terms to be included in certain consumer contracts)). While such interventions do interfere with the ability of parties to engage in purely private orderings, the resultant transaction still looks like a contract. *See, e.g.* Samuel J. Williston, *Liberty of Contract*, 6 CORNELL L. Q. 365, 379-80 (1921) (arguing that while many legislative interventions such as minimum wage acts, hours regulations and even building codes interfere with party autonomy to some extent, contracts such as for employment and housing construction are still largely regulated by contract law). On the other hand, many observers have noted that while marriage vows and intrafamily devisements strongly resemble contractual promises, family law is entirely removed or separated from contract law. *See* Unger, *supra* note 150, at 621-25 (analyzing separation of family law and contract law).

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under criminal, not contract law (at least outside Nevada) and any promises by the parties are not only unenforceable but also give rise to affirmative criminal and civil liability. Divorce settlements and labor agreements, while they reflect some aspects of contract, are regulated under judicial and regulatory regimes that impose publicly mandated terms and procedures. Consumer protection legislation and judicial doctrines such as unconscionability govern promissory relations between consumers and merchants. Parties may make any donative promises to convey gifts they wish, but such promises generally are not enforceable by resort to state sanction. Attempts to define a complete interpretive or normative theory of “contract law” necessarily must falter because these broad senses of contract or bargain are too broad and too inconsistent to permit themselves to be addressed by a single theoretical structure.<sup>171</sup>

Again, the question of what it means for a promise or set of promises to be enforceable “within” contract law operates within a graduated continuum, and, as Stephen A. Smith suggests, whether a particular regime or doctrine is within or without contract law ultimately may depend upon what “people familiar with the law (lawyers, judges, legal scholars) take to be contract law.”<sup>172</sup> This “consensus method is usually sufficient to establish which rules and decisions count as part of contract law,” because the consensus is widely shared – borderline cases such as promissory estoppel generate scholarly dispute as to whether they are contract or tort, but every contracts casebook deals with offer, acceptance and consideration.<sup>173</sup> The point here is that theories about contract law essentially concern the degree to which the state should leave private orderings alone. The borderline cases are interesting because the theory that is used to define the borders of contract law also suggests the size of the doctrinal area within which state interference is minimized and private autonomy maximized.

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<sup>171</sup> Cf. HILLMAN, *supra* note 118, at 36-41.

<sup>172</sup> STEPHEN A. SMITH, CONTRACT THEORY 9 (2004).

<sup>173</sup> *Id.*

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In this sense, bargaining power is useful in defining the boundaries of contract, the area of law within which private orderings are relatively respected, by identifying those types of promises that should be enforceable because (1) both sides must have bargaining power; and (2) that power is legally cognizable. The first element requires that both sides have power to affect the outcome of a bargain relationship. The practical and legal scope of that relationship is open to debate, but here the term “bargain” refers broadly to an exchange relation in which at least one party is giving up something to the other party.<sup>174</sup> For a promise to be enforceable in contract – i.e., without significant state intervention into the bargaining process or terms, both parties must possess some ability to affect the outcome of that exchange. If one of the parties lacks that power, the relation must be regulated by doctrines wholly outside of contract.<sup>175</sup>

The second element is the key to defining whether a promise within the bargain relationship should be enforced. Power – even a subset such as bargaining power – has so many forms and sources that legal decisionmakers likely can never recognize, assess and assign legal consequences to exercises of power in individual cases. The legal cognizability criterion provides a screening mechanism that moves the inquiry from the direct analysis of power to the institutional competence of courts and legislatures. Where courts and legislatures perceive systemic and extreme power disparities, they establish rules and doctrines that regulate those relations, eventually regulating so much that the relation moves “outside” of contract.<sup>176</sup> Courts analyzing individual cases still police the power relationship of the parties, but it is based upon pre-determined proxies – is the subject matter susceptible to analysis under core contract

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<sup>174</sup> See *supra* notes 41-50 and accompanying text.

<sup>175</sup> To take an oft-used example, minors and incompetents generally lack the power to conclude enforceable contracts, and the state regulates their ability to acquire goods and services through, inter alia, family law, guardianship, property law, and welfare statutes. Similarly, a party who lacks bargaining power because the other side has an exclusive monopoly on truthful information may bring an action in tort for fraud as well as in contract for rescission.

<sup>176</sup> See *supra* note 170 and accompanying text.

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doctrine, or (like labor agreements, divorce and custody settlements, prostitution and illicit drug contracts, consumer sales or credit, and so on) is it subject to different rules and mandatory terms.

Not all promises involving obvious bargaining power on both sides are enforceable.<sup>177</sup> Legal cognizability demands that rules governing the parties' power relations must be consistently applicable to similarly situated parties and credible to outside observers who regularly reassess the authority of courts to determine those issues.<sup>178</sup> Where courts identify real power relationships as legally cognizable where they are not, or vice versa, they inevitably create the basis for legislative or social reactions to bring the real power relation and the legal rule in line.<sup>179</sup> This legal recognition of the power relation between the parties describes and defines the circumstances in which promises will be made legally enforceable – namely, where both parties are able to affect the outcome of their interaction *and* courts are capable of consistently and credibly recognizing that capacity. In other words, it is not necessary that the legal assessment of the parties' relative bargaining power be accurate. Insurance companies, for instance, may occasionally lack bargaining power compared to their consumers,<sup>180</sup> but judicial or legislative declarations to the contrary fit so well with common experience and perception that typical findings of an insurer's superior power are accepted and credible.

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<sup>177</sup> See Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 4 (1979-80) [hereinafter Eisenberg, *Donative Promises*] (“Of course, the promise may have raised the promisor’s status with the promisee or with some sector of the community, but legal intervention based solely on unjust enrichment must normally involve something more than undue gratification.”).

<sup>178</sup> Cf. *id.* at 2 (“[C]ontract rules must reflect considerations of administrability, particularly information costs, as well as considerations of substance. An otherwise preferable rule may therefore be rejected, if its application turns on facts that cannot be readily, reliably, and suitably determined in the relevant forum.”).

<sup>179</sup> See, e.g., GALBRAITH, *supra* note 29, at 72-80 (“The usual and most effective response to an unwelcome exercise of power is to build a countering position of power.”).

<sup>180</sup> See *Fisher v. Crescent Ins. Co.*, 33 F. 544, \_\_\_ (Wis. 1887) (“In cases of contracts for insurance the parties are not, in all respects, on equal footing, as the *applicant for insurance has a better knowledge of the subject matter of the contract than the insurer.*”) (emphasis added). Admittedly, such cases are extraordinarily rare.

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The development of the legal doctrine of inequality of bargaining power itself illustrates what happens when legal recognition of power relations fails to produce both consistent and credible results that bear some relation to social perceptions of the parties' actual power relations.<sup>181</sup> *Lochner*-era<sup>182</sup> freedom of contract doctrine presumed that competent parties possessed equal bargaining power, or at least for purposes of policy would be treated as such regardless of the reality. From this presumption of equal bargaining power followed the conclusion that each party possessed the ability to protect their interests in the transaction.<sup>183</sup> The inequality of bargaining power doctrine began as political rhetoric challenging that presumption and critiquing perceived abuses of the contract power by employers.<sup>184</sup> In other words, contract law's insistence that competent parties had equal bargaining power – even if it was only the power to walk away – lost credibility in the face of perceived, widespread inequalities between employer and employee. With these changing perceptions of systemic inequalities between employers and labor, inequality of bargaining power shifted from political rhetoric to a legal doctrine that justified legislative and judicial interventions into private contracts for labor.<sup>185</sup> By the mid-1940s, the legal concept of inequality of bargaining power emerged as a principle

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<sup>181</sup> A thorough analysis of the historical development of a legal conception of bargaining power and bargaining power disparities, although beyond the scope of this Article, is the subject of a current work in progress.

<sup>182</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 64-65 (1905) (absent justified use of police power, “the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.”).

<sup>183</sup> See *supra* notes 22-23 and accompanying text.

<sup>184</sup> Duncan Kennedy argues that an alternative regime to freedom of contract was necessary to counteract this growing dissatisfaction within some classes of society that purportedly were being denied the opportunity to participate in the bargaining process on an equal footing with other classes. See Kennedy, *Will Theory*, *supra* note 78, at 151 (2000). This dissatisfaction arose from the perception that grossly unequal bargaining power between some contracting parties invalidated “true consent” and that the “practical or real world effects of operating the [freedom of contract] regime were inconsistent with the public interest.” *Id.*

<sup>185</sup> See, e.g., *Buck's Stove & Range Co. v. Gompers*, 221 U.S. 418, 437 (1911) (noting “[T]he very fact that it is lawful to form these [unions], with multitudes of members, means that they have acquired a vast power, in the presence of which the individual [employer] may be helpless.”); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 258 (1917) (Brandeis, J., dissenting) (arguing that employees need to organize to match power of employers).

supporting judicial intervention into private contracts.<sup>186</sup> Two decades later, courts had started treating inequality of bargaining power as a necessary but insufficient justification for intervention on behalf of the weaker party.<sup>187</sup>

#### **IV. BARGAINING POWER AND ENFORCEABLE PROMISES IN THE CONTEXT OF GIFT AND PROMISSORY ESTOPPEL**

As discussed above, bargaining power defines the existence of contract in its constitutive function and limits the enforceability of promises in its impositional function. Traditional common law contract doctrine – the bilateral negotiation and exchange of promises or performances between parties to create an enforceable agreement – implicates bargaining power issues throughout a wide range of subdoctrines.<sup>188</sup>

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<sup>186</sup> See, e.g., *Austin v. National Employment Exchange*, 266 N.Y.S. 306, 311 (Mun. Ct. NYC 1933) (noting weak bargaining power of white collar employees in dealing with executive placement service); *Parr-Richmond Terminal Corp. v. Railroad Comm’n of Cal.*, 43 P.2d 1088, 1090 (Cal. 1935) (noting large shippers may have greater bargaining power than wharf owner, permitting them to obtain better rates than small shippers); see also *Rawson v. Hardy*, 48 P.2d 473, 475-76 (Utah 1935) (relying in part on vendor’s apparent “shrewdness and bargaining power” as evidence of competence); *United States Navigation Co. v. Cunnard S.S. Co.*, 284 U.S. 474, 480 (1932) (examining bargaining power disparities in antitrust context).

<sup>187</sup> See, e.g., *Adler & Silverstein*, *supra* note 19, at 48 (noting that the vast majority of unconscionability claims involve contracts between merchants and unsophisticated consumers). Admittedly, many courts continue to treat inequality of bargaining power as only one factor in the unconscionability analysis. See, e.g., *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 906-07 (Kan. 1976) (noting unequal bargaining power as one of ten factors relevant to a determination of unconscionability); *Layne v. Garner*, 612 So.2d 404, 408 (Ala. 1992) (identifying inequality of bargaining power as one of four factors of unconscionability analysis); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 181 (Iowa 1975) (noting inequality of bargaining power as one of five factors giving rise to unconscionability). But very few – indeed, I have not found any – unconscionability cases involve successful claims of unconscionability by parties with superior bargaining power.

<sup>188</sup> Many contract subdoctrines, including unconscionability and public policy explicitly analyze bargaining power disparities as an element of a claim or defense. See *Barnhizer*, *supra* note 7, at 144 (noting use of bargaining power disparities as explicit element in unconscionability, adhesion contract and public policy analyses); see also JOHN D. CALAMARI & JOSEPH PERILLO, *THE LAW OF CONTRACTS* § 9.40 at 372-374 (4th ed. 1998) (noting unequal bargaining power is generally not sufficient in itself to invalidate contract for unconscionability). Bargaining power disparities appear implicitly, or even covertly, in an even greater range of contract subdoctrines such as consideration, the parol evidence rule, and contract interpretation. See *Barnhizer*, *supra* note 7, at 144-53 (noting implicit use of inequality of bargaining power as element in contract defenses such as duress, fraud or undue influence, contract formation, contract interpretation and contract remedies).



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But the legal cognizability of bargaining power also determines the enforceability of promises outside the traditional boundaries of common law contract doctrine. Although any non-contract or quasi-contractual regime involving the regulation of promissory behavior can illustrate the relation between enforceability of promises and legally cognizable bargaining power, promises in the context of gift and promissory estoppel relations are especially useful. At one level of analysis, the regimes of contract, promissory estoppel and gift form a natural continuum or cross-section of promissory behavior. Contract governs situations involving mutual promises and exchanges, promissory estoppel covers cases of unilateral promise on one side and reliance by the other, while gift addresses situations involving executory promises alone. At another level, however, gift and promissory estoppel also lie on the ragged edge of contract law where the line between what should be enforced and what should not is more of a grey borderland pockmarked by intrusions and exceptions. Legally cognizable bargaining power provides both a positive description of those boundaries, grey zones and exceptions and a normative explanation of why some promises should be enforced while others are left undone.

### A. LEGALLY COGNIZABLE POWER in GIFT RELATIONSHIPS

The gift relation is a power relation. As many observers have noted of both traditional gift-based economies<sup>189</sup> and gift relations in contemporary society,<sup>190</sup> a gift can both describe the

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<sup>189</sup> See, e.g., MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 17-41 (1925) (trans. Ian Cunnison trans. 1967) (analyzing complex system of gift, exchange, reciprocity and obligation among societies bordering Pacific Ocean); BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 29-32 (1926) (LITTLEFIELD ADAMS QUALITY PAPERBACK ED. 1989) (describing gift relations as generating reciprocal obligations that define donor's and donee's social and economic power and status); SALLY FALK MOORE, *SOCIAL FACTS & FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980* 152-53 (1986) (describing use of obligatory "gifts" or tribute as source of power and support for certain East Africa tribal chiefs).

<sup>190</sup> See, e.g., RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 71-75, 238 (1971) (describing motivations of blood donors and noting role that gifts generally and blood donations specifically have in developing personal, psychological and social status relations); Joe Hermer, *Gift Encounters: Conceptualizing the Elements of Begging Conduct*, 56 U. MIAMI L. REV. 77, 84-88 (2001) (analyzing power relations of gift encounters between street beggars and passersby); cf.

balance of power between the donor and the donee<sup>191</sup> and create a new balance of power with social and psychological dimensions.<sup>192</sup>

Studies of traditional gift-based economies, for example, have observed that gifts are intrinsically linked to the social status or standing of both the donor and the donee.<sup>193</sup> For the donor, the making of substantial gifts can maintain or increase social status and honor<sup>194</sup> – both important factors in personal or political power.<sup>195</sup> The making of a gift or gift promise also creates a relationship between the donor and the donee that imposes recognizable obligations upon the donee to reciprocate with a countergift.<sup>196</sup> And the donor, by offering the gift, creates

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Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEG. STUD. 411, 411-14 (1977) (analyzing economics of gift relations).

<sup>191</sup> See Eisenberg, *Donative Promises*, *supra* note 177, at 4 (noting that gift promise may raise status of donor with donee or with community).

<sup>192</sup> See *id.* at 2-4 (noting that breach of promise may cause social or psychological injury to promisee); see also MALINOWSKI, *supra* note 189, at 28-32; MAUSS, *supra* note 189, at 11.

<sup>193</sup> See, e.g., MAUSS, *supra* note 189, at 4-5. Mauss's description of the "potlatch" form of total prestation in which tribes of the American and Canadian Northwest gather for ceremonial or ritualistic gift exchanges in which prestations occur primarily to define social status presents a particularly clear example of power relations within gift institutions:

We are here confronted with total prestation in the sense that the whole clan, through the intermediacy of its chiefs, makes contracts involving all its members and everything it possesses. But the antagonistic character of the prestation is pronounced. Essentially usurious and extravagant, it is above all a struggle among nobles to determine their position in the hierarchy to the ultimate benefit, if they are successful, of their own clans.

*Id.*

<sup>194</sup> See *id.* at 35 (describing importance of appropriate participation in gift economy of Native Americans of the Pacific Northwest for maintaining or enhancing personal honor - "The rich man who shows his wealth by spending recklessly is the man who wins prestige."); MALINOWSKI, *supra* note 189, at 36-37 (describing importance of displays and gifts of wealth to maintaining and improving social standing).

<sup>195</sup> See Adler & Silverstein, *supra* note 19, at 8 (noting "the ability to persuade and inspire is an important element of power"); GALBRAITH, *supra* note 29, at 38-46 (discussing role of personality in personal power of figures such as Moses, Confucius, Aristotle, Plato, Jesus, Mohammed, Marx and Gandhi).

<sup>196</sup> See MALINOWSKI, *supra* note 189, at 39-45 (observing in gift-based economy of Tobriand Islanders around the beginning of the twentieth century that "[m]ost, if not all economic acts are found to belong to some chain of reciprocal gifts and countergifts, which in the long run balance, benefiting both sides equally."); MAUSS, *supra* note 189, at . Importantly, Malinowski's description, despite being plagued by racial and cultural insensitivities common to his era, emphasizes that an individual's status and social power depend upon his or her compliance with this interconnected web of gift and expectations

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power in the donee to affect the donor’s social standing by refusing the gift, potentially communicating the snub to the surrounding community.<sup>197</sup> The reciprocal obligations created by gifts, such as prohibitions on miserliness and requirements of counter-gifts, are not legally enforceable but are enforced through social sanction as the violator suffers diminished social standing and ultimately is forced out of the social network of mutual reciprocal obligations.<sup>198</sup>

Dawson describes a similar gift and reciprocity basis for the system of legally enforceable donative promises recognized in the Roman law and the continental civil codes.<sup>199</sup> The Roman law and later Civil Codes identify specific transaction forms by which a promisor could make a promise to convey property or services to another that would be legally binding without any return promise or recompense from the promisee.<sup>200</sup> The origin of these donative promises, like the socially enforceable power relationships between donor and donee in traditional gift-based economies discussed above, rests in power relations between ancient Roman aristocrats that were later recognized and made enforceable by legal decisionmakers:

[T]hese conceptions originated at a much earlier time in the upper levels of a highly stratified society. For Romans who either occupied or sought to infiltrate these commanding heights, acceptance of payment for personal services was demeaning, even sordid, and income from commerce rather than landed estates had to be earned under various disguises. The admired posture was that of the generous friend, ready to give aid or render service but finding abhorrent any notion of an agreed, enforceable reward. *If the enterprise undertaken because of friendship, mutual respect, or personal honor was left incomplete or was carelessly*

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of reciprocity. See MALINOWSKI, *supra* note 189, at 41-42 (noting that individuals who ignore their gift obligations become social outcasts).

<sup>197</sup> See MAUSS, *supra* note 189, at 11 (“To refuse to give, or to fail to invite, is – like refusing to accept – the equivalent of a declaration of war; it is a refusal of friendship and intercourse.”).

<sup>198</sup> See MALINOWSKI, *supra* note 189, at 39-45;

<sup>199</sup> See DAWSON, GIFTS AND PROMISES, *supra* note 169, at 11-14.

<sup>200</sup> The donative transactions in code systems include *mancipatio* (a physical delivery of the transferred object); *stipulatio* (a formal and ritualized promissory form presented as the question “Do you promise [to do X act]?” and response “I promise”) *depositum* (grant of custody to promisee); *commodatum* (loan for use); *mutuum* (a loan of money without interest); and *mandatum* (promise of services). See *id.* at 8-11 (describing donative transactions in Roman law); JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 30-31 (1991) (same).

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*managed, the compulsion to adhere to high standards of conduct was felt strongly enough that it was appropriate for courts to intervene and administer correctives.*<sup>201</sup>

Dawson’s description of the Roman donative promise institutions, and the theme of later Civil Codes that “contracts providing for human services or for mere use, without alteration, of another’s property do not ordinarily call for remuneration but are enforceable nonetheless,”<sup>202</sup> mirror the descriptions of the power relations involved in traditional gift-based economies discussed above. The institution of gift creates a power relationship between the donor and the donee under which each party has the ability to affect the outcome of the interaction, although that ability may be based upon diffuse social obligations and abstract notions of honor and status. The primary difference is that the Roman law expressly recognized as legal obligations the social compulsions to perform certain donative promises that bound the ancient Roman aristocracy as something that could be legally enforced.<sup>203</sup>

In contrast to the enforceability of donative promises in the civil law, American common law typically does not enforce donative promises that are unsupported by consideration or some similar evidence of a bargain and remuneration between the parties.<sup>204</sup> But the American common law does recognize specific circumstances where courts will enforce donative promises that are unsupported by consideration.<sup>205</sup> While the most obvious example of enforceable donative promises arises where the promisee justifiably relies upon a donative promise, the reliance principle does not explain other types of enforceable donative promises such as the

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<sup>201</sup> DAWSON, GIFTS AND PROMISES, *supra* note 169, at 12-13 (emphasis added) (citing J. MICHEL, GRATUITÉ EN DROIT ROMAIN 147-156 (1962)).

<sup>202</sup> *Id.* at 12-14; *see also* Baron, *supra* note 42, at 157 (noting that common law distinction between gifts and bargains has “never been used in the civil law.”).

<sup>203</sup> *See* DAWSON, GIFTS AND PROMISES, *supra* note 169, at 12-13.

<sup>204</sup> *See* Eisenberg, *World of Contract*, *supra* note 43, at 821-22 (“An important general principle of contract law is that a donative promise – a promise to make a gift – is not legally enforceable simply because it is a promise, although certain kinds of donative promises are enforceable under special principles, like reliance.”).

<sup>205</sup> *See id.* at 822-23 (distinguishing “special donative promises” from the generally non-enforceable “general donative promise”).

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common law rule that charitable subscriptions are enforceable without a showing of detrimental reliance.<sup>206</sup>

The enforceability of charitable subscriptions at common law often is justified in terms of social benefits.<sup>207</sup> But this explanation is unsatisfying both because charitable donations are not necessarily socially beneficial and because there are many types of donative promises that may be socially beneficial to enforce but are not recognized as legally enforceable.<sup>208</sup> Nor can this distinction between charitable subscriptions and other types of donative promises be explained by arguing that charitable subscriptions are usually accompanied by evidentiary or other cautionary protections that make them more like bargains.<sup>209</sup> Courts often reject donative promises as unenforceable regardless of indications of formality and seriousness of the parties,

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<sup>206</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (“A charitable subscription . . . is binding . . . without proof that the promise induced action or forbearance.”).

<sup>207</sup> See, e.g., *Jewish Fed. of Central N.J. v. Barondess*, 560 A.2d 1353, 1354 (N.J. Super. 1989) (“The real basis for enforcing a charitable subscription is one of public policy – that enforcement of a charitable subscription is a desirable social goal.”) (citing *More Game Birds in America, Inc. v. Boettger*, 14 A.2d 778, 780 (N.J. 1940)); *Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609, 612 (Iowa 1974) (“[T]he courts have generally striven to find grounds for enforcement [of charitable subscriptions], indicating the depth of feeling in this country that private philanthropy serves a highly important function in our society.”). This social benefits justification, however, fails to explain why courts and commentators distinguish these donative promises from other types of equally beneficial donative promises that are unenforceable. There is nothing about charitable subscriptions in themselves that suggests they will necessarily result in a net social benefit. Many would argue that society would be better off without the work of the Sierra Club or the National Rifle Association. Additionally, given the high administrative costs of many charitable organizations – particularly those that solicit donations through professional solicitation services – in many cases donors could likely achieve a greater social benefit by making direct wealth transfers. See James W. Harvey & Kevin F. McCrohan, *Fundraising Costs – Societal Implications for Philanthropies and Their Supporters*, 27 BUS. & SOC. 15, 17, 19-20 (1988) (noting fundraising costs ranged from 2-38% of raised funds across sample and concluding that donors tend to give more to charities as belief in level of efficiency increases); William P. Barrett, *Give Wisely to Charity*, FORBES.COM Dec. 13, 2004, available at [http://www.forbes.com/finance/2004/12/13/cz\\_wb\\_1213charity.html](http://www.forbes.com/finance/2004/12/13/cz_wb_1213charity.html) (last visited Jan. 11, 2005) (recommending that donors be “wary” of giving to charities with less than 70% fundraising efficiency).

<sup>208</sup> See Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L. J. 1261, 1304-05 (1979-80) (suggesting that making donative promises enforceable would inefficiently increase costs of making donative promises); Eisenberg, *World of Contract*, *supra* note 43, at 847-52 (arguing that moral considerations require donative promisee to release promisor who later regrets making donative promise).

<sup>209</sup> Fuller’s evidentiary, cautionary and channeling functions for the legal formalities necessary to make an enforceable contract (see Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941)) are usually diminished in the context of promises to make a gift in the future.

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and while many charitable subscriptions are carefully negotiated between donor and donee there is no particular degree of formality, evidence or seriousness of the parties necessary to make such promises enforceable.<sup>210</sup>

Whether the gift or gift promise occurs in a relationship involving legally cognizable bargaining power, however, explains the enforceability of some gift promises. While every gift involves bargaining power, in many instances that power relation is subtle and complicated. The gift relationship is often, perhaps predominantly, formed in the context of familial or other close, emotional relations.<sup>211</sup> The interplay between parties in such situations is messy and complicated, and in many cases considerations of institutional competence and public policy will strongly caution courts against attempting to analyze those relationships post hoc.<sup>212</sup> A wealthy uncle may have many reasons to promise a large sum to his niece – increased social status within the community and the family, gaining the attention and subjugation of other non-wealthy relatives, satisfaction of personal desires, control of the niece’s affections and future interests, and so on. The niece may be entirely submissive or entirely dominant with respect to the uncle. The power relation created by such a transaction is not subject to easy unraveling because the ability of the niece to protect her interests and affect the outcome may vary widely depending on her emotional and reputational power over the uncle and other factors. Legal decisionmakers may

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<sup>210</sup> Eisenberg notes that donors may create enforceable donative promises by making their promise in the form of a written conveyance, delivery of possession, by a sealed writing or by phrasing their gift as a trust. *See* Eisenberg, *Donative Promises*, *supra* note 177, at 3 n.5.

<sup>211</sup> *See* Baron, *supra* note 42, at 155 (“Donative transfers carry out benevolent urges in the context, usually, of the family, whereas contractual exchanges carry out self-interested aims in the context, usually, of the market.”); Eisenberg, *Donative Promises*, *supra* note 177, at 5 (“But since actors involved in a donative transaction are often emotionally involved, and since the donative promisor tends to look mainly to the interests of the promisee, an informal donative promise is more likely to be uncalculated than deliberative. Indeed, such promises may raise a problem akin to capacity, because they are frequently made in highly emotional states brought on by surges of gratitude, impulses of display, or other intense but transient feelings.”).

<sup>212</sup> According to Dawson, Roman law evidenced a similar reluctance to enforce gifts in a family setting, although the Roman prohibition on intra-family gifts applied only to gifts between spouses. *See* DAWSON, *GIFTS AND PROMISES*, *supra* note 169, at 14-18.

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find it best to just leave such matters to informal enforcement mechanisms such as familial and community opprobrium should the uncle fail to deliver or the niece fail to accept and be suitably appreciative.<sup>213</sup>

In contrast, the power relationship in the charitable subscription context is legally cognizable. Charitable subscriptions bypass the typical messiness of intra-family or similarly emotional gift relations. Such transactions are sufficiently common that most observers will have participated in such gifts on many occasions.<sup>214</sup> Additionally, the range of power relations between the charitable donor and donee will usually be less complicated than the typical intra-familial or intra-friendship gift relationship.<sup>215</sup> Although charitable subscriptions clearly involve emotional and psychological factors,<sup>216</sup> they do not implicate the incredibly intricate web of social relations and obligations involved where the parties are members of the same family or close social group.<sup>217</sup> The ability of the donor and the donee to affect the outcome of such relations is generally accepted, commonly understood, and subject to observation, evaluation, and enforcement by courts.

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<sup>213</sup> Cf. Goetz & Scott, *supra* note 208, at 1279-80 (analyzing efficiency of legal enforcement versus social enforcement or self-sanctions in producing optimal enforcement levels for non-reciprocal promises).

<sup>214</sup> See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, 378 (Table No. 580 “Charity Contributions – Percent of Households Contributing by Dollar Amount, 1991 to 2000, and Type of Charity, 2000)(noting approximately 88% of U.S. households made charitable contributions in year 2000); George Melloan, *As NGOs Multiply, They Expand a New 'Private Sector'*, June 22, 2004, WALL ST. J., at A19 (“Americans give some \$240 billion a year to private charities and a like amount in volunteer services, if you value the time they devote based on the hourly earnings of production workers.”).

<sup>215</sup> Cf. Joe Hermer, *Gift Encounters: Conceptualizing the Elements of Begging Conduct*, 56 U. MIAMI L. REV. 77, (2001) (contrasting complex and “socially dangerous” open gift encounters such as street begging with legally permissible and closely controlled charitable giving).

<sup>216</sup> See TITMUSS, *supra* note 190, at 238-40 (discussing emotional and psychological motivations of blood donors).

<sup>217</sup> Cf. RESTATEMENT (SECOND) OF CONTRACTS §90(2) cmt. f (“Where recovery is rested on reliance in such cases, a probability of reliance is enough, and *no effort is made to sort out mixed motives* or to consider whether partial enforcement would be appropriate.”) (emphasis added).

**B. LEGALLY COGNIZABLE POWER AND PROMISSORY ESTOPPEL**

Just as with the gift promise in American common law, the promissory estoppel relationship is a power relationship between the promisor and the promisee in which both parties have power to affect the outcome of the interaction.<sup>218</sup> At the moment of the promise, the promisor possesses both the power to confer a benefit upon the promisee and the power to withhold that benefit. The promisor appears to have complete power over whether to make the donative promise, and the extent of the promise. And the promisor appears to “abuse” its power over the promisee by making a promise on which the promisee reasonably relies to its detriment.<sup>219</sup>

But just as with the gift relation, the promisee also has power to affect the outcome of the promissory relationship. After the promise, the promisee has the choice to rely and, consciously or unconsciously, makes that choice in such a way as to maximize the promisee’s preferred outcome. In some ways, the doctrine of promissory estoppel suggests that mere donative promises can “mature” into promissory estoppel when the promisee undertakes some act in reliance on the promise. Importantly, though, reliance is not the only manifestation of the power relationship between the parties, it is just a manifestation of power that legal decisionmakers

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<sup>218</sup> Although doctrines of gift and promissory estoppel provide useful illustrations of the role of bargaining power in defining the boundaries of contract and enforceable promises, a full analysis of the role of bargaining power in those doctrines is beyond the scope of this paper. I anticipate that these issues will be the subject of future papers.

<sup>219</sup> See Gregory M. Duhl, *Red Owl’s Legacy*, 87 MARQ. L. REV. 297, 306 (2003) (“The court in *Red Owl* recognized that franchisors could abuse that bargaining power without risk to themselves and provided a mechanism in promissory estoppel to induce franchisors to live up to their precontractual assurances and representations.”); Jeffrey A. Brueggeman, Note, *Where is the First Amendment When You Really Need It? Lowering the Constitutional Barrier to Suits against the Press*, 9 J. L. & POL. 147, 179-80 (1992) (noting traditional justification for enforceability of promises of confidentiality to sources to protect sources from abuse by press and arguing that power relations actually favor sources); Howard C. Ellis, *Employment at Will and Contract Principles: The Paradigm of Pennsylvania*, 96 DICK. L. REV. 595, 612-13 (1992) (characterizing promissory estoppel as tool to prevent employer abuse of bargaining power); cf. Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 712 n.371 (“Indeed, one of the reasons that lies are thought to be reprehensible is that they involve the deliberate abuse of power over persons in weaker informational positions and undermine people’s prospects for self-determination.”).



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have chosen to recognize as evidence of the underlying power relationship. In other words, “reliance” is part of the vocabulary we use to describe the existence and scope of the bargaining power relation for this type of transaction.

The textbook cases of *Ricketts v. Scothorn*<sup>220</sup> and *Hoffman v. Red Owl Stores, Inc.*<sup>221</sup> illustrate the operation of bargaining power in this context. Promissory estoppel cases in some instances may look more like gifts, in others like contracts. In the former, the relation looks like a gift promise upon which the promisee detrimentally relies. The grandfather in *Ricketts v. Scothorn* who promised to pay \$2000 to his granddaughter so she would “not got to work any more” made a gift and appeared willing to do so regardless of whether the granddaughter changed her position in reliance on the gift promise.<sup>222</sup> In the latter, the promisor attempts to cause the promisee to undertake some action in reliance on the promise, either because the promisor in good faith believes that the parties will conclude an enforceable bargain or because the promisor is intentionally manipulating the promisee. Thus, in the seminal *Red Owl* case, the promisor – Red Owl Stores – clearly made its promises to attempt to influence Hoffman’s actions on the expectation that the parties would conclude a contract for a grocery store franchise.<sup>223</sup> In both cases, however, courts purportedly enforce such promises because of the reliance produced by the promise.

This view of promissory estoppel, however, ignores the reasons for the promisee’s reliance. In both of the cases above, the promisee exercises a form of bargaining power to affect

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<sup>220</sup> 77 N.W. 365, 366 (Neb. 1898).

<sup>221</sup> 133 N.W.2d 267 (Wis. 1965).

<sup>222</sup> See 77 N.W. at 366 (enforcing grandfather’s bare promise to pay \$2000 to granddaughter upon which granddaughter relied in quitting employment). Importantly, the court expressly characterized the promise as a “gift” before holding that the granddaughter’s reliance on the promise made the obligation enforceable. See *id.* at 367.

<sup>223</sup> See *id.* at 269-71. Hoffman alleged that in reliance upon promises by Red Owl and its agents, he and his wife (1) sold their bakery business and building; (2) purchased and later sold at a loss a small grocery store; (3) purchased a building site for a new Red Owl franchise; and (4) rented a residence near the proposed site of the new store. *Id.*

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a preferred outcome for the interaction. In *Red Owl*, the promisee's reliance clearly was an attempt to induce the promisor to transfer the grocery franchise on favorable terms. Hoffman undertook each act of reliance – selling his bakery business and building, purchasing an option on a building lot for the new franchise, buying, operating and selling a small grocery to gain experience and moving residences – because Red Owl promised that a franchise would be forthcoming if he did these acts.<sup>224</sup> Hoffman relied because by doing so he could influence Red Owl's decision to sell him a franchise on favorable terms. Hoffman exercised his bargaining power to attempt to control the outcome of the parties' interaction.

Although not immediately obvious, the gift version of promissory estoppel described in *Ricketts* is just as much a naked exercise of power by the granddaughter as were Hoffman's acts of reliance. The grandfather's gift, of course, entailed all of the power relations involved in every gift. The grandfather had bargaining power with respect to the making and the amount of the gift, and impliedly made the gift because it increased his familial and social standing to distribute largesse sufficient to permit his grandchildren to live as monied gentry. The granddaughter, according to the reported opinion, immediately expressed gratitude and quit her job.<sup>225</sup> Even

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<sup>224</sup> See *id.* at 270-71 (noting multiple representations by Red Owl representatives that if Hoffman would receive a Red Owl franchise if he fulfilled several conditions) and 272 (relating special verdict concluding that Red Owl made representations to Hoffman "that if he fulfilled certain conditions . . . they would establish him as franchise operator of a Red Owl Store in Clinton."). Some commentators have challenged the notion that *Hoffman* is actually a promissory estoppel case given that the court never expressly identified the specific promise upon which Hoffman actually relied. See, e.g., Duhl, *supra* note 219, at 303 ("Implicit in the court's analysis was that Red Owl made a promise or a series of promises to Hoffman, however indefinite, but the court failed to identify the specific promise or promises in its opinion.") and 312-316 (analyzing poor fit between promissory estoppel doctrine and actual facts of *Hoffman*).

<sup>225</sup> See *Ricketts*, 77 N.W. at 366:

What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses: "A. Well, the old gentleman came in there one morning about nine o'clock, probably a little before or a little after, but early in the morning, and he unbuttoned his vest, and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, 'I have fixed out something that you have not got to work any more.' He says, none of

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assuming that the granddaughter had not exercised her bargaining power to cause her grandfather to make the gift, her reaction to the gift was a perfect example of the donee's power over a donor to receive the gift promise and to maximize the likelihood that the gift would be delivered.<sup>226</sup>

This is not to say that the granddaughter was not also acting reasonably in relying on the gift, nor is it a claim that she was a scheming mercenary out to squeeze her grandfather for living expenses. Rather, she was taking part – consciously or unconsciously – in a social and cultural milieu where reliance on such a promise is reasonable precisely because of the power relationship created by the promise.<sup>227</sup> If the grandfather reneged on the promise (while still alive) because the granddaughter refused to quit her job, such an action could have significantly affected his social standing and intra-familial status.<sup>228</sup> The granddaughter's objective reliance on the promise makes that bargaining power relationship legally cognizable, and thus removes the gift promise from the messy and complicated *mélange* of intrafamily emotional and cultural obligations<sup>229</sup> and permits courts to observe and assess the underlying power relation. It is

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my grandchildren work, and you don't have to. Q. Where was she? A. She took the piece of paper and kissed him, and kissed the old gentleman, and commenced to cry." It seems Miss Scothorn immediately notified her employer of her intention to quit work, and that she did soon after abandon her occupation.

<sup>226</sup> As noted in the discussion of gift promises in Part IV.A, the gift promise in the intrafamily is generally unenforceable. *See supra* note 209 and accompanying text. In the context of bargaining power, however, reliance on a gift promise supercedes the messy and complex power relations inherent in such gift promises and provides evidence of bargaining power on both sides of the transaction.

<sup>227</sup> The social framework that made such reliance reasonable is evident in both traditional and modern gift relationships. *Cf.* FRIED, *supra* note 166, at 19 (“[R]eliance on a promise cannot alone explain its force: *There is reliance because a promise is binding, and not the other way around.*”); Lon L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 60-61 (1936-37) (suggesting that expectancy interest may be described as prophylaxis against losses based upon reliance interest); Cohen, *supra* note 82, at 555 (noting that expansion of markets and commerce has favored “reliance on promises as a basis for individual enterprise otherwise impossible”).

<sup>228</sup> The reported opinion indicates that, although the grandfather was only able to make payments of interest on the note before his death three years after the gift promise, he never repudiated the promise. *See id.* at 366 (relating grandfather's regret at being unable to pay balance of note and his intent to sell property to fulfill his promise to granddaughter).

<sup>229</sup> *See supra* notes 210-213 and accompanying text (noting difficulty of observing bargaining power relations in context of intrafamily gifts).

something that courts are capable of recognizing as an indicia of a meaningful power relationship in which the parties come together for an exchange in which each of them were able to affect the outcome.

While a legally cognizable bargaining power rule works in cases where the promisee has relied on the promise, it also explains the enforceability of promises under a promissory estoppel theory even where there is no clear reliance by the promisee<sup>230</sup> or where promissory estoppel is justified on promissory, rather than reliance grounds.<sup>231</sup> Many courts, for example, no longer require detrimental reliance in cases involving promises made in furtherance of commercial activity.<sup>232</sup> Specifically, a rule that justifies the enforceability of promises on the basis of legally recognized power relationships may view both promise<sup>233</sup> and reliance as evidence of the ability of the parties to exercise bargaining power to protect their interests against each other. Viewed in terms of power relations, either indicia of power may justify enforcement. The fact that the parties came together and exercised bargaining power in a manner that courts are capable of recognizing and analyzing renders the promise enforceable.

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<sup>230</sup> See, e.g., Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake”*, 52 U. CHI. L. REV. 903, 904, & 907-24 (1985) (surveying cases enforcing promises on promissory estoppel claims and concluding that many courts have abandoned reliance element of promissory estoppel claim).

Our fourth and most important finding is the diminished role of reliance in determining liability. The essential requirement for liability on a promissory estoppel theory has traditionally been some specific action in justifiable reliance on the promise. This requirement of an identifiable detriment no longer defines the boundary of enforceability.

*Id.* (internal citations omitted).

<sup>231</sup> See FRIED, *supra* note 166, at 18-21 (arguing that promise, not reliance, provides moral basis for enforcement of contracts); Fuller & Perdue, *supra* note 227, at 60-61.

<sup>232</sup> See Farber & Matheson, *supra* note 230, at 914-15. Farber & Matheson acknowledge that many courts still employ traditional promissory estoppel standards that require a showing of detrimental reliance as a condition of recovery. See *id.* at 914. They argue, however, that rather than reliance, “three factors ... tip the balance in favor of recovery: (1) the presence of a credible promise; (2) the promisor’s authority to make the promise; and (3) the existence of a benefit to the promisor from economic activity.”

*Id.*

<sup>233</sup> See *supra* notes 136-155 and accompanying text (discussing power relations formed by gift promises).

**V. CONCLUSION**

Legal decisionmakers must regulate bargaining power disparities on multiple levels. Beyond a general normative bias against enforcement of contracts arising from an inequality of bargaining power, legal decisionmakers regularly intervene to correct perceived bargaining power disparities in individual cases. Such analyses of power can occur under bright line rules such as minority, mental capacity and the like or under more idiosyncratic equitable rules based upon specific situations and relational advantages and disadvantages as in the cases of duress, unconscionability, and application of the parol evidence rule and rules of contract interpretation. Because power is so complex and so dynamic, however, such bargaining power sub-doctrines will always be subject to criticisms of incoherency. On the surface, the easy money would have been on Goliath to pound David to a pulp inside of three rounds. But the point of the David & Goliath story is not to provide a convenient allusion to grossly disparate match-ups. It's that *David won*. The little guy had sources of power up his sleeve that the bookies couldn't see, and he used that power to turn the tables on the apparently stronger party. Although contract law must respond to gross inequalities of bargaining power, legal decisionmakers often lack the tools necessary to assess accurately and respond to the actual power relation between the parties.

But the basic principle that underlies the legal concept of inequality of bargaining power – the idea that the state must regulate gross abuses of power – is correct. Although direct assessments of relative power are difficult in individual cases, courts and legislatures can consistently and credibly distinguish specific social relations that involve systemic power disparities and those relations where both parties possess legally cognizable bargaining power. While this consensus on power relations in particular transactions may shift over time and in reaction to changing social, economic and political conditions, it nonetheless provides a basis and justification for distinguishing which promises may be enforced in primarily private regimes

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such as contract and which require additional state regulation of the process and terms of the resulting transaction.