INEQUALITY OF BARGAINING POWER

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An honest list of [law school] course descriptions might look something like this: . . . Contracts. Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879.[1]

I. INTRODUCTION

Power. How to get it, keep it, and use it have been central questions of politics, business, military strategy, and human relationships for millennia—from the military genius of Sun Tzu[2] to the fictional mob leadership of Tony Soprano.[3] This extended study of power has yielded a wealth of nuanced and sophisticated models for assessing, maintaining or altering the balance of power in relationships. As a result, the practical,

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1. James D. Gordon III, Essay, *How Not to Succeed in Law School*, 100 YALE L. J. 1679, 1696 (1991).

2. *See infra* notes 163-166 and accompanying text.

3. *See The Sopranos* (HBO television broadcast, Apr. 15, 2001). The character of Tony Soprano discusses the continuing relevance of Sun Tzu's THE ART OF WAR for successful leadership of organized crime operations:

> Been reading that—that book you told me about. You know, The Art of War by Sun Tzu. I mean here's this guy, a Chinese general, wrote this thing 2400 years ago, and most of it still applies today! Balk the enemy's power. Force him to reveal himself. You know most of the guys that I know, they read Prince Machiabelli [sic], and I had Carmela go and get the Cliff Notes once and—he's okay. But this book is much better about strategy.

Id.

real-world approach to power is fundamentally strategic and recognizes that all actors and all relationships possess power. Power is a complex phenomenon that arises from numerous sources and may assume forms not immediately apparent to an outside observer. Finally, power is not a static event but is subject to dynamic change throughout the course of the actors' relationship.

In contrast to the complex and sophisticated real-world understanding of power, American contract law rarely acknowledges power explicitly and typically assesses the legal consequences of relational power asymmetries from a two-dimensional, status-based perspective. The contract doctrine of "inequality of bargaining power" is the legal equivalent of the socially embarrassing aunt or uncle that the family talks about but to whom no one really pays attention. Courts dealing with the legal concept of inequality of bargaining power assess relative power tactically, limiting their analysis to how the power dynamics appear to exist at a particular moment in the contracting parties' relationship. The legal conception of bargaining power disparities also fails to account for numerous sources and forms of power and ignores the capacity of power relationships to shift dynamically in response to party inputs on the micro level and to social, technological and economic changes on the macro level.

This Article addresses the surprising inconsistency between the rich understanding gained in the practical study of power and the legal system's far more limited and simplistic efforts to police perceived power disparities between bargaining parties through the legal doctrine of inequality of bargaining power. Specifically, judicial efforts to assess and remedy seeming bargaining power asymmetries systematically disadvantage parties who do not fit within the courts' traditional narratives of disempowerment. At the same time, courts engage in paternalistic social and demographic assumptions while routinely ignoring the role that apparently weaker parties have in reducing their own bargaining power. To the extent that courts purport to regulate the legal consequences of bargaining power disparities through the inequality of bargaining power doctrine, the legal doctrine should bear some semblance to how power actually works. Consequently, courts must identify those situations in which bargaining power should have legal consequences and develop more sophisticated and realistic analyses of that phenomenon.

Part II of this Article surveys the legal doctrine of inequality of bargaining power as a significant component of the American law of contracts. This doctrine is most evident and explicit in only a few areas, primarily unconscionability, contracts of adhesion, and public policy

analysis.[4] But inequality of bargaining power also affects analysis of many other contract doctrines, including, inter alia, defenses, remedies, consideration, contract interpretation, and the parol evidence rule.[5]

Given the pervasiveness of the concept of bargaining power asymmetries throughout contract law, the legal doctrine imposes substantial costs upon actors who are traditionally viewed as possessing bargaining power, including small businesses and middle-class consumers.[6] Specifically, the legal concept of inequality of bargaining power discriminates by not being open to all who suffer from real bargaining power disparities. As a result, truly disadvantaged parties are denied the benefits of the doctrine while those that merely fall within stereotypically "weak" socioeconomic classes benefit regardless of their actual bargaining power.[7]

Part III analyzes the basic concept of power through illustrations from a wide variety of contexts, including military strategy, political theory, producer-consumer relations, and employment negotiations. Without attempting to summarize the entire field, this Part analyzes the building blocks of bargaining power disparities and concludes that power has three characteristics that are critical for any legal analysis of relative bargaining power in contracts. First, power is omnipresent in human relations—every actor has power of some kind and to some degree.[8] Second, power is complex. It is a highly situational phenomenon arising from a large number of potential sources and taking varied forms that may not be obvious to the observer.[9] Third, power is dynamic.[10] Any power relationship can change dramatically and instantaneously, depending on the actors, their preferences, their relationships with other actors, and any of a multitude of additional strategic inputs.

Even though power relationships are clearly complex and dynamic, courts approach certain claims of inequality of bargaining power as if power relationships depend upon limited inputs and remain fixed over time. As discussed in Part IV, the modern approach to inequality of bargaining power as a legal concept ignores the practical operation of power, instead focusing upon *ad hoc* generalizations drawn from the class struggles of the last 150 years.[11] Applying typical legal standards

4. *See infra* note 18 and accompanying text.
5. *See* sources cited *infra* notes 20-48 and accompanying text.
6. *See infra* notes 38-48 and accompanying text.
7. *See* Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 237 (2003) (analyzing negative impact of formalistic contract doctrines that deny small businesses protection of contract rules based upon inequality of bargaining power).
8. *See infra* notes 82-100 and accompanying text.
9. *See infra* notes 101-61 and accompanying text.
10. *See infra* notes 162-212 and accompanying text.
11. *See* sources cited *infra* notes 224-28 and accompanying text.

for assessing bargaining power such as availability of meaningful alternatives,[12] opportunity to negotiate,[13] and traditional status-based classifications[14] without regard to the practical analysis of power, courts ignore real power disparities in favor of limited, incomplete, and often incorrect legal conceptions of bargaining power asymmetries.

Finally, Part V concludes that the dynamic nature of power relationships and the inability of courts to identify standards for assessing power relationships mean that the legal concept of inequality of bargaining power as presently understood and applied is incapable of correctly guiding judicial discretion. If courts continue to apply legal consequences to perceived inequalities of bargaining power without conforming the legal doctrine to the practical use of power,[15] then the legal system's attempts to regulate the actual abuse of superior bargaining power will never be effective.

First, courts must begin to address power strategically, not tactically.[16] In so doing, they should assess actions the parties could reasona-

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12. *See infra* Part IV.B.1.a.

13. *See infra* Part IV.B.1.b.

14. *See infra* Part IV.B.2.

15. My study of inequality of bargaining power as a legal concept has raised personal doubts that the doctrine has any usefulness in guiding judicial discretion. *See also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 104 (3d ed. 1986) (raising "the general question whether the concept of unequal bargaining power is fruitful, or even meaningful"). But rather than being merely incoherent and paternalistic, the doctrine may illustrate a legal conceit that I characterize as a "legal myth." As opposed to "legal fictions," which courts knowingly adopt for the purpose of manipulating legal doctrines to fit relationships between parties, I preliminarily define legal myths as narratives that work upon the legal decision maker on both a conscious and a subconscious level. Like real myths, legal myths can powerfully affect the decision making process by communicating not only facts and evidence but also motifs and archetypes that operate on a much more basic level than the actual narrative before the court. While litigants can craft arguments to counter each other's competing cases, they cannot accurately answer the decision maker's unconscious response to the mythic elements of the case. A complete analysis of this concept will be the subject of a subsequent article. For the present, this Article addresses the need for development of a more sophisticated and nuanced standard for assessing relative bargaining power if courts continue using power relationships to guide their discretion in contract cases.

16. The distinction between strategy and tactics is best understood in terms of military action. As one commentator stated:

> A campaign consists in the marching of an army about the country or into foreign territory to seek the enemy or inflict damage on him. Strategy is the complement of this term, and is the art of so moving an army over a country,—on the map, as it were,—that when you meet the enemy you shall have placed him in a disadvantageous position for battle or other manœuvers. One or more battles may occur in a campaign. Tactics . . . relates only to and is coextensive with the evolutions of the battle-field. *Strategy comprehends your manœuvers when not in the presence of the enemy; tactics, your manœuvers when in contact with him.*

THEODORE A. DODGE, GREAT CAPTAINS: THE ART OF WAR IN THE CAMPAIGNS OF ALEXANDER, HANNIBAL, CAESAR, GUSTAVUS ADOLPHUS, FREDERICK THE GREAT, AND

bly have taken to improve their bargaining power, appraise bargaining power throughout the parties' interaction, and recognize sources and forms of power beyond the traditionally fixed, status-based frameworks courts currently employ. Second, despite development of the legal concept of bargaining power as a contract doctrine in the 1930s, the standards for assessing relative bargaining power, the types and degrees of bargaining power disparities justifying judicial intervention into private contracts, and the purpose of the doctrine within contract law remain largely undeveloped.[17] Absent such development, the legal concept of inequality of bargaining power will remain a grossly inaccurate tool for policing power relationships between contracting parties.

II. WHY SHOULD CONTRACT LAW CARE ABOUT INEQUALITY OF BARGAINING POWER?

The legal doctrine of inequality of bargaining power occupies a strange place in contract law. As an explicitly acknowledged legal concept, inequality of bargaining power is seemingly of little moment. Since the inception of the doctrine,[18] American courts largely have restricted explicit analyses of bargaining power asymmetries to the periphery of contract law. For example, the legal doctrine appears primarily as one element of the standard for unconscionability and adhesion contracts, and courts occasionally cite it as a reason for refusing to enforce private agreements that are objectionable for reasons of public policy.[19] Courts rarely overturn contracts on the basis of these doctrines explicitly employing inequality of bargaining power as an element, and inequality of bargaining power alone is not a sufficient justification for judicial intervention into contract disputes.

But beyond contract doctrines that employ the legal doctrine of inequality of bargaining power as an explicit element or standard, implicit analyses of the concept of inequality of bargaining power occupy a position of central—if undefined—importance in contract law. Specifically, bargaining power issues can be observed in the contexts of contract defenses, contract formation, contract interpretation, and contract remedies.

NAPOLEON 2-3 (Barnes & Noble 1995) (1889) (emphasis added). In the bargaining context, strategy generally encompasses planning, preparation, and assessment before approaching a particular bargaining interaction, as well as a party's general approach to satisfying its needs and wants through commercial interactions. Tactics are those tools and techniques—such as the use of standard form contracts and high-pressure sales talk—that the bargainers use to negotiate and conclude the bargain.

17. *See infra* Part IV.

18. *See infra* notes 225-27 and accompanying text.

19. *See infra* notes 228-41 and accompanying text.

Many contract defenses seem to reflect implicit attempts to regulate bargains between parties apparently suffering from a gross disparity of bargaining power. For example, English courts in the 1970s toyed briefly with a legal rule that would permit invalidation of contracts between parties of grossly disparate bargaining power. In *Lloyd's Bank Ltd. v. Bundy*,[20] Lord Denning explicitly suggested that bargaining power disparities formed the common denominator among equitable and legal defenses to contract:

> Gathering all [categories of cases in which courts set aside transactions—duress of goods, unconscionable transactions, undue influence, undue pressure, and unfair salvage agreements] together, *I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power."* By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, *when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity*, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.[21]

English courts, however, quickly rejected Denning's proposed inequality of bargaining power doctrine as unworkable.[22] But Denning's in-

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20. 1975 Q.B. 326 (C.A. 1974).

21. *Id.* at 339 (Lord Denning) (emphasis added); *see also* A. Schroeder Music Publishing Co. v. Macaulay, [1974] 3 All E.R. 616 (H.L.) (Lord Diplock) (justifying refusal to enforce non-competition clause in musician-publisher standard form agreement on basis of inequality of bargaining power); Spencer N. Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J. LEGAL STUD. 17, 17-19 (1988) (describing rise and fall of Lord Denning's attempt to institute inequality of bargaining power as a defense to contract). In addition to Thal's excellent treatment of the English experiment with inequality of bargaining power as an independent defense to contract, see generally M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L. J. 359, 359 (1976) (describing Lord Denning's suggestion that "many of the traditional defences to contract enforcement, for example, duress, undue influence, breach of fiduciary duty, were properly seen as merely exemplary of a general doctrine of 'inequality of bargaining power'"); 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, 344-46 (1999) (describing Lord Denning's attempt to promote inequality of bargaining power doctrine so that "[i]nstead of needing to pigeonhole injustice or unfairness into one of the equitable safe havens, the court would give relief to anyone who entered into an unfair contract in which there was a significant inequality of bargaining power"); Thomas Glyn Watkin, *The Spirit of the Seventies*, 6 ANGLO-AM. L. REV. 119, 122-23 (1977).

22. *See, e.g.*, Nat'l Westminster Bank v. Morgan, [1985] 1 All E.R. 821, 830 (H.L.) (Lord Scarman) (explicitly rejecting Lord Denning's "general principle that English courts will grant relief where there has been 'inequality of bargaining power'"); Thal, *supra* note 21, at 19 (describing rejection of inequality of bargaining power by English courts).

sight still suggests that many contract defenses are essentially second order moral restraints that attempt to enforce a first order moral rule[23] to protect against some inequity related to the parties' relative bargaining power. The problem for Denning, of course, was that his broad notion of inequality of bargaining power was insufficiently nuanced to permit courts to determine consistently the appropriate legal consequences of such inequalities.

American contract law likewise demonstrates a relationship between contract defenses and the legal concept of inequality of bargaining power. As noted, bargaining power disparities continue to appear as an explicit element in unconscionability analyses. Other contract defenses, however, implicitly incorporate at least a sense of inequality of bargaining power. Duress and economic duress, for instance, attempt to deal with situations in which agreement has been coerced from an apparently weaker party through a bargaining power disparity resulting from a wrongful threat or action by the apparently stronger party.[24] Thus, in *Duress by Economic Pressure*, John Dalzell noted that economic duress arises in those situations where one party—by reason of an advantage created by the parties' sequential performances—possesses momentarily greater bargaining power sufficient to coerce additional payments or new terms from the weaker party:

> In these decisions the courts talk much of the inequality of the parties as a weighty argument for relief. . . .
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> . . . .
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> So far as inequality is to be considered, it is inequality in the particular situation; and the corporate Goliath might have been in such immediate need of the wharfage rights there involved as to put it quite

23. *See* Eric A. Posner, *The Decline of Formality in Contract Law*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 61, 68-69 (F.H. Buckley ed. 1999) (describing criticism that unconscionability doctrines, inter alia, "required direct application of moral theory, rather than the application of second-order rules"); *cf.* John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 12 TUL. L. REV. 42, 62-72 (1937) (describing Nazi efforts to impose first order moral rules barring loans at greater than "customary rate of interest").

24. *See, e.g.*, United States v. Bethlehem Steel Corp., 315 U.S. 289, 300 (1942) ("The word duress implies feebleness on one side, overpowering strength on the other."); *cf.* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 297 (1975) ("The question of duress is not that of the equality of bargaining power in a loose sense that refers to the wealth of the parties. It is the question of what means are permissible to achieve agreement.").

> at the mercy of an unconscionable David in an advantageous position.[25]

Likewise, the undue influence defense raises substantial issues of the power imbalance that necessarily arises between parties contracting within a special or fiduciary relationship.[26] Instead of the purposeful coercion apparent to all parties in cases of duress, however, the undue influence defense looks to more subtle indications of impropriety and overbearing that may indicate some abuse of the bargaining power made possible by the trust and confidence in the parties' relationship. Similarly, fraud, deceit or misrepresentation may be analyzed as an inequality of bargaining power generated by a monopoly on truthful information held by one party to a transaction.[27] On a more general level, courts may find some classes of contracts void as contrary to public policy based partly upon apparent bargaining power disparities between the parties.[28]

Bargaining power issues recur in other doctrines in contract law, but more subtly. Selection or rejection of particular interpretive rules such as *contra proferentum* often depends upon whether a party can convince a court of a bargaining power disparity.[29] Similarly, the reasonable expec-

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25. John Dalzell, *Duress by Economic Pressure*, 20 N.C. L. REV. 237, 244, 244 n.21 (1941) (citing Heiserman v. Burlington C.R. & N. Ry., 18 N.W. 903 (Iowa 1884); McGregor v. Erie Ry., 35 N.J.L. 89 (N.J. 1871); New Orleans R.R. v. Louisiana Constr. Co., 33 So. 51 (La. 1902)).

26. *See* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 29 (2000) (noting importance of policing special relationships for power imbalance); *cf.* Brian Alan Ross, Note, *Undue Influence and Gender Inequity*, 19 WOMEN'S RTS. L. REP. 97, 98 (1997) (discussing solicitousness of courts in policing meretricious relationships between female decedents and their heirs in will contests).

27. *See* Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1096 (1935) [hereinafter *The Peppercorn Theory*] ("In addition to the outlawing of fraud and duress as bargaining pressures the courts have refused enforcement of advantages gained by exercise of a power resulting from fortuitous circumstances not within the ethical range of accepted economic practice.") (internal citations omitted).

28. *See, e.g.*, Wolf v. Ford, 644 A.2d 522, 526 (Md. 1994) ("When one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence, the agreement is void as against public policy.") (quoting Winterstein v. Wilcom, 293 A.2d 821, 824 (Md. App. 1972)); Heyde Cos. v. Dove Healthcare, LLC, 654 N.W.2d 830, 833, 837 (Wis. 2002) (holding restrictive covenant between employment agency and health care provider void as contrary to public policy of protecting employees "who often have unequal bargaining power" from unfairly restrictive covenants not to compete).

29. *See, e.g.*, First Fin. Ins. Co. v. Purolator Sec., Inc., 388 N.E.2d 17, 21-22 (Ill. App. Ct. 1979) (existence of disparity in bargaining power "may affect the court's interpretation of contractual provisions"); Ferguson v. Lakeland Mut. Ins. Co., 596 A.2d 883, 885 (Pa. Super. Ct. 1991) ("[I]n light of the manifest inequality of bargaining power between an insurance company and a purchaser of insurance, a court may on occasion be justified in deviating from the

tations doctrine purports to regulate power imbalances between insurance companies and their insureds by interpreting some insurance contracts to conform to the reasonable expectations of the insured, regardless of the actual language of the agreement.[30] Judges have invalidated specific contract terms—particularly forum selection clauses—where the contract was obtained through "fraud, undue influence, or *overweening bargaining power*."[31] And courts invalidate exculpation clauses—lying at the crossroads of tort, contract, and public policy—"where the parties are not on roughly equal bargaining terms."[32] Even the availability of certain equitable remedies may depend upon the appearance of inequity created by the presence of gross disparities of bargaining power.[33]

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plain language of a contract of insurance.") (quoting Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 567 (Pa. 1983)); Votto v. Am. Car Rental, Inc., 35 Conn. L. Rptr. 17, 2003 WL 21716003, at *2 (Conn. Super. Ct. June 16, 2003) ("The concept that a contract of adhesion should be interpreted and enforced differently from an ordinary contract has evolved from cases which have involved contractual provisions drafted and imposed by a party enjoying superior bargaining strength . . . .") (quoting Madden v. Kaison Found. Hosps. 552 P.2d 1178, 1186 (Cal. 1976)).

30. *See, e.g.*, Smith v. Westland Life Ins. Co., 539 P.2d 433, 440-42 (Cal. 1975) (interpreting ambiguity in insurance contract against insurer and holding insurer bound by insured's reasonable expectations of coverage upon premium payment absent unambiguous term to the contrary and actual explanation of restrictive term to insured); Werner Indus. v. First State Ins. Co., 548 A.2d 188, 192 (N.J. 1988) (rejecting application of reasonable expectations doctrine for commercial risk policy because "both sides of the bargaining table . . . were sophisticated with regard to insurance"); *see also* Robert E. Keeton, *Insurance Law Rights At Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970) ("reasonable expectations" doctrine describes practice of courts varying plain terms of written insurance contract to reflect purported reasonable expectations of insured). *But see* Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 782 (Mich. 2003) (reasonable expectations doctrine "is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit").

31. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (emphasis added); *see also Ex parte* D.M. White Constr. Co., 806 So.2d 370, 372-73 (Ala. 2001) (larger size of defendant and use of non-negotiable contract terms was not sufficient to invalidate forum selection clause on basis of "overweening bargaining power."). Similarly, some courts and commentators have suggested that exculpatory provisions should be invalidated if, inter alia, "the parties are in a substantively unequal bargaining position." Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 785 (Ind. App. 1976) (citing Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?*, 1975 WIS. L. REV. 19, 23-31 (1975) (surveying cases involving non-enforcement of exculpatory clauses in lease contracts where parties are of unequal bargaining power)), *superseded on other grounds*, 369 N.E.2d 404 (Ind. 1977).

32. Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248, 249 (1937) (analyzing cases in which courts upheld or invalidated exculpatory contract provisions).

33. *Cf.* Campbell Soup. Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948) (refusing specific performance where bargain deemed "too one-sided" and oppressive); M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949, 955 (2d Cir. 1942) (Frank, J., dissenting) (arguing that equitable remedies such as specific performance should not lie where, inter alia, "the defendant was an author, one of a class of persons notoriously inexperienced in business, and . . . in desperate financial straights, while the plaintiff was a successful and experienced publisher");

Legal concepts of relative bargaining power even insinuate themselves into cases in which bright-line legal rules, at face value, would make the parties' relative bargaining positions irrelevant. At least two empirical studies, for example, have found that courts are reluctant to apply the parol evidence rule strictly in the face of gross disparities of bargaining power.[34] As one author concluded, "the parol evidence rule does not apply in situations involving a disparity in the bargaining position or expertise of the parties. The party who alleges inferior bargaining position or an abuse of discretion usually gets his or her evidence to the judge or jury."[35] Similarly, although courts generally avoid explicit inquiries into the adequacy of consideration exchanged between contracting parties, grossly inadequate consideration may be evidence of flaws in the bargaining process, including gross disparities of bargaining power, that justify closer scrutiny of the transaction.[36]

The legal concept of inequality of bargaining power thus may be outcome determinative across cases involving a wide array of contract doctrines. But courts rarely discuss inequality of bargaining power explicitly. Accordingly, there are no generally accepted standards for appraising whether disparities of bargaining power unduly affect a transac-

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Marks v. Gates, 154 F. 481, 483 (9th Cir. 1907) ("[W]here the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the nature of the property to be affected thereby, or of its value, no equitable principle is violated if specific performance is denied . . . .").

34. *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). With particular attention to Wisconsin court decisions, Lawrence's work expanded the earlier study of Professors Spitz and Childres who had likewise empirically demonstrated a connection between the parties' relative status, bargaining power and the willingness of courts to admit parol evidence. *See* Robert Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 7, 24 (1972) (analyzing relevance of party status to availability of certain contract rights such as application of the parol evidence rule and noting rule usually does not apply to party alleging inferior bargaining position).

35. Lawrence, *supra* note 34, at 1094-95.

36. *See The Peppercorn Theory*, *supra* note 27, at 1095 ("Indeed, undesired disparity in a transaction would seem possible only where one party erred as to the market values of the products exchanged or where the parties were unequal in bargaining power."); *cf.* Note, *The Enforcibility of a Promise Not to Compete After an Employment at Will*, 29 Colum. L. Rev. 347, 348 (1929) ("While inadequacy of consideration is no bar to relief at the employer's suit, in some instances, where the consideration has been 'grossly' inadequate or 'shocking to the conscience' or the enforcement of the agreement would be 'harsh and oppressive,' equity has relegated the employer solely to his remedy at law."). *See also* Justin Sweet, *Liquidated Damages in California*, 60 CAL. L. REV. 84, 85 (1972) (noting that consideration limits pure freedom of contract "by not enforcing gift promises and by *balancing extremely unequal bargaining power* through the mutuality concept") (emphasis added); *cf.* Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1825 (1994) (noting that consideration is "a paternalistic doctrine" and arguing that price unconscionability doctrine is insufficient to protect consumers against more powerful merchants).

tion. As a result, contract doctrine seems to hold conflicting parallel views on the appropriate legal response to issues of power and its effects on the bargaining process.

It is important at this point to distinguish the legal doctrine of inequality of bargaining power from the practical concept of bargaining power. Specifically, the legal doctrine represents an attempt by the legal system to assign legal consequences to perceived gross disparities of bargaining power in a transaction and to assess the degree of those disparities post hoc through the judicial process. The legal doctrine covers both the contract doctrines that explicitly employ inequality of bargaining power as a formal element and those legal doctrines where bargaining power disparities may affect the outcome of the case but are not explicitly at issue.

In contrast, the practical concept of inequality of bargaining power addresses how power is used, manipulated, and perceived in real world interactions. There is no question that some parties are "weak" when compared to the other party or parties to a transaction. Bargaining power disparities are a real phenomenon that can affect the ability of the "weak" party to obtain its preferred terms in a contractual interaction with a "strong" party.[37] Often, courts attribute bargaining weakness to certain status groups, such as women, consumers, the poor, and the uneducated,[38] thus permitting members of those groups to claim whatever protections arise in contract law from such an apparent lack of bargaining power. Alternatively, a court may employ a process-based approach to assessing bargaining power to conclude that a party had no bargaining power because she "lacked meaningful alternatives" or "had no opportunity to negotiate terms."[39] Given the substantial overlap between these latter process-based analyses and the former status-based characteristics, the apparent distinction between these approaches to assessing relative bargaining power quickly breaks down, as discussed, *infra*, in Part IV.B. In essence, the relationship between status-based characteristics typically described as weak—such as poverty, lack of education, lack of business sophistication, and so on—is so closely related to questions of whether a party lacked meaningful alternatives to the bargain or had no opportunity to bargain as to blur any distinction beyond recognition. Numerous reported opinions and academic discourses begin and end their analyses of relative bargaining power by concluding that a poor, uneducated, or otherwise traditionally disadvantaged party has no meaningful alternatives

37. *See infra* notes 52-53 and accompanying text (noting general definition of power as ability to affect a preferred outcome).

38. *See infra* notes 249-57 and accompanying text.

39. *See infra* Part IV.B.1.

to the contract offered them or could not have negotiated the contract terms simply because that party was poor, uneducated, or a member of a traditionally disadvantaged class.[40]

On the other hand, courts and commentators often ignore bargaining power issues relating to parties outside stereotypically "weak" categories. The most obvious victims of the incomplete development of the legal doctrine of inequality of bargaining power are middle class consumers and small business owners. For instance, Blake Morant's recent empirical study of bargaining behavior by small businesses determined that the rigid and formalistic conception of bargaining power disparities that most courts employ combined with a competitive free market effectively denied small businesses access to equitable agreements.[41] Similarly, other commentators have recognized that explicit relief for bargaining power disparities through unconscionability or adhesion contract doctrines are reserved almost exclusively for consumers and the poor.[42] But in light of the gross disparities of bargaining power that often exist between small businesses and their vendors and customers, and given the importance of small businesses to the American economy in general,[43]

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40. *See infra* notes 243-52, Part IV.B.2. and accompanying text.

41. *See* Morant, *supra* note 7, at 267.

42. *See, e.g.*, Adler & Silverstein, *supra* note 26, at 48 ("The vast majority of successful unconscionability claims involve poor, often unsophisticated, consumers challenging oppressive adhesion contracts foisted on them by retail merchants or credit sellers. *In fact, the courts have generally been unreceptive to unconscionability claims by middle class purchasers or by merchants against other merchants.*") (emphasis added) (citation omitted); Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L. J. 1065, 1066-67 (1986) (discussing general hostility to claims of unconscionability by merchants); *cf.* 2A RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 2-302:108, :126, :128 (3d ed. 1997) (observing generally that inequality of bargaining power can support unconscionability finding in both commercial and non-commercial settings, but noting "[a]lthough a commercial setting does not necessarily bar a claim of unconscionability, it is the exceptional commercial setting where a claim of unconscionability will be allowed") (surveying cases). Even legislative attempts to address perceived bargaining power disparities often fail to address real inadequacies experienced by small businesses. *See, e.g.*, Pamela Edwards, *Into the Abyss: How Party Autonomy Supports Overreaching through the Exercise of Unequal Bargaining Power*, 36 J. MARSHALL L. REV. 421, 455 (2003) (noting that legislation mandating enforcement of choice of law clauses creates exceptions for consumers "to protect individuals who are thought of as tending to have lesser bargaining power" but ignores unequal bargaining power between commercial entities). *But cf.* W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW 143 (1996) (arguing that "[c]ourts now apply the unconscionability defense to business consumers and individual consumers without distinction") (citing Mallor, *supra*); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 554 (1989) (noting increasing attempts to apply unconscionability standards to merchant-to-merchant contracts, but describing such attempts as "preembryonic" and limited to "exceptional and atypical cases").

43. *See, e.g.*, Morant, *supra* note 7, at 239-44 (discussing the importance of small businesses to U.S. economy); MANSEL G. BLACKFORD, A HISTORY OF SMALL BUSINESS IN AMERICA xiii-xv, 124 (1991) (same); OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., TOP

the unavailability of remedial contract doctrines to such entities may have real and significant negative impacts upon economic activity.[44]

The impact of this incomplete and undeveloped approach to assessing the legal import of bargaining power asymmetries between contracting parties is significant. A more sophisticated approach to legal analysis of bargaining power may appear at first blush to offer little to stereotypically "weak" contracting parties. Such generalizations regarding perceived bargaining power may accurately reflect the actual bargaining power of individuals fitting the generalization. As a practical matter, poor individuals often do lack bargaining power—the power to obtain a preferred outcome in a transaction—in many situations and are often systematically deprived of the ability to offer meaningful consent to proffered contracts.

But those same generalizations may also arise from the private biases of judges and other observers. Ultimately, biased stereotypes of weakness may be destructive to the well-being and social integration of the affected class. Thus, as some have argued, judicial interventions to "correct" perceived bargaining power disparities may help individual litigants in the short term but ultimately prove harmful in terms of social perceptions and additional contracting costs imposed on the class.[45]

For parties who typically fall outside of the "weak" status-classifications, however, the benefits of a sophisticated and fully-developed bargaining power jurisprudence would be significant. Under current treatments of the doctrine, for example, small businesses and

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10 REASONS TO LOVE SMALL BUSINESS (February 13, 2004) (noting, inter alia, that small businesses make up over 99.7% of employers, "create more than 50 percent of the nonfarm private gross domestic product," and create 75% of net new jobs), http://www.sba.gov/advo/press/04-06.html. Beyond the substantial direct economic benefits from production and employment, small businesses also employ disproportionate numbers of women and minority individuals. *See* BLACKFORD, *supra* at 58-60, 117-20, and 124 ("To the extent that they succeeded at all in business management and ownership, women and minorities moved ahead in small firms."); Morant, *supra* note 7, at 242 (discussing importance of women and minority-owned businesses). Additionally, the existence and prevalence of small businesses are a foundation stone in our national mythos. Although unquantifiable, that psychological symbolism has been recognized as an important benefit of small business participation in the American economy. *See, e.g.*, A.D.H. KAPLAN, SMALL BUSINESS: ITS PLACE AND PROBLEMS 3-5 (1948) (describing post-World War II sentiment that independence symbolized by small businesses contrasted sharply with centralized economies and totalitarian regimes and offered every individual the possibility "of becoming his own boss"); BLACKFORD, *supra* at xiv ("[M]any Americans have seen the owners of small businesses as epitomizing all that is best about the American way of life.").

44. *See* Morant, *supra* note 7, at 245-46 (assessing impact of inability to obtain relief for bargaining power disparities on small businesses).

45. *See infra* notes 330-38 and accompanying text (discussing potential negative impacts of legal narratives regarding participants in the legal system for their personal and social well-being).

middle-class consumers gain little by claiming that they lacked bargaining power in a transaction. The courts' failure to develop sophisticated and nuanced standards for assessing bargaining power means that such parties are denied access to theories of recovery that would be available to stereotypically "weak" parties who are similarly situated in terms of the dynamics and context of contract formation.

This proposition is not merely academic. If the legal doctrine of inequality of bargaining power affected the outcome solely in those cases where the parties' relative bargaining power is explicitly at issue, the practical impact would be minimal. Courts rarely overturn contracts for unconscionability,[46] and the mere determination that a contract is adhesive has limited effects upon the enforceability of the agreement. But inequality of bargaining power—whether conceived as a legal doctrine or some more amorphous judicial concept—extends throughout contract law. Rather than a doctrine that gives rise to a limited judicial interference in otherwise valid contracts, the legal doctrine creates a substantial potential that many parties suffering from a real bargaining power disadvantage will be denied relief or that parties who do not suffer from any real bargaining power weakness will nonetheless receive the benefits of the legal doctrine of inequality of bargaining power.[47] Given the potential for uncertainty, injustice, and unpredictability inherent in current legal conceptions of bargaining power disparities, the lack of jurisprudential development is surprising. To the extent that bargaining power disparities are worthwhile tools for legal discrimination,[48] courts should develop a much more nuanced and sophisticated approach to the legal analysis of actual bargaining power disparities.

III. THE NATURE OF POWER

The legal concept of inequality of bargaining power must begin, fundamentally, with an understanding of "power." Specifically, the phenomenon of power has fascinated social theorists, military strategists, politicians, economists, businesspeople, and negotiators, who have, in turn, generated a substantial literature regarding the nature of power and how it may be manipulated. Many courts, however, appear to ignore this

46. *See* Morant, *supra* note 7, at 265-66 (noting even consumers are rarely able to assert unconscionability defense successfully).

47. *But 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, 622-23 (1982) [hereinafter Kennedy, *Motives in Contract*] (arguing that liberal courts should use the inequality of bargaining power doctrine as a weapon to favor disempowered classes).

48. *See supra* note 15.

body of knowledge in favor of gut-level conclusions regarding the relative power of the parties before them.

The development of a sophisticated legal approach to analyzing power issues requires an understanding by legal decisionmakers and commenters of how parties use and assess power in real-world applications. Part III.A begins this process by examining practical definitions of the concept of "power" both within and without the legal system and the inherent difficulties in isolating a definition that can work in the legal context. Part III.B continues by crafting a framework for assessing different forms of power. Specifically, power is omnipresent, complex, and dynamic. All actors have some form of power in their relationships, the phenomenon of power is incredibly complex and may take on forms not readily apparent to legal observers, and power relationships have the capacity to change dynamically at any time throughout the relationship. By recognizing these fundamental characteristics of power, legal decisionmakers may be better able to craft the nuanced models of power relationships necessary to assign credible legal responses to practical uses of power.

A. Definitions of Power

Power has long eluded adequate definition. As one prominent social theorist stated, power describes something key to the human experience:

> That some people have more power than others is one of the most palpable facts of human existence. Because of this, the concept of power is as ancient and ubiquitous as any that social theory can boast. If these assertions needed any documentation, one could set up an endless parade of great names from Plato and Aristotle through Machiavelli and Hobbes to Pareto and Weber to demonstrate that a large number of seminal social theorists have devoted a good deal of attention to power and the phenomena associated with it.[49]

Despite this attention, the systematic study of power as a social and political phenomenon is a recent development.[50] Even in the social and political sciences, where it might be expected that some clarity would be achieved given the integral role of power, scholars have failed to establish a commonly accepted or clear definition.[51]

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49. Robert A. Dahl, *The Concept of Power*, *in* POLITICAL POWER: A READER IN THEORY AND RESEARCH 79 (Roderick Bell et al. eds., 1969).

50. *See id.*

51. *See id.* (describing the study of power as "a bottomless swamp"); *see also* Nina Burkardt et al., *Power Distribution in Complex Environmental Negotiations: Does Balance Mat-*

"Power" is elusive because the word is often used to define and describe many different aspects of the human experience.[52] Power typically describes—in courts, politics, war, sports, and other contexts—an ability to affect or obtain a preferred outcome.[53] But beyond such generalities, further attempts to produce a unified definition disintegrate into such disputes as arguments over the source(s) of power;[54] whether power

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ter?, 7 J. PUB. ADMIN. RES. & THEORY 247 (1997) (surveying past attempts to define power in social and political sciences and noting wide disagreements over definitions).

52. *See, e.g.*, Dahl, *supra* note 49, at 79 (describing cynical suspicion that power may be "a Thing to which people attach many labels with subtly or grossly different meanings in many different cultures and times [such that it] is probably not a Thing at all, but many Things").

53. *See, e.g.*, Adler & Silverstein, *supra* note 26, at 8 ("Most observers agree that the critical element of power is the ability to have one's way, either by influencing others to do one's bidding or by gaining their acquiescence to one's action."); SLAWSON, *supra* note 42, at 23 ("Bargaining power is the power to set the terms of a contract."); JEFFREY PFEFFER, POWER IN ORGANIZATIONS 2 (1981) [hereinafter PFEFFER, POWER] ("Most definitions of power include an element indicating that power is the capability of one social actor to overcome resistance in achieving a desired objective or result."). Even this basic definition is incomplete. For example, to the extent that the definition implies a contest between two actors, many negotiators would argue that it assumes a zero sum game in which one side must lose in the power relationship for the other to gain. *See, e.g.*, Talcott Parsons, *On the Concept of Political Power*, *in* POLITICAL POWER: A READER IN THEORY AND RESEARCH, *supra* note 49, at 251, 251-52 (noting tendency of social theorists to assume power is a zero-sum phenomenon and that there is a fixed quantity of power available in relation systems); *see also* PFEFFER, POWER, *supra* at 4-6 (suggesting that exercise of raw power imposes costs, while exercise of legitimate power—i.e., authority—"far from diminishing through use, may actually serve to enhance the amount of authority subsequently possessed"). Fisher and Ury famously shifted the negotiation paradigm a little over two decades ago in advocating a problem-solving approach to bargaining. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 9-14 (2d ed. 1991). Within this new paradigm, bargainers seek to maximize value for both sides by recognizing their mutual interests and attempting to craft a "win-win" solution. *See generally id.* at 17-94. Importantly, while Fisher and Ury acknowledged the existence of bargaining power disparities in some situations, *id.* at 97 ("[n]o method can guarantee success if all the leverage lies on the other side"), they also noted that in cooperative bargaining, power arises, inter alia, from developing good alternatives to negotiated agreements and crafting agreements based upon options for mutual gain. *See id.* at 56-80, 97-106. Other sources of bargaining power in the problem-solving paradigm include developing good working relationships with the opposing party, understanding interests, inventing elegant options, and using external standards of legitimacy. *See id.* at 179-183.

54. *See, e.g.*, GEOFFREY DEBNAM, THE ANALYSIS OF POWER: CORE ELEMENTS AND STRUCTURE 1 (1984). Debnam describes three schools of thought on the structure of power. The reputational or elitist school presumes that power is "socially structured, and that its study must start from a statement of the nature of its structure." *Id.* In contrast, the decision-making school—associated primarily with Robert Dahl—"denie[s] that power is necessarily structured . . . and argue[s] that the only valid evidence about power [is] to be derived from a study of action in the decision-making arena." *Id.* The third school—the neo-elitists—argues that the operation of power within social structures is generally diffuse and therefore requires "greater sensitivity to problems of evidence" in assessing that operation. *Id.* This third approach parallels the central thesis of this Article that the judicial approach to assessing power relationships focuses only on simple social structures as the source of power imbalances between actors and must adapt to recognize that power is a complex and sophisticated phenome-

includes physical coercion, influence, positive sanctions, negative sanctions,[55] as well as a host of other variables; whether power can exist outside of relationships,[56] and various other disagreements that have neither end nor solution.[57] Some definitions of power include:

- "A has power over B to the extent that he can get B to do something that B would not otherwise do."[58]
- "Power is the ability to impose cost."[59]
- "'Power' (*Macht*) is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance. . ."[60]
- Power is "the capacity of an individual, or group of individuals, to modify the conduct of other individuals or groups in the manner which he desires, and to prevent his own conduct being modified in the manner in which he does not."[61]
- "[P]ower refers to all kinds of influence between persons or groups, including those exercised in exchange transactions, where one induces others to accede to his wishes by rewarding them for doing so."[62]
- "Power . . . is the knowing capacity to determine some aspect(s) of the future, or to determine the range of available futures from which such choices are made."[63]
- Power is man's "present means, to obtain some future apparent Good."[64]

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non requiring a more nuanced approach to evidence of relationships between bargaining parties.

55. *See, e.g.*, Peter Blau, *Differentiation of Power, in* POLITICAL POWER: A READER IN THEORY AND RESEARCH, *supra* note 49, at 293 (noting distinction and relationships between coercive physical power, influence, and influence through negative and positive sanctions).

56. *See* R. Harrison Wagner, *The Concept of Power and the Study of Politics, in* POLITICAL POWER: A READER IN THEORY AND RESEARCH, *supra* note 49, at 3 (disputing that power necessarily requires relationships to exist); DEBNAM, *supra* note 54, at 1-2 (describing ongoing social sciences debate over whether power arises from particular social structures or from decision making process).

57. *See* Marcia Lynn Whicker et al., *The Troublesome Cleft: Public Administration and Political Science*, 53 PUB. ADMIN. REV. 531, 534 (1993) ("Attempts to use power as a main variable for political science . . . have reached a limit.").

58. Dahl, *supra* note 49, at 80.

59. YORAM BARZEL, A THEORY OF THE STATE 18 (2002).

60. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 152 (A.M. Henderson & Talcott Parsons trans., 1947).

61. R.H. TAWNEY, EQUALITY 211 (1931).

62. Blau, *supra* note 55, at 293 (1969).

63. Douglas W. Rae, *Knowing Power: A Working Paper, in* POWER, INEQUALITY, AND DEMOCRATIC POLITICS: ESSAYS IN HONOR OF ROBERT A. DAHL 17, 40 (Ian Shapiro and Grant Reeher eds., 1988).

64. THOMAS HOBBES, LEVIATHAN 150 (C.B. MacPherson ed., Penguin Books 1968) (1651).

- Power is "the production of intended effects."[65]

This list of definitions of power only touches the surface—one scholar argues, in fact, that "there are hundreds, perhaps thousands, of . . . definitions of social power, or of the power of men over other men, in the literature of social science . . . ."[66]

The power struggle, so to speak, over a definition may derive in part from the fact that students of power have been attempting to combine many different things under the umbrella of a single definition, sort of a general theory of power.[67] Another potential reason for the inability of observers to capture the notion of power may be that the concept itself is inherently pre-verbal and the ultra-rationality of modern academic language lacks the tools to convey a meaningful sense of that concept. The variety and complexity of social, political, psychological and economic inputs may make accurate and comprehensive observation and explanation of the raw, elemental workings of power impossible. Or, perceptions of power change over time so that the definitions of the past fail to describe the sources or uses of power in the present. For instance, the power of a church or a community to ostracize, excommunicate or ban a person—although still significant today—is much diminished from the real consequences of such actions in the past.[68] Regardless, no single definition has accurately captured either power in general or the totality of its component elements.[69]

The disagreements surrounding every aspect of power flow into the legal arena where courts appear especially reticent to grapple with the exercise of power, or even acknowledge its existence outside of a few discrete forums. On the one hand, "power" often substitutes for the derivative concept of "authority"—the ability of the state, through its agents, to coerce individual actors within the polity into obeying the sovereign's commands.[70] In this sense, power always connotes the sovereign's right to enforce individual compliance through the state's monop-

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65. BERTRAND RUSSELL, POWER: A NEW SOCIAL ANALYSIS 35 (1938).

66. D.H. WRONG, POWER: ITS FORMS, BASES AND USES 2 (1979).

67. *See* Dahl, *supra* note 49, at 79.

68. *See, e.g.*, Julia Duin, *McCarrick Tempered Letter on Pro-Choice Politicians*, WASH. TIMES, July 7, 2004, at A1 (describing attempts by American Catholic bishops to avoid Vatican directive to deny communion to politicians who support abortion rights).

69. *See* Burkardt, et al., *supra* note 51, at 250 (surveying scholarly attempts to define power for research purposes and noting "power has not been precisely defined").

70. *See* RICHARD EPSTEIN, SKEPTICISM AND FREEDOM 6 (2003) [hereinafter EPSTEIN, SKEPTICISM AND FREEDOM] (arguing that government compulsion to protect individual property, autonomy and contract rights within the state is always necessary to some degree and noting, "[t]he key is to make sure that we choose it, so that it is not imposed by conquest"). For a comprehensive analysis of the necessary role of authority in supporting the continued existence of any organized group, see THOMAS MOLNAR, AUTHORITY AND ITS ENEMIES (1976).

oly on the legitimate use of force. Applied correctly, such coercion may be "*justified* on the ground that it allows all individuals to achieve a higher state of well-being than they could do by their own efforts. . . ."[71]

Power also may refer to the legal capacity or authorization to do some act.[72] Used in this way, power concerns the capacity of individuals to enter enforceable agreements on their own behalf. Courts specifically investigate and analyze this concept of power, for example, in cases of infancy, incompetence or inebriation. The "capacity" connotation of power also represents the idea of the right or authority to enter into binding commitments on behalf of others, as with agency and competency.[73]

The connotation of power as capacity still relates loosely to the "authority" dimension in that it describes that set of agreements not subject to enforcement through operation of the power of the state by appeal to the sovereign authority. The sovereign has declared that in cases of incapacity it has removed from the incapacitated person some or all power or authority to bargain legally. Those who bargain with the incapacitated may be denied the benefits of their "tainted" bargain[74] as the state refuses the competent party seeking enforcement access to its coercive machinery.

Even the sovereign's control of the economic regulatory scheme governs the capacity of actors within that regime to determine the outcome of their interactions with other actors. Thus, the economic regime itself—the recognition of a need to regulate the distribution of scarce resources among individuals with varying demands for those resources—may be said to be inherently coercive.[75] Importantly, participants within

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71. EPSTEIN, SKEPTICISM AND FREEDOM, *supra* note 70, at 7.

72. *See, e.g.*, WESLEY N. HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *in* FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 23, 50-60 (Walter W. Cook ed., 1923) (analyzing power as one element of complex scheme of jural relations and jural correlatives and defining legal power as the ability to affect the legal relation of another actor and illustrating concept of legal power, inter alia, by reference to power of agents to bind principals and power of offerees to create contractual relations by accepting offers).

73. *See, e.g.*, 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 712 (2d ed. 1914) (distinguishing between authority of agent granted by principal and power of agent to bind principal in absence of legitimate authority). The RESTATEMENT (SECOND) OF AGENCY § 6 (1958) defines power as "an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act." While power may be exercised legitimately or illegitimately by an agent to bind its principal, authority means a particular kind of power of an agent "to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." RESTATEMENT (SECOND) OF AGENCY § 7 (1958).

74. *See, e.g.*, Ortelere v. Teachers' Retirement Bd. of N.Y., 250 N.E.2d 460 (N.Y. 1969) (invalidating contract executed by mentally incompetent party despite that pension payment method designated in contract was financially rational at time of contracting).

75. *See* 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

these systems likely are not to view the operation of such ground rules as giving rise to greater power in one actor over the other.[76] But these background rules may give rise to the strongest bargaining power in a transaction. In a transaction for the sale of real property in a capitalist regime, for instance, the underlying regime of property rights generally support the owner's right to refuse to sell. As a result, the property owner possesses substantial power in determining the outcome of the transaction. If that were the only relationship relevant to the parties' power in this transaction, the owner could be said to have power over the potential buyer with respect to the question of whether the exchange takes place.[77]

In the legal sense, power also may refer to a relation between two interacting parties.[78] The interaction may be involuntary—as with crimes or torts—or voluntary, as with contracts and other private orderings. In this application, power is uniquely concerned with the ability of private parties to influence or coerce[79] one another to their respective preferred outcomes.[80] Power in this sense is most clearly a *contest*, not an ability,

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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 . . . ."); *see also* HOHFELD, *supra* note 72, at 50-60.

76. *See Samuels, supra* note 75, at 151 (distinguishing intrasystemic perceptions of coercion specific to particular economic systems from intersystemic perceptions of coercion).

77. *See id.* at 151-53; *see also The Peppercorn Theory, supra* note 27, at 1092 ("Bargaining power exists only because of government protection of the property rights bargained, and is properly subject to government control."). While government recognition of property rights is clearly *not* the only source of bargaining power, *see infra* Part III.B.2.a, the *Peppercorn* Note captures the key point that a great deal of bargaining power analysis depends upon background rules enforced by the State.

78. Note that in this context, even the state may be treated much like a private party at the bargaining table. *See, e.g.*, United States v. Bethlehem Steel Corp., 315 U.S. 289, 300-304 (1942) (impliedly comparing bargaining power of steel manufacturer in wartime with that of federal government); *see also id.* at 314, 336 (Frankfurter, J., dissenting) (arguing United States did not have bargaining power to compel unwilling organization to build ships for war effort and that "[d]uring wartime the bargaining position of the Government . . . is inherently weak").

79. *See, e.g.*, Blau, *supra* note 55, at 293 (1969) (distinguishing between power based on ability to coerce others through threatened negative sanctions and influence based on ability to convince others through promises of rewards and incentives). *See also* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-71 (1923) [hereinafter Hale, *Coercion and Distribution*] (noting pervasiveness of coercion in every legal system).

80. Such private orderings always take place against the background power of the state to police the conduct of each of the parties. In a legal context and on a very abstract level, the concept of an economy, as well as particular economic systems, allocate power that is both visible and real between actors in any social transaction. This power includes power arising from operation of the economic system within which the actors are engaging in their social transactions. Every economic system imposes ground rules upon the actors within that system that allocates power among those actors. This is obvious in a socialist economic system, where state managers direct economic transactions. *See* Samuels, *supra* note 75, at 150-51.

right, authority, or capacity.[81] Each party to this contest expends his or her power in attempting to obtain a preferred outcome vis-à-vis the other party to the transaction.

B. Characteristics of Power

The sources of disagreement over a working definition of power nonetheless illustrate three key characteristics of power that render power difficult to employ as a legal concept: Power is (1) omnipresent, (2) complex, and (3) dynamic.

1. Power is Omnipresent

Power exists in every relationship between two or more actors. It is impossible to describe an interaction in which power is not present to some extent.[82] The statement "A has power" is meaningless. The first impulse of the reader of such a statement should be to ask "Power to do what?" While we may state the answer in terms of A's ability to affect her physical surroundings (such as by lifting a rock), we have still described A's power in terms of her relationship with something else. Con-

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Samuels notes that coercion—and by direct implication the use of power by a stronger actor to control and direct the actions of a weaker actor—is intrinsic to any economic system:

> Each economic system—whatever the taxonomy: capitalism, socialism, mixed economy, and so on—comprises a distinctive mode of organization and control of economic life; a particular system of freedom, control and power; a particular system of the human control, discipline and use of the human labor force; a particular system of institutions in control and liberation of individuals; a different regulatory, or coordinating, mechanism; and so on. It is not surprising, therefore, that coercion can be perceived in both the very nature of particular economic systems and in the operation of each system.

Id. But such coercive forces also exist in capitalist regimes, where basic rules such as regulating rights in property and defining the types of transactions that will be enforced by state action act coercively upon the participants in that regime. *See id.* at 151-53 (discussing coercive nature of capitalist economic systems and surveying arguments that capitalist regimes are coercive despite apparent commitment to voluntary individual action as motive force of economic transaction). Samuels notes that capitalist systems may be described as coercive in the goal of such systems to organize human labor, "channel the human desire to succeed by compelling individuals to get ahead only by serving others through producing a saleable good or service," and by coercing producers to minimize costs through the competition mechanism. *See id.* at 152.

81. *Cf.* Adler & Silverstein, *supra* note 26, at 13-14 (describing exercise of power as a contest and noting that "[a]bsent the actual contest, each side must guess about the other's power").

82. *See, e.g.*, Dahl, *The Concept of Power*, *supra* note 49, at 80 ("First, let us agree that power is a relation, and that it is a relation among people."); *see also* PFEFFER, POWER, *supra* note 53, at 3 ("It is also generally agreed that power characterizes relationships among social actors.").

sequently, it is impossible to assess the meaning of "A has power" without including something or someone upon which A can act. In contrast, the statement "A has power over B" does have meaning. It communicates that in some sense A can act upon B in a way that B cannot act upon A—and thereby affect B in a way that A itself cannot be affected. The statement describes something about the *relationship* between A and B and something about the outcome of that relationship.

This is particularly salient in a legal context. Law systemizes and regulates human relationships—it forms the social, economic and political grease that permits society to operate. Even outside the law (assuming such a backward step is possible), power requires a relationship to have meaning. Power in a purely Hobbesian state of nature—the chaotic war of all against all[83]—exists theoretically only in a situation where there are no laws or rules to guide behavior.[84] In that system, one individual may gain a temporary advantage with respect to all other "ordinary" individuals.[85] While such individual power likely is minimal at best—even the strongest must sleep[86]—forms of power will exist in any relationship.

While power exists independently of law, at the same time law can create and promote certain forms and sources of power. Agreed on rules create power of a special kind as mandated by the terms established by the rules, and also inhibit, prohibit, permit or promote natural forms of power. Once individuals acting in common agree upon a set of rules or laws to guide their behavior, even if the rules are as gross as "let's wait until the jerk is asleep and bash his head with a rock," the relation be-

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83. *See* HOBBES, *supra* note 64, at 185 ("[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.").

84. *Cf. id.* at 188 ("Where there is no common Power, there is no Law: where no Law, no Injustice."). Hobbes, despite his infamous speculation that Native Americans lived in such a state of nature, admitted that it was unlikely that a state of nature ever existed as a general proposition:

> It may peradventure be thought, there was never such a time, nor condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of *America* . . . have no government at all . . . .

Id. at 187.

85. Hobbes concludes that human beings are equal in abilities, so long as the equality is measured over time and it is recognized that any apparent advantages of one person over another are by nature temporary and may be overcome as others vie for the same advantages. *See id.* at 183 ("[T]he difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he.").

86. *See id.* at 183 ("For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himselfe.").

tween law and power arises. Collectively, the power of the group will be far more than the power of the one. To the extent that relationship develops to a Rule of Law system, law functions to remove the conditions of the Hobbesian state,[87] creates limits to individual power and defines the conditions in which there is a communitarian balance of power while (theoretically) still allowing the individual a substantial freedom of action.

The presence of power in a relationship between one or more actors is inescapable, and this fact is especially obvious in market-based economic interactions. As the Kansas Supreme Court observed in *State v. Coppage*,[88] the financial situation of employees generally limited their ability to reject onerous contracts:

> The Legislature, in passing the act in question, probably also took into consideration a fact of general knowledge that employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof.
>
> To many the demands for housing, food, and clothing for their families and the education of their children brook no interruption of wages to the bread-winner. Necessity may compel the acceptance of unreasonable and unjust demands.[89]

In any competitive system involving actors of varying levels of skill, with different needs, desires and goals, every scarce resource—including bargaining power—will be subject to unequal distributions. As Robert Hale recognized in the 1920s, coercion—the use of power to

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87. *See supra* note 84 and accompanying text.

88. 125 P. 8 (Kan. 1912).

89. *Id.* at 10-11; *see also* SLAWSON, *supra* note 42, at 14-15 (analyzing Kansas Supreme Court's reasoning regarding relative bargaining power in *Coppage*). The United States Supreme Court implicitly accepted the Kansas Court's relation between property and the ability to hold out for better terms, but concluded that wealth—and thus, implicitly, power—disparities are an inevitable result of any economic or legal system that recognizes individual property rights and freedom of contract:

> [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Coppage v. Kansas, 236 U.S. 1, 17 (1915). *Cf.* THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) ("The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.").

force another to act in a preferred manner—lies at the foundation of every distributional transaction, even in regimes that purport to enforce freedom of contract.[90] Hale argued that distribution of income in a free market regime "depends on the relative power of coercion which the different members of the community can exert against one another."[91] Within such a community, every person—individually or in concert with others having similar interests—possesses coercive tools that can compel or influence others to increase distribution of societal resources to that individual or interest group, including the power to withhold labor, to use existing wealth to purchase a greater share of resources, to establish competing enterprises, and to petition for favorable government action.[92]

Because power is present in every relationship and every actor has some degree of power of some type (whether active or obstructionist in nature), judicial intervention into private contracts cannot meaningfully turn upon the determination that one party to a relationship lacks power. No such situation exists nor can exist. Even the most intuitively obvious case of an apparently "absolute" disparity of bargaining power—the hoary "your money or your life" demand by the highwayman or tax collector—never really removes all power from the victim of the duress.[93] A victim of the most extreme coercion still possesses some power to choose between unpleasant alternatives:

> We have talked of contracts signed under duress as lacking "real consent. . . ." When I feel that I must choose between having a bullet lodged in my head and signing a contract, my desire to escape the bullet would hardly be described as unreal or merely apparent; and the signing of the contract is simply the expression of that fear of

90. *See* Hale, *Coercion and Distribution, supra* note 79, at 474; 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).

91. *See* Hale, *Coercion and Distribution, supra* note 79, at 474.

92. *See id.* ("But were it once recognized that nearly all incomes are the result of private coercion, some with the help of the state, some without it, it would then be plain that to admit the coercive nature of the process would not be to condemn it.").

93. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 175(1) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."). Other examples of apparently absolute bargaining power disparities abound in contract law. Cases of fraud can be seen as an absolute disparity of bargaining power—one party to the contract misrepresents material information upon which the injured party reasonably relies and thereby presents the injured party with only the illusion of power to bargain over the outcome. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 163 ("If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.").

> death. . . . Faced with the choice that was offered, the victim of duress gives a genuine consent rather than suffer the alternative consequences.[94]

The victim of the most egregious forms of duress still retains considerable power over the situation. He may comply, or he may resist. The power of confronting unjust opponents as a choice was made obvious by Gandhi's and Martin Luther King, Jr.'s use of passive disobedience as a tool to achieve their social aims. If the victim resists and fails—and thus concludes the encounter as a martyred corpse, an unconscious body or a part of the penal system such as Nobel Peace Prize winners Nelson Mandela of South Africa[95] and Aung San Suu Kyi of Burma[96]—the victim still retains the power to affect the outcome of the interaction with the stronger party. Unconscious victims require disposal or their evidence can increase the likelihood of apprehension; corpses create their own problems of concealment and disposal, and convicts impose substantial costs upon the penal system.[97] All of these outcomes, however, have a real impact upon the ability of the criminal or tax collector to engage in their livelihood and thus demonstrate the power of the victim to affect the outcome of his or her interaction with the criminal or tax collector.

Thus, even in situations involving apparently absolute disparities of power, the weaker party still has some degree or form of power. That power may be insufficient to obtain the most *preferred* outcome to the situation—i.e., a happy ending in which the heroic former victim over-

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94. Dalzell, *supra* note 25, at 238-39.

95. *See, e.g.*, Thomas Kamm, *Mandela Declares Victory in Election, Mixing Conciliatory Tone, Warnings*, WALL ST. J., May 3, 1994, at A10 (describing Nelson Mandela's election as president of South Africa after twenty-seven years in prison).

96. *See, e.g.*, Colin L. Powell, *It's Time to Turn the Tables on Burma's Thugs*, WALL ST. J., June 12, 2003, at A16 (describing political struggles of Aung San Suu Kyi to restore democracy to Burma, despite numerous periods of imprisonment and physical attacks by ruling Burmese military dictatorship).

97. For example, many non-violent activists "go limp" when their civil disobedience prompts police to initiate an arrest because doing so imposes greater costs in terms of time and manpower upon the arresting officers than cooperating. *See, e.g.*, Bruce Hartford, *Notes from a Non-Violent Training Session (1963)*, *at* http://www.crmvet.org/info/nv1.htm (last visited Nov. 1, 2004) (noting different tactics for going limp as described during training for activists in 1963); CPT Public Witness, *Arrest, Jail and Court: Making Choices*, at http://www.cpt.org/publicwitness/arrest.php (last visited Nov. 1, 2004) (advising making choice between cooperating with arresting officer or going limp before time of arrest); ENVIRONMENT DEFENDERS OFFICE VICTORIA, HASSLE-FREE NON-VIOLENT ACTION: A RESOURCE FOR ACTIVISTS 8, *at* http://www.edo.org.au/edovic/Publications/4_hassleFreeNonviolentAction.PDF (last visited Sept. 28, 2004) (recommending protesters refrain from resisting arrest, defined as "doing anything other than voluntarily going along with the police officer or going limp and allowing yourself to be carried away"). Likewise, generation of corpses or unconscious bodies creates higher risks of severe or capital punishment and greater difficulties in disposing of evidence.

comes the aggressor—but the actual achievement of preferred outcomes is not relevant to the question of whether an actor has power in any given situation.

Actors dependent upon a practical, real-world analysis of power must assume the omnipresence of power on both sides of their relationships. The highwayman, for example, cannot presume that merely because he has a gun and has issued the famous "stand and deliver" directive that his victims are powerless and incapable of successful resistance. The tax collector must continue to exercise her coercive powers through various enforcement mechanisms lest the taxpayer decide to abscond, refuse to pay, or engage in fraud. Likewise, given that all parties have some power in every relationship, the legal system's response to power must—like the practical analysis of power—address not the presence or absence of power as an outcome determinative factor, but rather the *quantities* of bargaining power on either side of a transaction.[98] Consequently, contract law requires courts to examine bargains for abuses of "superior" bargaining power.[99] At that point, the inquiry shifts from attempting to discern the absence or presence of power to assessing the sources of power and the degrees to which each party to the interaction possesses the particular kind of power deemed relevant to the situation,[100] and whether it existed at a point in time deemed meaningful by the court.

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98. Assessing the quantity or amount of bargaining power held by parties to a transaction may in fact be an irreducibly complex endeavor. *See, e.g.*, James G. March, *Preferences, Power, and Democracy*, *in* POWER, INEQUALITY, AND DEMOCRATIC POLITICS: ESSAYS IN HONOR OF ROBERT A. DAHL 50, 51-53 (Ian Shapiro & Grant Reeher eds., 1988). As March observes, the attempt to compare relative power presupposes that "there exists a metric by which the extent to which one person has induced others to contribute to this [sic] or her interests can be compared with the extent to which others have done so." *Id.* at 51. But given that power depends largely upon subjective preferences that change over time (*cf.* TAWNEY, *supra* note 61, at 211-12 (noting relationship between power and preferences)), power cannot be unambiguously measured between two parties to a transaction. *See* March, *supra*, at 51-53.

99. *See, e.g.*, SLAWSON, *supra* note 42, 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.").

100. This principle is partly enshrined in the doctrines explicitly employing inequality of bargaining power. For example, the comments to U.C.C. § 2-302 explicitly acknowledge that the purpose of the unconscionability doctrine is not to upset allocations of risk resulting merely from superior bargaining power. *See* U.C.C. § 2-302 cmt. 1 (1989). Likewise, other contract defenses depending in part upon inequality of bargaining power purport to avoid interfering with contracts where the party with superior bargaining power does not *abuse* that bargaining power in achieving a favorable outcome. *See* Barry J. Reiter, *The Control of Contract Power*, 1 OXFORD J. LEGAL STUD. 347, 368-70 (1981) ("The courts are concerned with preventing the exaction of too great an advantage from positions of power, irrespective of whence the power derives.").

2. Power is Complex

Power is a "complex, multidimensional parameter."[101] This complexity arises from two primary sources. First, power is a situational phenomenon.[102] The amount of power an actor may have in any given situation depends entirely upon the situation and the other actor or actors in the power relationship.[103] Power may be generated from a multitude of sources, but no single factor, or set of factors, can give an actor power to control every situation. Second, power has many forms and comprises not only visible displays of a real ability to affect an outcome, but also includes hidden assets and the ability to deceive others regarding the nature, extent or source of one's own power. Combined, both factors contribute to the difficulties and costs of accurately assessing and measuring relative power disparities, either at the time of the interaction or on a post hoc basis.

a. Sources of Power

An actor's power can derive from a potentially infinite number of sources and contexts.[104] On a political, national, or international level, sources may include military capability, economic strength, political influence, and willingness to engage in conflict or exercise power.[105] Or-

101. JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 257-58 (1975).

102. *See* WEBER, *supra* note 60, at 153.

103. *See* Adler & Silverstein, *supra* note 26, at 11-12. "Power's complexity stems no doubt from its highly situational nature—even slight changes in a setting may substantially affect the underlying power dynamics." *Id.* at 11.

104. *See, e.g.*, WEBER, *supra* note 60, at 153 ("The concept of power is highly comprehensive from the point of view of sociology. *All conceivable qualities of a person and all conceivable combinations of circumstances may put him in a position to impose his will in a given situation.*") (emphasis added); MICHAEL PALMER & SIMON ROBERTS, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION MAKING 70 (1998) ("[W]hile respective sources of power inform the outcome of negotiations, power sources are multiple and imponderable."). Hobbes, for example, lists over thirty different sources of power in his discussion on the nature of that phenomenon, including strength, form, prudence, arts, eloquence, riches, reputation, patriotism, organization, fortune, affability, and knowledge. *See* HOBBES, *supra* note 64, at 150.

105. *See, e.g.*, 1 MICHAEL MANN, THE SOURCES OF SOCIAL POWER: A HISTORY OF POWER FROM THE BEGINNING TO A.D. 1760, at 2 (1986) (identifying four sources of social power: "*ideological, economic, military, and political (IEMP) relationships*"); Marcia Lynn Whicker et al., *The Troublesome Cleft: Public Administration and Political Science*, 53 PUB. ADMIN. REV. 531, 533-34 (1993) ("Various forms of power, such as military power, economic power, and political penetrative power have been found to form the power capabilities of nation-states."); UNITED STATES MARINE CORPS, SMALL WARS MANUAL ¶ 2-3 (1940) [hereinafter SMALL WARS MANUAL] (listing enemy political status, economic status, information,

ganizations may obtain power from wealth, ability to dominate relevant markets, the goods or services provided by that organization, claims to moral, intellectual, political, or economic legitimacy, and many other factors.[106]

For individuals, power likewise typically is seen as related to an individual's personal wealth, political connections, education, experience, and socio-economic status.[107] Individuals within organizations may acquire power over others through the ability to dole out positive and negative sanctions to subordinates while resisting negative sanctions from superiors[108] or the ability to motivate the organization to support their personal goals.[109] And individual power can arise from access to information, knowledge, or skill, and—most importantly—a willingness to use power once obtained.[110]

Complicating the identification of sources of power is the fact that the concept of "power" means different things in different contexts. In the military context, power often means the ability to cause an enemy to capitulate by proper application of force and violence, including intimidation through threat and destructive potential.[111] In the political realm,

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security services, military materials, organization, and skill, as well as terrain and climate as factors relevant to assessing enemy strength in small wars).

106. *See* PFEFFER, POWER, *supra* note 53, at 4-6 (discussing process of legitimation by which raw power is transformed into legitimate authority).

107. *See, e.g.*, Kennedy, *Motives in Contract*, *supra* note 47, at 566-67 (noting that power disparities arise from class hierarchies, patriarchy and race); Brooke Overby, *Contract in the Age of Sustainable Consumption*, 27 J. Corp. L. 603, 615 (2002) (questioning assumption of equal bargaining power where parties have disparate ages, wealth, races, and/or genders); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 556-57 (1967) (discussing tendency of equity courts to ascribe grossly stereotypical degrees of bargaining power to various classes, including the elderly, women and English seamen).

108. *See* PFEFFER, POWER, *supra* note 53, at 5. Pfeffer notes that in many organizational structures, lower level employees may possess substantial power since by refusing to obey directives of superiors, the lower level employees could greatly hinder the operations of the organization. *Id.* That power to disrupt the organization, however, is limited by the employees' lack of authority to do so—if they engage in such actions it is likely the manager would impose negative sanctions upon the employees that would limit their future power to disrupt. *See id.* at 4-5. The ultimate balance of the legitimate authority of the manager and the power of the lower level employee defines how well the organization will operate. *See id.* at 5-6.

109. *See also* HOBBES, *supra* note 64, at 150 ("The Greatest of humane Powers, is that which is compounded of the Powers of most men, united by consent, in one person, Naturall, or Civill, that has the use of all their Powers depending on his will . . . .").

110. *See* Adler & Silverstein, *supra* note 26, at 16 (noting that power arises from willingness to use power); H. Lee Hetherington, *The Wizard and Dorothy, Patton and Rommel: Negotiation Parables in Fiction and Fact*, 28 PEPP. L. REV. 289, 311-15 (2001) (observing importance of perceptions of other side's power, superior information, deception, and negotiation skills to successfully negotiating favorable outcomes).

111. *See generally* SMALL WARS MANUAL, *supra* note 105 (detailing strategy and tactics for fighting "small wars").

power means the ability to marshal societal resources in support of a particular goal.[112] Psychologically, power—or the perception of power—to influence the events or persons around us may be necessary for our mental well-being.[113] In the religious context, power may refer to a perceived association with supernatural forces or the charismatic ability to motivate the hearts and minds of adherents.[114] Economic power may mean the ability of individuals, business entities or nations to withstand economic losses while maintaining a given standard of living. In the legal context "power" can substitute for authority, capacity,[115] or—in the case of contract transactions—the ability to obtain preferred terms in the parties' bargain.[116] Although power may take different forms in different contexts, these disparate forms can to some extent inform analysis of power in other contexts.[117]

Even attempts to categorize the sources of power in a single context—bargaining—presents an array of potential sources of power that defies easy summary. As Hale observed, coercive power in the bargaining context starts with a recognition by party A that party B has something A wants.[118] The moment of formation of A's desire creates the first bargaining power, depending solely on the strength of A's desire.[119] In situations where A's desire for what B has is great and A will bear significant costs if he is unable to obtain what B has, we might describe A's situation as one of "necessity" and identify A's bargaining power as

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112. *See, e.g.*, HOBBES, *supra* note 64, at 150-51.

113. *See* Yuval Feldman, *Control or Security: A Therapeutic Approach to the Freedom of Contract*, 18 TOURO L. REV. 503 (2002).

114. *Cf.* JOHN KENNETH GALBRAITH, THE ANATOMY OF POWER 38-46 (1983) (discussing role of personality in personal power of figures such as Moses, Confucius, Aristotle, Plato, Jesus, Mohammed, Marx and Gandhi).

115. *See supra* notes 70-81 and accompanying text.

116. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 974-75 (1984) [hereinafter Epstein, *Contract at Will*].

117. *See, e.g.*, Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAVIORAL SCIENTIST 149, 149 (1983) (noting confluence of negotiating power and military power in international relations: "At the international level, negotiating power is typically equated with military power.").

118. *See* Hale, *Bargaining, Duress, and Economic Liberty*, *supra* note 90, at 604. Hale argues that economic power begins with a party's desire for something that he does not have:

> The owner of a shoe factory is in no danger of going ill-shod .... But he cannot live on shoes alone. Like everyone else, he must *buy* food or starve .... Any person, in order to live, must induce some of the owners of things which he needs, to permit him to use them. The owner has no legal obligation to grant the permission. But if offered enough money he will probably do so; for he, too, must obtain the permission of other owners to make use of *their* goods, and for this purpose he too needs money—more than he has at the outset.

Id.

119. *See id.*; TAWNEY, *supra* note 61, at 211-12 (noting relationship between preferences and power).

weak, compared to B. Alternatively, A may have little desire for B's goods or services, leading to the perception that B will have relatively little power to coerce or influence A's acceptance of B's preferred terms.

After the initial moment of desire, A's bargaining power—the ability to satisfy his desire at the least cost or to obtain a greater share of the surplus between the two parties' reservation prices[120]—depends upon an ever increasing set of inputs determined by A's interaction with B. At the moment A approaches B, bargaining power depends initially upon (1) B's desire to retain the good or not perform the requested service; (2) the protection (or lack thereof) the underlying legal and economic regimes afford B's ability to retain or refuse the good or service; and (3) B's desire—if any—to obtain something of value from A.[121]

Once the parties begin bargaining, they initiate a contest over who can marshal the greatest amount of bargaining power and apply those resources toward the goal of obtaining the greatest possible value from the other party at an exchange price equal to or less than their respective reserve prices. Without an actual contest, it is impossible to identify the power resources each party could bring to bear on the contest.[122] Even with such a contest, perceptions of power—by the parties themselves or in a post hoc judicial analysis—will rarely match the reality of the parties' interaction.

Further, the potential sources of power that may be brought to bear in the bargaining context are too numerous to catalog. Negotiation experts commonly identify a broad array of potential sources of bargaining power that may roughly be based upon characteristics of the parties and upon characteristics of the situation or transaction. Characteristics commonly associated with bargaining power in the negotiation context often include status-based characteristics such as monopoly,[123] size or the ability to marshal organizational power,[124] wealth,[125] gender,[126] educa-

120. *See* Epstein, *Contract At Will*, *supra* note 116, at 974-75 (defining bargaining power as the ability to obtain a greater share of the surplus than the other party to the bargain).

121. *See supra* note 118 and accompanying text.

122. *See* Adler & Silverstein, *supra* note 26, at 13-14 (suggesting that without actual exercise of power between parties, each side must guess at other side's actual resources).

123. *See* Kennedy, *Motives in Contract*, *supra* note 47, at 616-20 (assessing validity of traditional notions of unequal bargaining power caused by the public nature of the industry, the use of adhesion contracts, size, monopoly power, necessity, and shortage).

124. *See* GALBRAITH, *supra* note 114, at 54-64 (analyzing relationship between power and organization); JEFFREY PFEFFER, MANAGING WITH POWER: POLITICS AND INFLUENCE IN ORGANIZATIONS 71-77 (1992) (power arises from personal characteristics, including status within organizations and ability to control resources within the organization, as well as situational factors); *cf.* PALMER & ROBERTS, *supra* note 104, at 70-71 (noting particular problems arising from negotiation across ranks and in stratified contexts such as sovereign-subject, employer-employee, and producer-consumer contracts).

tion,[127] and business sophistication.[128] The nature of the transaction itself may likewise give rise to bargaining power asymmetries, for example where the subject matter of the bargain is deemed a public good[129] or a necessity such as housing.[130] Finally, situational characteristics refer to sources of bargaining power arising from relatively mutable factors peculiar to the specific bargaining interaction at issue. Such characteristics

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125. The relation between wealth and power has a long pedigree. *See, e.g.*, GALBRAITH, *supra* note 114, at 47 ("The association between property and compensatory power is so simple and direct that in the past it has been considered comprehensive."); Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* (1932), *reprinted in* AMERICAN LEGAL REALISM 155, 155-56 (William W. Fisher III et al. eds., 1993) (discussing role of increasing concentration of wealth in corporate forms in shifting power from individuals to large business organizations); *cf.* HOBBES, *supra* note 64, at 150 ("Also Riches joined with liberality, is Power; because it procureth friends and servants: Without liberality, not so; because in this case they defend not; but expose men to Envy, as a Prey."); *Proverbs* 22:7 (King James) ("The rich ruleth over the poor, and the borrower is servant to the lender.").

126. *See, e.g.*, LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 10-12 (2003) (analyzing negotiation habits and psychology based upon gender and noting areas in which women suffer from significant bargaining power disadvantages); Overby, *supra* note 107 (questioning American contract law assumption of equality of bargaining power and freedom of contract when considered in light of sources of inequality such as, inter alia, gender, wealth, age and race).

127. *See, e.g.*, Ahern v. Knecht, 563 N.E.2d 787, 793 (Ill. App. Ct. 1990) (acknowledging plaintiff's ignorance of air conditioner maintenance and repair as one element of bargaining power analysis).

128. *See, e.g.*, Banks McDowell, *Party Autonomy in Contract Remedies*, 57 B.U. L. Rev. 429, 431 (1977) (observing that parties on higher level of distribution chains for goods and services have greater economic power, derived from greater business sophistication).

129. *See, e.g.*, Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968, 973 (Wash. 1988) (holding that school district exercised decisive advantage of bargaining strength in requiring parents of schoolchildren seeking to participate in school district's wrestling program to execute release as condition of participation in public program); Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445-46 (Cal. 1963) ("As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.").

130. Courts often hold, for example, that tenants have no bargaining power in dealing with prospective landlords and must meekly accept whatever terms the landlord seeks to impose through standard form lease contracts, without inquiry whether the tenant could have bargained for different terms. *See, e.g.*, Ransburg v. Richards, 770 N.E.2d 393, 401 (Ind. Ct. App. 2002) ("[A]s a result of the essential nature of the service and the economic setting of the transaction, a residential landlord has a decisive advantage in bargaining strength against any member of the public who seeks its services."); Feld v. Meriam, 4 Phila. Co. Rptr. 511, 522 (Pa. Com. Pl. 1980) ("[T]he tenant has no bargaining power and must accept his landlord's terms. There is no meeting of the minds and the agreement is in effect a mere contract of adhesion, . . . a prospective tenant for an apartment being unable to bargain away an exculpatory clause, is not [a free bargaining agent].") (quoting Galligan v. Arovitch, 421 Pa. 301, 304-05 (1966)); *see generally* Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?*, 1975 WIS. L. REV. 19 (1975).

include the degree of necessity experienced by the parties,[131] perceptions of the other party's power,[132] the skill and expertise at bargaining that a party brings to the negotiation table,[133] party access to information,[134] cooperation and development of common interests between bargaining parties,[135] the quality and nature of alternatives to a negotiated outcome available to each of the parties,[136] and the legitimacy or moral power of the parties' negotiating positions.

This partial list cannot exhaust the possible sources of power in the bargaining context. Accordingly, it is beyond the scope of this article to attempt a catalog of even the broad categories of power sources that have been described and observed by negotiation experts, judges, and other legal commentators. Rather, it is important to note that assessment of even this partial list of potential factors in the bargaining power equation gives rise to a multifactor balancing test in which many of the factors are unquantifiable and often hard to define in terms of how they are reflected in the real world.[137]

Additionally, the mere fact that a party has the potential to use these sources of power does not require that the party actually use that power. In many cases, a party may be unaware of its actual power, may be unwilling to incur the costs associated with the exercise of power, or may

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131. *See, e.g.*, LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 25-26 (2d ed. 2001) (noting power disparities—in terms of lacking good alternatives to negotiated outcome—arising from negotiating out of necessity); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 553-54 (2003) (identifying bargaining power as a function of (1) the parties' relative patience, and (2) each party's "disagreement point" or "next best option").

132. *See* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT §12.03[1] (4th ed. 2001) ("The strength of each party is determined more by *perception* than by actual circumstances.") (citing G.R. SHELL, BARGAINING FOR ADVANTAGE 111 (1999) and R. LEWICKI ET AL., NEGOTIATION 296-97 (1994) (emphasis added)); Hetherington, *supra* note 110, at 311-12 (explaining that bargaining power is largely based upon perceptions of the opposing party).

133. *See* SLAWSON, *supra* note 42, at 30-31 (describing relationship between bargaining power and efficient contracting methods, including use of standard form contracts).

134. *See id.* at 26-29 (describing importance of information to developing superior bargaining power of producers over consumers).

135. *See* FISHER ET AL., *supra* note 53, at 179-81 (describing the development of common interests between parties as source of bargaining power); LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 17-19 (2d ed. 1994) (same).

136. FISHER ET AL., *supra* note 53, at 179, 183-84 (arguing that development of a good "Best Alternative To Negotiated Agreement" ("BATNA") generates substantial bargaining power and noting that parties legitimately may attempt to improve their own BATNAs or worsen their opponents'); RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 151-81 (2002) (relating techniques for improving one's own BATNA or diminishing opponent's BATNA to gain greater bargaining power).

137. *Cf.* March, *supra* note 98, at 51-53 (noting difficulties inherent in measuring power).

just make a bad decision not to use power when in fact such use would be advantageous. In each of these cases, the failure to employ resources and thereby affect the outcome of the interaction is at base the fault of the party who fails to use power, not the opponent.[138]

b. "Forms" of Power

Legal analysis depends primarily upon observed exercises of power or threats to exercise power proved to be held by one of the parties to the transaction. In the typical contract of adhesion case, for example, courts assume that the drafter of the adhesion contract had greater power than the adherent because the drafter presented the contract on a take-it-or-leave-it basis and the adherent signed the contract. A court can observe the apparent exercise of power by the drafter and accept it as real. Alternatively, a drafter may threaten to withhold a valuable benefit that it has the authority to withhold. Again, the court sees the exercise of power and acknowledges that power as real. In essence, courts assess power as if they were monitoring a game of chess—the pieces are visible, the threats are known, and the moves are made in full view of the players.

But this chess-like view of the interplay of power between two actors is often an incomplete picture of the actual use of power, regardless of whether the context is a commercial transaction or a military battle.[139] In contests of power, parties typically expend substantial energies attempting to deceive each other regarding not only their intentions, goals and bargaining positions, but also to prevent the other party from obtaining information about their actual degree of power.[140] This class of

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138. This is true despite that in most interactions, the opponent will be doing everything possible to prevent the other party from perceiving or using power to affect the interaction.

139. *Cf.* 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.

> One major difference between chess and war is that chess does not contain what the military terms "information uncertainty." 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.

Id.

140. *See, e.g.*, FISHER ET AL., *supra* note 53, at 129-143 (advocating techniques for protection of one's own negotiating position, settlement authority, and flexibility in the event of deception or other "dirty tricks" by the opposing party); CRAVER, *supra* note 132, at §§ 6.01-6.03 (describing techniques for protecting and obtaining information regarding bargaining positions and goals); HON. ROBERT A. WENKE, THE ART OF NEGOTIATION FOR LAWYERS 68-69 (1985) (relating dangers of over-disclosure of information and tactics for protection of party information in negotiations); DAVID R. BARNHIZER, THE WARRIOR LAWYER 237-243 (1997) (listing strategies for protecting information about clients' negotiation position); PALMER & ROBERTS, *supra* note 104, at 75-76 (In competitive negotiations, negotiator "manipulates both

power may be wholly hidden from the other side's knowledge, or a party may devote substantial effort to projecting a false image to the other side. Rather than chess, power interactions are better analogized to Seven-Card Stud or Texas Hold-'em poker where all parties have incomplete information about each other's hands and actively practice deception regarding the strength of their own positions.[141] If one player folds, those cards remain hidden. The winning player may actually have the full house he claims to hold, but only has to reveal his cards if at least one other player is willing to call his bluff.

The addition of hidden, deceptive and unexercised forms of power creates three dichotomies that may be used to describe a party's power—power may be visible or hidden; real or false; and exercised or unexercised. First, a party's ability to affect the outcome of the bargaining process may be visible to the other party or hidden. Visible power is a form of power that is known to the other side in any interaction. In the military context, for example, the Cold War doctrine of Mutually Assured Destruction ("MAD") depended not only upon both the United States and the Soviet Union maintaining highly visible stocks of nuclear missiles,[142] but also upon repeated statements that each side was willing to use their nuclear weapons in response to any attack.[143]

In contrast, to be useful, hidden power often depends upon secrecy and the other side's ignorance of that power. For example, in negotiations to conclude the Mexican-American War, the Mexican negotiators had secretly acquired an American draft treaty and negotiation instructions stating that the American negotiator should attempt to gain cession of Baja California, unless the Mexican negotiators refused to give up the region.[144] The Mexicans used this informational asset to preserve Baja California for Mexico.[145] In this instance, the information asset was hid-

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people and process, in particular, trying to uncover as much as possible about the position of the other party and, at the same time, to mislead the other side about that negotiators' [sic] own situation.").

141. *See, e.g.*, Adler & Silverstein, *supra* note 26, at 13-15 (noting that perceptions of bargaining power are often as important as actual power, but parties' attempts to project false impressions of power injects substantial uncertainty into measurement of bargaining power).

142. *See* JOHN LEWIS GADDIS, WE NOW KNOW: RETHINKING COLD WAR HISTORY 85-86 (1997) (following use of atomic weapons against Hiroshima and Nagasaki, United States and Soviet Union "turned out tens of thousands of nuclear weapons, most of which they aimed provocatively at one another").

143. For a detailed assessment of nuclear deterrence doctrines and strategies during the Cold War, see STEPHEN J. CIMBALA, THE PAST AND FUTURE OF NUCLEAR DETERRENCE (1998).

144. *See, e.g.*, Matthew Biggers, *The Treaty of Guadalupe Hidalgo, An Essay, available at* http://historicaltextarchive.com/sections.php?op=viewarticle&artid=545 (last visited Oct. 29, 2003).

145. *See id.*

den from the American negotiators—indeed, had the American team known of the asset it would have lost all value because they would have known to demand Baja despite Mexican protests.

Second, a party's power may be either real or false. Real power means power that, if used, would impose costs on the other side and effectively would assist the user in achieving a preferred outcome. The nuclear deterrent mentioned above[146] might be one example of real power, although given that each side's threat to launch missiles if attacked was fortunately never tested, the world will never know. On the other hand, "Dirty" Harry Callahan's sixth round in his .44 Magnum represents a clear example of power in that it was proved real by the "punk" who was apparently "feeling lucky."[147]

False or deceptive power, however, is power that depends upon one party's perceptions of the other party's capacity to achieve a preferred outcome. Deceptive power cannot be exercised or it becomes worthless. Montgomery's tactics at El Alamein during the North Africa campaign of World War II provide one example of deceptive power. To convince Rommel that the main Allied attack would come from the south of the German-Italian position, Montgomery initiated a substantial plan of deceptions, including elaborate mock-ups of Allied tanks and a false logistical pipeline, placed to convince observers that Montgomery contemplated an eventual southern offensive.[148] At the same time, the real Allied tanks were disguised as trucks to hide their actual positions.[149] Had Rommel at any time attacked the mock tanks, they would have proved worthless to holding the Allied position. But the deception suc-

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146. *See supra* notes 142-43 and accompanying text.

147.

> I know what you're thinking, punk. You're thinking, did he fire six shots or only five? And to tell you the truth, I forgot myself in all this excitement. But being as this is a .44 Magnum, the most powerful handgun in the world and will blow your head clean off, you've got to ask yourself a question: do I feel lucky? Well do ya, punk?

DIRTY HARRY (Malpaso Co. & Warner Bros. 1971). The punk attacked, and Harry Callahan had fired only five shots.

148. *See* FIELD-MARSHALL THE VISCOUNT MONTGOMERY, EL ALAMEIN TO THE RIVER SANGRO: NORMANDY TO THE BALTIC 22-23 (1948) [hereinafter MONTGOMERY] (describing elaborate visual deception leading up to October 23, 1942 battle of El Alamein); ALEXANDER MCKEE, EL ALAMEIN: ULTRA AND THE THREE BATTLES 141 (1991) (same). Beyond constructing the false pipeline to the south and maintaining mock tanks on a southern front, Montgomery also built numerous false structures and placed remotely detonated explosives under false ammo dumps to be exploded in the event German planes bombed the ammo dumps. *See* TIM CLAYTON & PHIL CRAIG, THE END OF THE BEGINNING: FROM THE SIEGE OF MALTA TO THE ALLIED VICTORY AT EL ALAMEIN 286-87 (2002).

149. *See* MONTGOMERY, *supra* note 148, at 17 ("In the Sherman we had at last a match for the German tanks.").

cessfully diverted Rommel's attention, kept his forces rooted in a defensive position primarily focused on the "developing" southern battle line, and ultimately contributed substantially to Montgomery's successful attack from the north.[150]

Third, power may be exercised or unexercised. Exercised power is that which a party attempts to use to obtain a desired outcome. Exercise alone does not say anything about whether the exercising party was effective in obtaining the preferred result, only that the party expended resources to try to get to that result. Unexercised power means that a party has power that he or she did not use. As with the Cold War MAD doctrine that required both the West and the Communist Bloc to maintain sufficient power in the form of nuclear weapons to destroy the world many times over, power may be effective at achieving preferred ends in some situations only if it remains unexercised.[151]

Of course, these categories are highly artificial[152]—the overlap between hidden power and deceptive power, for example, is likely substantial.[153] Similarly, is a threat an exercise of power or only a promise that

150. *See id.* at 22-23 (observing that failure of German artillery to shell British troops hidden in slit trenches along planned northern attack route indicated "that we would indeed achieve tactical surprise").

151. *See* sources cited *supra* notes 142-43.

152. Moreover, there may be other useful classifications of various forms of power that may profitably inform a court's analysis of relative bargaining power. In commenting on an earlier draft of this Article, for example, Blake Morant suggested that power also may manifest "indirectly or vicariously" as in the case of government set-asides for small businesses that may increase the bargaining power of traditionally disadvantaged parties. This form of power would contrast with "direct" forms of power—situations where an actor takes direct action and expends personal resources within the power relationship with the opposing transacting party. Such a dichotomy could assist courts in recognizing the importance of background economic and legal principles in assessing the parties' power relationship. *Cf.* United States v. Bethlehem Steel Corp., 315 U.S. 289, 303 (1942) (noting background law permitting government to take control of manufacturing company if parties could not agree on contract terms as element in considering government's claims of duress).

153. These three dichotomies give rise to eight possible combinations to describe a party's power in a transaction: (1) visible, real, exercised power; (2) visible, real, unexercised power; (3) visible, false, exercised power; (4) visible, false, unexercised power; (5) hidden, real, exercised power; (6) hidden, real, unexercised power; (7) hidden, false, exercised power; (8) hidden, false, unexercised power. Obviously, some forms of power in this taxonomy will be less useful than others at achieving an actor's preferred outcome. Hidden, false, unexercised power, for example, may comprise only those sources of power arising from the other party's uncertainty regarding the situation. But such uncertainty cannot be wholly discounted. As Secretary of Defense Donald Rumsfeld stated with respect to analyzing information about terrorist connections with the regime of deposed dictator Saddam Hussein:

> Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't

the threat-maker will not exercise his or her power so long as the opposing party complies? And if the threat is merely a bluff, does the threat represent real or false power? In reality, that answer is only marginally relevant.

The value of this matrix lies not in classification of power, but rather in refocusing attention on forms of power that strategists and practical students of power have long recognized, used, and attempted to account for,[154] but that courts and the legal system have traditionally ignored. Where the practical user of power must presume that her opponent possesses hidden reserves, that her opponent is attempting to deceive her, that some forms of power cannot be exercised, courts approach power from a purely post hoc position that promotes inquiry into what *did* happen rather than what *could have* happened. Courts appear well-equipped to evaluate power that is visible and real. But other types of power, such as the Mexican negotiators' hidden knowledge of the American negotiation position, would rarely be evident to a fact finder. Likewise, unexercised power that is merely threatened, false power that is never tested, or real power that is never used present significant difficulties to fact finders attempting to assess the balance of power between two parties. As a result, courts are ill-equipped to make judgments attempting to address inequities arising from those coercive forces.[155] Because visible, exercised power is most easily evidenced in the adversarial contests of the courtroom, legal analysis has become fixated upon the low-hanging fruit, and has largely ignored the more sophisticated and subtle level of interaction at which the game of power is really played.[156]

Beyond the notion that there are dimensions of power that courts are incapable of, or not accustomed to, observing, even the effects of a large

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> know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.

Secretary of Defense Donald Rumsfeld, Remarks at Dep't of Defense News Briefing (Feb. 12, 2002) (responding to alleged reports of non-existence of any evidence of "direct link between Baghdad and some of these terrorist organizations"), *available at* http://www.defense link.mil/transcripts/2002/t02122002_t212sdv2.html. Although widely mocked, *see, e.g.*, Hart Seely, *The Poetry of D.H. Rumsfeld: Recent Works by the Secretary of Defense*, SLATE, Apr. 2, 2003, *at* http://slate.msn.com/id/2081042, Secretary Rumsfeld's observation is important because it captures precisely the caution strategists must employ in assessing the other party's power—there is always the potential for even the most apparently innocuous situation to turn out badly. That possibility means that even hidden, false, and unexercised power may have the potential to affect an outcome in the right circumstances.

154. *See* sources cited *supra* note 153 (relating Secretary Rumsfeld's attempts to account for uncertainty and deception by military opponents).

155. *See* Hale, *Bargaining, Duress, and Economic Liberty*, *supra* note 90, at 625 (arguing that courts are not suited for redressing the balance of coercive forces and should not prevent legislatures from reallocating coercive economic power between economic actors).

156. *See infra* Part III.B.3.

power disparity are unclear in many cases. In the negotiation context, greater apparent power "does not necessarily produce more favorable agreements for the powerful."[157] Similarly, in studies of the effects of power disparities versus balanced power in complex environmental negotiations, balanced power has often been associated with successful negotiations,[158] while great disparities in bargaining power were associated with unsuccessful negotiations.[159] While this conclusion may be counterintuitive, it illustrates that greater visible power presents only an incomplete picture of the real power relationship.

Additionally, that one side has great visible, real power in the bargaining process may just as easily permit that party to make concessions. In assessing the relative capacity of parties negotiating employment contracts, for example, Richard Epstein rejected the traditional conclusion[160] that the employer necessarily has greater bargaining power than the prospective employee:

> First, the employer often bargains through subordinate managers and thus faces an agency cost problem avoided by the worker who bargains on his own account. Second, the worker's opportunity cost for his time will often be lower than the employer's, so that the increased time he can spend on the transaction may offset the employer's greater skill, if any, per unit of time. Third, the worker may be able to learn something about the employer's reservation price (i.e., the maximum wage he would be willing to pay) because the employer must reveal some information about his willingness to pay in negotia-

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157. Adler & Silverstein, *supra* note 26, at 6. "Disproportionately greater power on the part of one party in a negotiation often reduces the likelihood of a favorable outcome for the powerful party, producing what Professor William Ury calls the 'power paradox': the harder you make it for them to say no, the harder you make it for them to say yes." *Id.* at 16-17 (citation, internal brackets and quotation marks omitted).

158. *See* JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 199, 213-15 (1975) (surveying experimental studies on effects of equal bargaining power and unequal bargaining power upon quality of experimental bargained outcomes and observing that 19 of 27 reviewed studies support the proposition that "equal power among bargainers tends to result in more effective bargaining than unequal power," while five studies showed no difference, and three studies showed equal bargaining power leading to less effective bargaining).

159. *See* Burkardt, *supra* note 51, at 252, 269, 273 (noting that relative balance of power between negotiating parties tends to support successful negotiations while power imbalance between parties tended to inhibit successful negotiations); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 175-76, 190-97 (2002) (concluding that cooperative or problem-solving negotiators are more likely to be rated by peers as effective negotiators than adversarial or competitive negotiators).

160. *See, e.g.*, State v. Coppage, 125 P. 8, 10-11 (Kan. 1912) ("To many the demands for housing, food, and clothing for their families and the education of their children brook no interruption of wages to the bread-winner.").

> tions with other long-term workers. Finally, it is not clear that the employer gains any real advantage because of his greater relative wealth, if any. To be sure, the wealthy employer can hold out for a larger share of the surplus because he has less, proportionally, to lose. Yet by the same token the employer's resolve may be weaker because he has less to gain by holding out.[161]

Yet, as discussed in Part IV, courts rarely look beyond the parties' visible displays of bargaining power before determining which party is the weaker and which the stronger.

3. Power is Dynamic

Power is not a static, set-piece game with the outcome predetermined. Rather, as military analysts—particularly Eastern analysts—have long recognized, power is a dynamic relationship that *either* party is capable of altering at any time.[162] The Chinese classic on military strategy, *The Art of War*, for example, deals explicitly with the dynamic nature of military power as a process of strategy by which a commander could ensure the enemy's defeat even before entering the contest. The key to Sun Tzu's strategic system was assessing opportunities beforehand and positioning oneself to take advantage of these opportunities:

> So it is that good warriors take their stand on ground where they cannot lose, and do not overlook conditions that make an opponent prone to defeat. Therefore a victorious army first wins and then seeks battle; a defeated army first battles and then seeks victory.[163]

The Art of War emphasizes the dynamic nature of power and the importance of assessing the opponent's and proponent's strengths and weaknesses and then adopting a position that maximizes the likelihood of a favorable outcome.[164] Sun Tzu directs the strategist to know himself

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161. Epstein, *Contract At Will*, *supra* note 116, at 975-76.

162. The parallels between military power and contests and negotiation have been often noted. Roger Fisher, for example, observed that "[a]t the international level, negotiating power is typically equated with military power." Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAVIORAL SCIENTIST 149, 149 (1983).

163. SUN TZU, THE ART OF WAR 90-91 (Thomas Cleary trans., Shambhala Publications 1988).

164. *See, e.g.*, *id.* at 48 ("Assess the advantages in taking advice, then structure your forces accordingly, to supplement extraordinary tactics. Forces are to be structured strategically, based on what is advantageous.").

> Military formation is like water—the form of water is to avoid the high and go to the low, the form of a military force is to avoid the full and attack the empty; the

and the enemy,[165] as well as to assess external factors such as weather, seasons, night and day, and terrain. Where the balance favors one side, that side should attack; where the balance of factors disfavors one side that side should work to alter the balance *until* it can be victorious.[166]

The dynamics of power relations play out on both an individual level and at a macroscopic level. The individual level of power relations concerns the responses that individuals may make to create or alter a particular power relation. The macroscopic dynamics of power relations, on the other hand, concern broad shifts of power relations across social, economic, political and legal bounds.

a. Individual Dynamics of Power Relations

For three millennia, the study of human relationships has primarily focused on power relations between social actors and on how to change the balance of power.[167] Students of power have long recognized that individual power ebbs and flows regularly and that individuals may have substantial control over their gain or loss of power. As one commentator on political and social power expressed, power is susceptible to dissipation at any moment:

> [Power] is thus both awful and fragile, and can dominate a continent, only in the end to be blown down by a whisper. To destroy it, nothing more is required than to be indifferent to its threats, and to prefer

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flow of water is determined by the earth, the victory of a military force is determined by the opponent.

. . . .

So a military force has no constant formation, water has no constant shape: the ability to gain victory by changing and adapting according to the opponent is called genius.

Id. at 112-13.

165. *See id.* at 9.

So the rule for use of the military is that if you outnumber the opponent ten to one, then surround them; five to one, attack; two to one, divide.

. . . .

If you are equal, then fight if you are able. If you are fewer, then keep away if you are able. If you are not as good, then flee if you are able.

Id. at 74-75.

So it is said that if you know others and know yourself, you will not be imperiled in a hundred battles; if you do not know others but know yourself, you win one and lose one; if you do not know others and do not know yourself, you will be imperiled in every single battle.

Id. at 82.

166. *See id.* at 84 ("In ancient times skillful warriors first made themselves invincible, and then watched for vulnerability in their opponents.").

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

> other goods to those which it promises. Nothing less, however, is required also.[168]

The ability of actors to render power impotent by ignoring it defines the tension between freedom of contract, personal autonomy in the practical context within which actual bargaining occurs and the purely legal responses to perceived gross disparities in bargaining power. Actors in the practical bargaining context may affect the balance of power in many ways at any time.[169] A non-exclusive list of the ways in which an apparently weaker party may alter the power balance in a relationship includes:

- Abandoning the interaction
- Acquiescing to the demands of the apparently stronger party
- Changing preferences
- Testing the other party's apparent power
- Developing competition
- Shopping for a better alternative
- Engaging in legal action to rescind a bad interaction
- Engaging in extra-legal responses

Abandonment as a means of altering the parties' power relationship has been discussed. Unless the parties are contracting in a state of emergency, duress or necessity such as the choice offered Indiana Jones when confronted with the proposition "Throw me the idol, I'll throw you the whip,"[170] every party theoretically has the power to walk away from the proposed bargain and satisfy its needs or wants elsewhere.[171] Alternatively, the apparently weaker party can acquiesce in the other party's demands, radically shifting the balance of power in favor of the non-acquiescing party. By acquiescing, the apparently weaker party relieves

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168. TAWNEY, *supra* note 61, at 212.

169. *Cf.* HARVARD BUSINESS ESSENTIALS, NEGOTIATION 21 (2003) (advocating that parties create alternatives to bargaining rather than take a deal out of necessity); WEBER, *supra* note 60, at 153 ("All conceivable qualities of a person and all conceivable combinations of circumstances may put him in a position to impose his will in a given situation.").

170. RAIDERS OF THE LOST ARK (Paramount Pictures 1981). Indiana Jones' guide, Satipo, made this "offer" to Jones after Satipo had used Jones' bullwhip to swing across an open pit as the two attempted to escape from a collapsing temple complex after removing a golden idol from the temple's sanctum. *Id.* Underlining the proposition that power is situational and that greater apparent power does not necessarily yield superior results, Satipo—deprived of Jones' expertise—moments later stepped on a booby trap and died. *See id.*

171. *See, e.g.*, FISHER ET AL., *supra* note 53, at 97-103 (recommending assessment of Best Alternative to Negotiated Agreement ("BATNA") to protect against making unfavorable deals when negotiating against party with greater bargaining power).

the apparently stronger party of the costs that would be incurred if the stronger party were forced to exercise his or her power.[172]

Similar to the walk-away power, a party with a perceived power disparity may alter his or her preferences in such a manner as to eliminate or even overcome the disparity.[173] For example, a car buyer may decide, after engaging in protracted negotiations, to prefer a different brand of automobile, enabling her to make a "take-it-or-leave-it" final offer to the car dealer or to walk away from the deal altogether. Likewise, a party may determine to invest greater resources in developing additional information regarding the opposing party's position, or shopping for a better bargain. Given that power in a bargaining context often depends upon one party subjectively preferring what the other party has,[174] any change in that subjective preference will alter the balance of power in the relationship.[175]

Moreover, when one party gains grossly superior bargaining power over those with whom it regularly contracts, entrepreneurs may seize the opportunity to compete with the grossly superior bargaining power.[176]

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172. *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, *supra* note 49, at 227 (suggesting that any scheme to measure power between parties must account for costs associated with actual exercise of power and opportunity costs of abandoning the bargain).

173. *See* James G. March, *Preferences, Power, and Democracy*, *in* POWER, INEQUALITY, AND DEMOCRATIC POLITICS: ESSAYS IN HONOR OF ROBERT A. DAHL 51-53 (Ian Shapiro & Grant Reeder eds., 1988) (observing interpersonal power is based partly upon "individual interests or preferences").

174. *See supra* notes 118-21 and accompanying text.

175. *See* March, *supra* note 173, at 51-53; Blau, *supra* note 55, at 296 ("The fewer the wants and needs of an individual, the less dependent he is on others to meet them. Needs, however, do not remain constant. By providing individuals with goods and services that increase their satisfaction, their level of expectations tends to be raised, and while they were previously satisfied without these benefits, they are now desirous of continuing to obtain them."); *cf.* TAWNEY, *supra* note 61, at 212 (discussing fragility of power in relation to changing preferences).

176. *See* GALBRAITH, *supra* note 114, at 73 ("The usual and most effective response to an unwelcome exercise of power is to build a countering position of power."). Robert S. Adler & Elliot M. Silverstein note that gross bargaining power disparities may cause the apparently weaker party to react against the power disparity in ways that reduce the likelihood of a successful transaction, including resistance to perceived coercion, rejection of "demeaning" offers to save face, adopting a stubborn and obstreperous negotiating position, and in general suspecting the apparently stronger party of bad faith motives. *See* Adler & Silverstein, *supra* note 26, at 16-20. Likewise, Steven McJohn suggests that power disparities may give rise to a status competition within the negotiation that ultimately ignores the potential of a mutually productive outcome in favor of attempting to gain status by "winning" the negotiation. Stephen M. McJohn, *Default Rules in Contract Law as Response to Status Competition in Negotiation*, 31 SUFFOLK U. L. REV. 39, 40 (1997) ("The process of negotiation itself, however, may become a competition. Rather than simply trying to achieve their original goals, parties sometimes shift in whole or in part to 'win' the bargaining.").

In *Henningsen v. Bloomfield Motors, Inc.*,[177] for instance, the Automobile Manufacturers Association arguably possessed monopolistic control over the terms of the warranty offered with every new car.[178] As a result, the *Henningsen* court held warranty terms excluding all warranty liability except the repair of defective parts returned at the buyer's expense to be void as against public policy.[179] That situation sharply contrasts, however, with the auto warranty market today. Manufacturers now expressly compete on warranty provisions and coverage. Additionally, numerous third-party insurers now offer extended warranties for both new and used vehicles.[180] The purported gross disparity of bargaining power that so limited choice in *Henningsen* to a single set of standardized terms created market opportunities that invited both intra-industry competition and the creation of a new niche market for third-party warrantors.

Additionally, the apparently weaker party may attempt to force an actual contest of power with the apparently stronger party to influence the outcome of their interaction. Importantly, the actual contest of power does provide some evidence of the relative bargaining power of the parties.[181] Moreover, this contest forces the powerful party to exercise its

177. 161 A.2d 69 (N.J. 1960). In the seminal *Henningsen* case, the plaintiff's wife was injured by a defective automobile sold by the defendant dealership under a standard form sales contract promulgated by the Automobile Manufacturers Association that expressly limited the manufacturer's warranty solely to a duty to replace defective parts returned to the manufacturer's factory. *See id.* at 78-79. After noting the "grossly unequal" bargaining positions between the consumer and the manufacturer (who, at that time, used the same standard form sales contract as virtually every other automobile manufacturer), and the fact that the consumer had no opportunity to shop around for a better warranty term, the court held the warranty exclusion void as against public policy. *See id.* at 94-97.

178. *See id.* at 87.

179. *See id.* at 94-97.

180. Besides dealer and manufacturer extended warranty programs, numerous firms advertise an array of warranty and extended warranty offers on automobiles and other consumer products. *See, e.g.*, http://www.warrantydirect.com (last visited Oct. 11, 2004) (offering five levels of extended warranty protection for automobiles); http://www.autoprotection.com /coverage (last visited Oct. 11, 2004) (multiple extended warranty plans); http://www.1sourceautowarranty.com (last visited Oct. 11, 2004) (same). Notably, many of the extended warranty firms expressly compete not only in terms of coverage plans and price, but also reputation, *see, e.g.*, http://www.1sourceautowarranty.com/ShowContent.asp?content=home (last visited Oct. 11, 2004) ("We have a 97% Customer satisfaction rating for claims handling."), direct written versus reinsurance, *see, e.g.*, http://aawarranty.com/faq.htm (last visited Oct. 25, 2004) ("Quality warranty providers purchase insurance to make sure that if for some reason the trust reserve account runs out of money, that present and future claim obligations are met."), and other non-price terms *see, e.g.*, *id.* (listing multiple non-price terms for comparison between extended warranty providers, including reliability, honesty, privacy policy, the ability to review the policy before entering agreement, administration of the policy, and others).

181. *See* Adler & Silverstein, *supra* note 26, at 13-14 ("Absent the actual contest, each side must guess about the other's power."); Roderick Bell, *Political Power: The Problem of Measurement*, *in* POLITICAL POWER: A READER IN THEORY AND RESEARCH, *supra* note 49, at 13-27 (noting that observers may attempt to measure power by (1) observing the actual out-

power, thereby incurring additional costs in consummating the transaction, including both the direct costs of exercising its power and indirect costs in terms of third party perceptions regarding the propriety, justice, or fairness of that use of power.[182]

One problem with great power is that it tends to anger both the people with whom one is dealing—thus threatening future relations—and similarly situated third parties who observe that use of power, unless that power is carefully managed and controlled. Consequently, the effects of large visible power disparities may often be counterintuitive. For example, the United States' overwhelming military and technological superiority in the Vietnam War caused the North Vietnamese Army ("NVA") to develop competing military and political strategies to counter the American advantage in air power, logistics, artillery, and mobility. In battle, NVA forces sought to close quickly with and infiltrate American forces to counter American air power and artillery.[183] Although American forces never lost a major military engagement against the NVA,[184] the North Vietnamese tactics enabled the NVA to stretch out the conflict sufficiently to weaken American resolve, inflict unacceptable levels of casualties and "win the minds" of the American people toward the anti-war position.[185] This also preserved sufficient NVA combat forces to al-

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come of the interaction, or (2) predicting the amount of power held by each party through analysis of known, observable factors).

182. *See* Harsanyi, *supra* note 172 and accompanying text; *see also* Kenneth E. Boulding, *Toward a Pure Theory of Threat Systems*, *in* POLITICAL POWER: A READER IN THEORY AND RESEARCH, *supra* note 49, at 287-88 ("[D]efiance puts a burden of response on the threatener and hence is in some sense a challenge to him. The threatener then has to decide whether or not to carry out the threat. If he does carry out the threat, this is likely to have a cost to him as well as to the threatened.").

183. For a graphic and compelling depiction of early uses of this strategy by North Vietnamese forces, *see generally* LT. GEN. HAROLD G. MOORE (RET.) & JOSEPH L. GALLOWAY, WE WERE SOLDIERS ONCE . . . AND YOUNG (1992) (relating details of the battle of the Ia Drang Valley in November 1965 between American troops and NVA regulars and describing attempts by NVA to close with and infiltrate American ranks to minimize American artillery and air power advantages).

184. *See, e.g.*, Malcolm C. Garland, Letter, *We Won on Battlefield*, N.Y. TIMES, Apr. 2, 1991, at A18 ("[T]he Republic of Vietnam was defeated after we withdrew, but American forces never lost a significant battle."); Interview by Ted Koppel and Peter Jennings with General Winant Sidle, *World News Tonight* (ABC television broadcast, Apr. 29, 1985) ("The Army never lost a major battle in all those years.").

185. *See, e.g.*, Interview by Stephen Young with Col. Bui Tin (Retired), *in How North Vietnam Won the War*, WALL ST. J., Aug. 3, 1995, at A8 (interview statements of North Vietnamese Army Col. Bui Tin (Retired) regarding importance of American anti-war movement to NVA victory over South Vietnam).

> [The American anti-war movement] was essential to our [the North Vietnamese] strategy. Support for the war from our rear was completely secure while the American rear was vulnerable. Every day our leadership would listen to world news over the radio at 9 a.m. to follow the growth of the American antiwar movement. Visits

low them to complete their invasion of the Republic of South Vietnam following the 1973 American withdrawal.[186]

Nor are such apparent "upsets" limited solely to the military battlefield. Microsoft, for example, has been the target of competitive attacks on many fronts, at least partly due to its image as a monolithic near-monopoly bent on world domination. Competitors have portrayed Microsoft as the proverbial 900-pound gorilla and successfully enlisted governments in antitrust actions against Microsoft.[187] Competing systems, such as Apple's Macintosh OSX and the open-source Linux and FreeBSD operating systems, have developed an almost cult-like following.[188] And software engineers around the world have contributed—gratis—millions of person-hours developing open source substitutes for Microsoft products.[189] Although many of these competing options likely

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> to Hanoi by people like Jane Fonda and former Attorney General Ramsey Clark and ministers gave us confidence that we should hold on in the face of battlefield reverses.

Id. (noting further that "through dissent and protest [America] lost the ability to mobilize a will to win"). Similar military examples based on fighting a war of attrition against a technologically or numerically superior enemy can be found in the Soviet invasion of Afghanistan and the Israeli victory against invading Arab forces in the 1967 Six Day War.

186. *See, e.g., id.* (noting that after staggering losses by North Vietnamese forces during the failed Tet Offensive of 1968, North Vietnam had reestablished forces in the south by 1971 and finally defeated the Republic of South Vietnam in 1975 after President Ford failed to respond to NVA attacks against Phuoc Long); Stephen B. Young, *Vietnam War: Washington Was Right*, WALL ST. J., Nov. 7, 1995, at A22 (describing NVA infiltration of 150,000 troops into South Vietnam after withdrawal of American combat forces in 1972 and further infiltration of 260,000 troops between 1973 and 1975 in violation of Paris Peace Accord).

187. *See, e.g.*, Bryan Gruley et al., *RE: Joel, Bill, a Chevy Vega and the 'Schnooks'*, WALL ST. J., Dec. 18, 1998, at B9 (describing 2,300 emails Justice Department attorney in charge of the Microsoft antitrust suit, many of which expressed strong approval of government's action against Microsoft); Chris Gaither, *Real Files Lawsuit Against Microsoft Rival: Software Giant Uses Monopoly Power To Control Digital Media*, THE BOSTON GLOBE, Dec. 19, 2003, at C1 (discussing antitrust actions by RealNetworks, Inc. and Netscape Communications, Inc. against Microsoft for alleged abuse of monopoly power through bundling of media player and internet browser software with Windows operating system); Daniel Dombey, *Brussels Set to Rule Against Microsoft*, FIN. TIMES, Jan. 27, 2004, at 1 (reporting European Commission preliminary decision that Microsoft had engaged in anti-competitive behavior by tying Windows Media Player software to Windows operating system).

188. *See, e.g.*, Bill Orr, *Time for Linux*, A.B.A. BANKING J., Aug. 2003, at 51-52 (noting devotion of Linux programmers to working in that medium and contributing programming to improving Linux); Dan Kennedy, *Why We Love to Hate Microsoft*, BOSTON PHOENIX, June 27, 2000, *available at* http://www.bostonphoenix.com/archive/features/00/06/22/MICROSOFT.html (last visited Oct. 11, 2004) ("There are the legions of folks urging consumers to boycott Microsoft, ranging from geeky Macintosh and Linux aficionados to geeky consumer advocate Ralph Nader."); *cf.* David Beckman & David Hirsch, *Going Soft on Microsoft*, A.B.A. J., Jan. 2002, at 64 (discussing author's former devotion to non-Windows operating systems).

189. *See* Orr, *supra* note 188, at 51-52 (describing open source Linux operating system as "gradually being perfected by those who donate their talents to creating a better operating sys-

are profit-based, much of the popularity of such attacks on and competition with Microsoft products is driven by an intense dislike of Microsoft's visible power to dominate the marketplace.[190]

Perceptions of grossly unequal power may also generate an extra-legal backlash. Microsoft software products—such as the ubiquitous Windows operating system, the Microsoft Word word processing program, and the Microsoft Outlook email client—have all been targets of attacks by hackers and virus authors at a greater rate than any competing software.[191] Computer science analysts have commented that recent virus attacks, such as the MyDoom virus released in late January 2004, have targeted corporate giants such as Microsoft and SCO Group, Inc. because those entities are perceived as attempting to destroy the open-source software movement competing with Microsoft's Windows operating system.[192] While such practices cannot wholly level the playing

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tem" and noting "[g]litches are found and fixed as soon as the Linux legions spot them"). Such open source substitutes generally are available free or at a lower cost than competing Microsoft products. Major open source products include OpenOffice, which competes with the Microsoft Office suite of business applications, *see About Us: OpenOffice.org*, http://www.openoffice.org/about.html#description (last visited Oct. 12, 2004) (describing OpenOffice as a suite of productivity applications that "works transparently with a variety of file formats, including those of Microsoft Office"), and the Netscape, Opera and Mozilla Internet browsers.

190. *See* Orr, *supra* note 188, at 51 (relating industry consensus that dramatically increasing Linux share of server market is due in part to "[t]he widespread perception that Microsoft may be getting into a position where it could strangle competition in corporate IT"); David Shenk, *Slamming Gates*, THE NEW REPUBLIC, Jan. 26, 1998 at 20, 20-22 (noting widespread expressions of hate and loathing directed toward Microsoft, as well as profit motives and low barriers of entry that promote competition in software industry).

191. *See, e.g.*, David Bank, *Virus Misses Microsoft but Stirs Fear*, WALL ST. J., Feb. 4, 2004, at A3 (noting that Microsoft makes a "tempting target for virus writers because its Windows software runs on about 95% of the world's personal computers" and suggesting that virus attacks against Microsoft are "intended to tap into the populist appeal of the Linux operating system, which both companies oppose"); Lee Gomes, *Love Bug Prompts Security Experts to Poke at Microsoft's Weak Points*, WALL ST. J., May 24, 2000, at B1 (describing security flaws across Microsoft software line, including Internet Explorer, Outlook, and Microsoft Word). In response to such attacks, Microsoft has created a reward fund for information on hackers who attack its systems, further demonstrating that the virus attacks attracted by Microsoft's market dominance have begun to affect negatively Microsoft's bottom line. *See* Gary Fields et al., *Microsoft Sets Up Reward Fund to Help Authorities Find Hackers*, WALL ST. J., Nov. 6, 2003, at B6 (noting that viruses such as SoBig, MSBlast, and the Blaster worm had hurt sales of Microsoft products and that Apple Computer, Inc. and Linux-based competitors had started to increase their market share because those platforms are perceived to be more secure than Microsoft products).

192. *See supra* note 191 and accompanying text; *see also* Rebecca Buckman, *Virus Gives 'Love' a Bad Name*, WALL ST. J., May 5, 2000, at B1 (noting that Microsoft software is attractive to virus writers because of Microsoft's market domination). Similarly, in discussing warranties in my first-year Contracts classes, several students have volunteered that they are fully aware that extended warranties on consumer electronic equipment are not a good deal on their face—the warranties are usually expensive relative to the risk insured and many consumers fail to take advantage of them. But in dealing with consumer electronics with relatively short

field, it is likely that greater perceived power imbalances stimulate greater extra-legal acts by those who feel disadvantaged.[193]

Beyond direct power contests and extra-legal measures against possessors of perceived extraordinary power, relatively weak parties may petition for judicial, legislative, or regulatory intervention to ameliorate perceived systemic power imbalances.[194] The Microsoft anti-trust action owes its genesis at least in part to perceptions that Microsoft was abusing its market power by forcing computer manufacturers to exclude competing browsers and other software from their pre-loaded software packages. Likewise, courts have demonstrated a proclivity for using unconscionability and other equitable doctrines to reform contracts where the power imbalance is too oppressive and the terms are at least marginally unfair.[195] And numerous statutory and regulatory schemes purport to address bargaining power disparities.[196]

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obsolescence cycles, the students explained that they often return working products within the warranty period in order to gain an upgraded device. More than one student claimed that she had exchanged several MP3 players in this manner.

193. *Cf.* Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929, 950-57 (1984) (discussing use of civil disobedience to delegitimate oppressive legal regimes).

194. *See* sources cited *supra* note 187 and accompanying text. The FCC's recent rulemaking on cellular telephone number portability is a good example of a legislative / regulatory alteration of relative bargaining power between consumers and producers. In *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999), the court held cellular telephone customers had no meaningful alternatives to accepting contract amendment mandating arbitration given costs to consumers in canceling current service contracts, losing current cellular numbers and contracting with new service providers. Now that cellular telephone numbers are freely transferable between cellular providers under a Nov. 10, 2003 FCC order, *see* Telephone Number Portability, 68 Fed. Reg. 68,831 (Dec. 9, 2003) (to be codified at 47 C.F.R. pt. 52), and given that shopping between competing plans is as easy as strolling the ubiquitous kiosks at the local mall or doing a simple Google search, the reasoning in *Powertel* likely no longer accords with the reality of obtaining cellular telephone service. *See infra* notes 42 and 155 and accompanying text (discussing legislative solutions to perceived bargaining power asymmetries).

195. *See* DiMatteo, *supra* note 21, at 270-71 (assessing equitable interventions by courts to police contracts lacking fairness in exchange); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448-50 (D.C. Cir. 1965) (acknowledging power of courts at common law and under U.C.C. § 2-302 to refuse to enforce unconscionable bargains).

196. Numerous legislative schemes attempt to redress perceived unequal bargaining power, including labor relations, *see, e.g.*, National Labor Relations Act of 1935, 29 U.S.C. § 151 (1935) (citing "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers" as justification for federal regulation of labor relations with capital); unfair and deceptive trade practices, *see, e.g.*, Massachusetts Unfair and Deceptive Trade Practices Act, MASS. GEN. LAWS ch. 93A, § 2 (1997); and high pressure sales tactics, *see, e.g.*, S.C. CODE ANN. § 37-2-502 (1976) (providing buyers in home solicitation sales three business days to cancel and rescind agreement); D.C. CODE ANN. § 28-3811 (2003) (same). *See also* Edwards, *supra* note 42, at 455 ("Much of the legislation mandating enforcement of parties' choice of law clauses address perceived inequalities in parties' bargaining power by carving out exceptions for consumer transactions

b. Macroscopic Dynamics of Power Relations

In addition to the individual-level responses to power discussed above, power relationships change over time within and among groups on a macroscopic level.[197] The situation again is one of action and reaction, ebb and flow of leverage, strength and interest as the use of or opposition to power within a society creates feedback that itself leads to broad-based dynamic shifts in power relations. These macroscopic changes to power relations take place on several levels including strategies to counter opposing power; changes in the effectiveness of sanctions and incentives underlying particular power structures; changes in status-based characteristics of groups or individuals over time; and changes in social and economic relationships over time. First, collective groups that perceive themselves to lack power necessarily react against that perceived lack and seek to develop and implement strategies that counter others' power over them. Thus, as Holmes opined in *Vegelahn v. Guntner*,[198] the best response by individual laborers to the power of employers' capital was for laborers to combine in unions to contend more effectively in bargaining for wages and other terms of employment.

Second, power also depends upon the effectiveness of possible sanctions or anticipated incentives.[199] But the efficacy of sanctions and incentives changes over time as societal and individual preferences

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and other agreements, such as employment contracts and other personal service contracts, to protect individuals who are thought of as tending to have lesser bargaining power.").

197. *Cf.* Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 576-83 (1983) (analyzing role of deviationist doctrine in promoting progressive dissolution of fixed orders of society, followed by reformation and rejustification of societal rules in new forms in a constant cycle of "routine and revolution").

198. 44 N.E. 1077 (Mass. 1896). The *Vegelahn* majority affirmed an injunction restraining union members from picketing the plaintiff's business and held that "a combination to do injurious acts expressly directed to another, by way of intimidation or constraint . . . is outside of allowable competition, and is unlawful." *Id.* at 1078. Holmes dissented, arguing that courts should not interfere with individual rights to combine in opposition to the greater bargaining power of employers. *See id.* at 1081 (Holmes, J., dissenting).

199. *See* Blau, *supra* note 55, at 293-94 (discussing changing baselines and mutation of positive sanctions such as employment and wages into negative sanctions such as the threat to terminate the employee).

> Regular rewards make recipients dependent on the supplier and subject to his power, since they engender expectations that make their discontinuation a punishment. A person who has a job is rewarded for performing his duties by his earnings, and as his wages are positive sanctions it seems at first that no power is involved . . . . However, being fired from a job cannot plausibly be considered to constitute merely the absence of rewards; it clearly is a punishing experience. The threat of being fired is a negative sanction that gives the employer power over his employees, enabling him to enforce their compliance with his directives.

Id.

change and develop in response to those sanctions and incentives. For example, the positive sanction of promising a job and continuing employment will be more or less effective over time depending on many factors such as appreciation for the work, competition (or lack thereof), and the workplace environment.[200] As any or all of these factors change over time, the balance of power between employer and employee itself will alter.[201]

Third, even the status-based classifications upon which courts determine power disparities are subject to change. In the case of relatively immutable characteristics such as gender or race, socio-economic factors underlying the prior lack of relative power by members of those groups are subject to change over time. For example, many disabilities affecting the political, legal, economic and cultural power of women and racial or ethnic minorities in the early twentieth century have been ameliorated or in some cases eliminated in the last several decades.[202] Likewise, individually mutable characteristics such as wealth, education, or business sophistication sometimes can be altered with an investment of time and effort. Thus, in the English case of *Schroeder Music Publishing Co. v. Macaulay*, the court invalidated the exclusive services contract between a music publisher and an artist partly on the basis of an inequality of bargaining power.[203] But as Trebilcock notes, as artists become more successful over time, they gain negotiating power with respect to their con-

200. *See id.*

201. *See id.*

202. Clearly, many traditionally disadvantaged or oppressed groups, including women and racial and ethnic minorities, have suffered and continue to suffer substantial political, economic, cultural and legal disabilities compared to other social groups or classes. But at the same time, that these and other traditionally disadvantaged classes have made significant strides toward full participation in the American polity since the early 20th century is beyond cavil. A cursory survey of even the purely legislative attempts to redress discriminatory power imbalances among various groups in American society since the mid-1960s reveals substantial increases in the power of those groups to enforce political, cultural, economic and legal rights. *See, e.g.*, Civil Rights Act of 1964 § 101(a), 42 U.S.C. § 1971 (2000) (prohibiting use of discriminatory voting procedures), § 301, 42 U.S.C. § 2000b (2000) (prohibiting segregation of public facilities), § 401, 42 U.S.C. § 2000c (2000) (prohibiting segregation of public educational facilities), § 601, 42 U.S.C. § 2000d (2000) (prohibiting discrimination in awards of federal financial assistance), § 703, 42 U.S.C. § 2000e-2 (2000) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin with respect to employment); Civil Rights Act of 1968 § 804, 42 U.S.C. § 3604 (2000) (prohibiting discrimination in the sale or rental of housing on the basis of race, color, sex, familial status, religion or national origin); Equal Credit Opportunity Act § 2, 15 U.S.C. § 1691(a) (2000) (prohibiting discrimination in credit transactions on the basis of applicant's race, color, religion, national origin, sex or marital status, or age).

203. [1974] 3 All E.R., 616, 623-24 (H.L.) (Lord Diplock) (characterizing music publishing industry as concentrated "in relatively few hands," giving publishers the power to dictate terms of exclusive services contracts to musicians).

tracts.[204] Similarly, wealth characteristics of parties may change dramatically over a period of months or years as individuals and firms move in and out of prosperity.[205]

Fourth, status-based classifications shift in response to other power relationships. It is arbitrary to restrict the assessment of relative power disparities between two parties to a bipolar function in which each party is treated as an autonomous entity, independent of the world around it. Power exists only in relationships, and relationships never involve solely two actors. Every party acts within a web of power relationships at all times[206] that may render that party relatively incapable of achieving a desired outcome in one context and relatively able in another. To borrow from Justice Holmes' famous dictum regarding regulatory takings, although a party may appear helpless in a given context, that party shares

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204. *See* Trebilcock, *supra* note 21, at 365-71 (noting that musician bargaining power changed over time and that music industry at time of *Schroeder* was actually highly competitive and that unknown artists could rationally chose the *Schroeder*-style contract over facially more beneficial terms because of additional intangible benefits). Even the *Schroeder* court acknowledged that successful musicians over time gained bargaining power with respect to their publishers. *See Schroeder*, [1974] 3 All E.R. at 624 ("[M]usic publishers in negotiating with song-writers whose success has been already established do not insist on adhering to a [standard form contract].").

205. Many commentators suggest that individuals in the United States experience a high degree of income mobility throughout their lives. *See, e.g.*, W. Michael Cox & Richard Alm, *By Our Own Bootstraps: Economic Opportunity and the Dynamics of Income Distribution*, *in* FEDERAL RESERVE BANK OF DALLAS, ANNUAL REPORT 6-10 (1995) (relating longitudinal study showing substantial income mobility among earners in the period 1975-1991 and noting only 5% of bottom quintile earners in 1975 remained there in 1991, while majority moved to middle class or better in the same period); Mark D. Wilson, *Income Mobility and the Fallacy of Class-Warfare Arguments Against Tax Relief*, *in* THE HERITAGE FOUNDATION, 1418 BACKGROUNDER 1 (Mar. 8, 2001), *available at* http://www.heritage.org/Research/Taxes/BG1418.cfm (last visited Oct. 11, 2004) (summarizing studies on income mobility within United States and observing "[t]he dynamic U.S. economy is characterized by an extraordinary degree of income mobility"); Daniel P. McMurrer & Isabel V. Sawhill, *How Much Do Americans Move Up and Down the Economic Ladder?*, *in* THE URBAN INSTITUTE, 3 OPPORTUNITY IN AMERICA 2 (Nov. 1996) (noting that income mobility in the U.S. is substantial by comparison to other countries). *But see* Paul Krugman, *The Death of Horatio Alger*, THE NATION, Jan. 5, 2004, at 16 ("The myth of income mobility has always exceeded the reality: As a general rule, once they've reached their 30s, people don't move up and down the income ladder very much.").

206. Michael Mann's theory of power and society persuasively addresses the fundamental interconnectedness of all power relationships within a society. *See generally*, MANN, *supra* note 105. Specifically, Mann's theory begins with two fundamental propositions. First, "[s]ocieties are constituted of multiple overlapping and intersecting sociospatial networks of power." *Id.* at 1. For Mann, societies cannot be defined as unitary totalities, but rather interconnecting power networks unconfined by spatial or cultural boundaries. *See id.* at 1-2. Second, Mann posits that "societies" are best described in terms of interrelations of four sources of social power: "ideological, economic, military, and political (IEMP) relationships." *Id.* at 2.

an "average reciprocity of advantage"[207] (or disadvantage) with respect to power relationships in all other aspects of society.

As Slawson notes, no one occupies a fixed place in the hierarchy of bargaining power.[208] Actors in society will find themselves possessing or lacking power depending on whether they are contracting in their role as a producer of goods or services, with corresponding advantages in information costs and contracting efficiency, or a consumer who lacks information about the subject matter of the contract and who will likely be bound to the producer's preferred contract terms.[209] Slawson, however, approaches the dynamic nature of power relationships from the perspective that contractual interactions are discrete events, usually involving a producer of a good or service and a consumer of a good or service.[210]

But even this view may be incomplete. First, an increasing amount of contract activity arguably takes place on a relational level that promotes a continuing basis of interaction extending across the boundaries of such discrete contractual interactions.[211] Thus, the producer may find itself locked into a quasi-symbiotic relationship with the consumer in which the consumer—individually or as a class—comes to exercise comparatively great bargaining power in the relationship.[212] For exam-

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207. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

208. *See* SLAWSON, *supra* note 42, at 32 ("No one has a fixed place in this hierarchy. All of us occupy different levels depending on whether we are the producer or the consumer of the product concerned.").

209. *See id.* at 31-32.

210. *See id.* Thus, while an individual may occupy different levels in the producer/consumer hierarchy depending on the individual's information costs and contracting efficiency, Slawson characterizes unequal bargaining power as a justification for legal intervention in contracts. *See id.* ("The long-held assumption that 'sophisticated businesspeople' do not need the law's protection when they contract with each other is no longer correct. We all need the law's protection except when we contract about what we produce." (citation omitted)); *see also id.* 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.").

211. *See* Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 595-96 (1974) (distinguishing between one-time, discrete contracting events and relational contracts and noting "most actual exchanges are at least partially relational"); Ian R. Macneil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, 143 ZEITSCHRIFT FUR DIE GESAMTE STAATSWISSENSCHAFT [J. INSTITUTIONAL & THEORETICAL ECON.] 272, 276 (1987) (describing contractual relations as lying on continuum between discrete transactions at one end and intertwined contractual relationships at the other end).

212. *See, e.g.*, FISHER ET AL., *supra* note 53, at 178 ("[I]n this increasingly interdependent world, there are almost always resources and potential allies that a skilled and persistent negotiator can exploit . . . ."); *cf.* Kennedy, *Motives in Contract*, *supra* note 47, at 608 (noting that consumers possess bargaining power largely on a collective basis). I recently experienced an example of increased bargaining power as a result of relational contracting principles when the fifth gear synchronizer failed on my 2000 Toyota Rav4 with 62150 miles on the odometer. A quick Internet search revealed not only numerous consumer complaints about this particular problem, but also that Toyota had issued a Transportation Safety Bulletin ("TSB")—otherwise

ple, recent shifts in segmentation of consumer markets has forced many producers of goods and services to customize their offerings for increasingly sophisticated and segmented markets and has created an increasingly sophisticated and demanding consumer base:

> The same technological advances that are fragmenting the mass audience also are empowering a new class of digitally savvy consumers who compile, edit, and otherwise customize the media they consume to their own personal requirements. "Companies must recognize that they increasingly have to engage gods and are not dealing with helpless consumers anymore . . . ."[213]

As producers focus on narrower segments of the total market, the relative bargaining power of individual consumers increases either as a result of greater opportunities for shopping or negotiation or as the number and quality of alternatives to proffered transactions increases.[214]

Second, bargaining power is not solely attributable to characteristics of the parties themselves, but also depends largely upon myriad interactions and power relationships between third parties that affect the parties' abilities to exercise their bargaining power.[215] Consequently, a consumer who executes an adhesion contract with an institutional lender for a mortgage may be said to be in a position of unequal bargaining power with respect to negotiating the terms of the contract.[216] The consumer and the lender, however, do not contract in a vacuum. The consumer's employer may have equal or greater bargaining power than the lender in negotiating a revolving credit agreement that enables the employer to employ the consumer and provide a competitive salary. Although the consumer may be at an apparent disadvantage if only one transaction is examined, the consumer herself benefits from relationships with other

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known as a "secret warranty"—that covered the repair up to 60,000 miles. Based upon this information and the fact that I and my family had been loyal Toyota customers for 20 years, the dealer agreed to split the cost of the $1250 repair despite that my car was out of warranty.

213. Anthony Bianco, *The Vanishing Mass Market*, BUS. WK., July 12, 2004, at 61, 65 (quoting Rishad Tobaccowala, Executive Vice President, Starcom MediaVest Group).

214. *Cf.* Kennedy, *Motives in Contract Law*, *supra* note 47, at 608 (noting that consumers in general exercise power over producers not as individuals but through mechanism of demand and aggregation of purchasing power).

215. *See, e.g.*, Schwartz & Scott, *supra* note 131, at 553-54 (noting that parties' relative bargaining power in the firm to firm contracting context will often depend upon alternative relationships with third parties, such as access to capital markets and alternative business opportunities).

216. *Cf.* Overby, *supra* note 107, at 613-21 (analyzing predatory lending practices and use of adhesion contracts in reverse mortgage agreements with the elderly and arguing "consumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts and unconscionable conditions of credit by sellers").

entities that themselves employ bargaining power disparities that advantage the consumer in terms of higher wages, job benefits, prestige, and so on. Ultimately, bargaining power issues may be subject to an irreducible complexity not subject to unpacking by judicial interventions.

IV. INEQUALITY OF BARGAINING POWER AS A LEGAL CONCEPT

Despite the importance of the concept of power to human relationships, once the inquiry shifts from the practical exercise of power to the legal response to issues of bargaining power, the complexity, dynamism and sophisticated recognition of the presence or capacity for power in *all* relationships vanishes. In place of the sophisticated and nuanced approach, the legal doctrine of inequality of bargaining power provides only an incomplete and two-dimensional picture of the power relationship. Of course, all legal doctrines represent only shorthand heuristics—or the legal equivalent of algorithms—designed to translate actions and facts into more or less formal narratives[217] that a legal decision maker can compare against other, similar narratives and particularized legal standards to produce the legal consequences attendant upon such practical actions.[218] In all cases, the legal system approaches real concepts and actions through a medium in which Plato's flickering shadows on a cave wall are accepted as reality.[219] Legal narratives are necessarily incomplete and indeterminate to some extent in their attempts to create legal consequences for real world actions.[220] Consequently, the legal approach

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217. *Cf.* Morant, *supra* note 7, at 261-67 (discussing impact of neo-formalist influences on modern judicial approaches to contract law and noting that such formalistic approaches often ignore the real bargaining power disparities suffered by small businesses).

218. *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-6 (1st ed. 1948) (describing legal reasoning as a process of classification of apparently similar cases into categories subject to application of legal rules which themselves change dynamically through the act of application); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274, 275-78 (1929) (describing the activity of judging as the process of familiarization of the decision maker with the facts and record of the case, after which the judge awaits some intuition that permits application of the appropriate legal rule to the facts at issue). As Judge Hutcheson eloquently described it, the judicial process depends often on nothing more than a flash of insight that resolves the competing arguments of the parties into a settled answer:

> I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.

Id. at 278.

219. PLATO, PLATO'S REPUBLIC 168-70 (G.M.A. Grube trans., Hacket Publishing Co. ed. 1974) (relating famous "allegory of the cave").

220. *Cf.* Herman Oliphant, *Stare Decisis—Continued*, 14 A.B.A. J. 159, 159 (1928):

to inequality of bargaining power necessarily never can fully reflect the reality of bargaining power disparities.[221]

The statement that one party to a bargain has greater power than the other party not only should tell something about the relationship between the parties, but also, to the extent that the legal system attempts to regulate that relationship, the standards applied should seek to reflect the practical consequences of that relationship across situations involving similar bargaining power asymmetries. To the extent the legal decision maker purports to police inequalities of bargaining power—and not some other goal such as wealth redistribution to the impoverished, to members of apparently oppressed classes, or to other types of actors[222]—then legal standards adopted for achieving that goal should reflect the real consequences of bargaining power disparities as closely as is reasonable given the limitations of the legal system. But the concept itself has proved so slippery and indefinable, so vague and nebulous, and so open to uncertainty that its utility for explaining any element of the bargaining relationship is doubtful.[223]

> Judges are men and men respond to human situations. When the facts stimulating them to the action taken are studied from a particular and current point of view, which our present classification presents, we acquire a new faith in *stare decisis*. From this viewpoint we see that courts are dominantly coerced, not by the essays of their predecessors but by a surer thing,—by an intuition of fitness of solution to problem . . . . To state the matter more concretely, the decision of a particular case by a thoughtful scholar is to be preferred to that by a poorly trained judge, but the decision of such a judge in a particular case is infinitely to be preferred to a decision of it preordained by some broad "principle" laid down by the scholar when this and a host of other concrete cases had never even occurred to him.

221. *See id.* at 159-61 (arguing that judicial intuition based upon necessarily minimal participation of judges in increasingly complex social realities provides an incomplete basis for judicial decision making and advocating greater use of empirical social studies in the judicial process).

222. *Cf.* Kennedy, *Motives in Contract*, *supra* note 47, at 615-24 (arguing that the doctrine of inequality of bargaining power masks distributive and paternalist motives by legal decision makers).

223. Other commentators have likewise questioned the utility of the concept of bargaining power disparities. *See, e.g.*, POSNER, *supra* note 15, at 102-104 (questioning utility of concept of unequal bargaining power in light of economic efficiency explanations for non-price competition in standard form contracts); Kennedy, *Motives in Contract*, *supra* note 47, at 623 ("[Inequality of bargaining power] may be internally incoherent, and it may achieve only rather randomly good results even when used skillfully. But it is a weapon on the side of equality, of the left and not of the right, however imperfect."); *cf.* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 284-86 (1986) (critiquing use of "unequal bargaining power" and substantive fairness as justification for judicial enforcement of, or interference, with individual preferences). Surprisingly, however, beyond these basic observations that the concept of inequality of bargaining power is potentially vague or unjustified, there remains no detailed doctrinal analysis of the subject. As noted above, I anticipate that the usefulness of inequality of bargaining power as a tool for guiding judicial discretion will be the subject of a future article. *See supra* note 15.

A. Development of Inequality of Bargaining Power as a Legal Concept

As a distinct legal concept, the doctrine of inequality of bargaining power is a relatively recent invention. Its provenance lies in the late 19th Century social and economic reactions to the perceived abuses of laissez-faire economic regulation and *Lochner*-era freedom of contract doctrine.[224] Although the phrase "inequality of bargaining power" did not occur in a reported opinion until 1925,[225] bargaining power disparities were first noticed and given rhetorical and legal import in the labor disputes of the 1880s and 1890s.[226] But beginning in the 1930s, inequality of bargaining power changed from a rhetorical tool of organized labor and its judicial and academic sympathizers to a legal doctrine applied to contract in general.[227] In the 1940s and 1950s, bargaining power became entrenched in contract law, particularly after adoption of Uniform Commercial Code ("U.C.C.") § 2-302 which expressly authorized courts to

224. *Lochner v. New York* represents the nadir of nineteenth century freedom of contract ideology and laissez faire economic theory. 198 U.S. 45, 60-64 (1905) (holding unconstitutional state interference in private employment contracts absent legitimate police power justification); Adair v. United States, 208 U.S. 161, 175 (1908) ("[T]he employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."); Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 128 (1992) (observing at close of *Lochner* era "[t]he realization grew that only the wealthy had a chance to freely negotiate and that freedom of contract was a slogan that protected vested interests against the forces of industrial society").

225. *See* Topeka Laundry Co. v. Court of Indus. Relations, 237 P. 1041, 1044 (Kan. 1925) ("Each statute undertook to remedy the mischief [of substandard wages for women and minors] by fixing a standard below which wages might not be depressed . . . *because of inequality of bargaining power* between employer and employee . . . .") (emphasis added).

226. *See, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077, 1081-82 (Mass. 1896) (Holmes, J., dissenting) (arguing that courts should not interfere in attempts by individuals to combine to compete with employers for a greater share of the return from their labor); *see also Coppage v. Kansas*, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting) (arguing constitution does not prohibit individuals from organizing in unions "to establish the equality of position between the parties in which liberty of contract begins"); *State v. Coppage*, 125 P. 8, 9-11 (Kan. 1912) (acknowledging disparities in economic power of employees and employers in negotiating terms of employment); Plant v. Woods, 57 N.E. 1011, 1016 (Mass. 1900) (Holmes, J., dissenting) (arguing "unity of organization is necessary to make the contest of labor effectual").

227. *See, e.g.*, United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 479-80 (1932) (analyzing bargaining power disparities in antitrust context and assessing whether firms abused combined bargaining power to restrain trade); Austin v. Nat'l Employment Exch., 266 N.Y.S. 306, 311 (N.Y. Mun. Ct. 1933) (noting power disparities between unemployed executive and executive placement service in negotiating contract terms); *cf.* United States v. Bethlehem Steel Corp., 315 U.S. 289, 301-03 (1942) (rejecting claims of U.S. government that war contingencies deprived it of bargaining power in negotiating shipbuilding contracts).

assess the parties' bargaining power under the rubric of unconscionability.[228]

Since adoption of U.C.C. § 2-302 (and the subsequent publication of Restatement (Second) of Contracts § 208), inequality of bargaining power has been strongly linked with unconscionability. This linkage is somewhat odd in light of the absence of references to bargaining power disparities in traditional formulations of the unconscionability doctrine.[229] Unconscionability had long existed as a legal doctrine before Karl Llewellyn spearheaded the push for codification. As early as the mid-17th Century, the common law recognized the power of courts to refuse to enforce contracts that overstep accepted bounds of fairness.[230] But the push to bring unconscionability into the open and away from "covert"[231] public policy analyses[232] also had the unintended side effect of promoting inequality of bargaining power from a hazy concept employed at the edges of contract doctrine to a new status as a de facto necessary precondition for a finding of unconscionability.

Even in the context of unconscionability and contracts of adhesion—where inequality of bargaining power is most often applied as an explicit element—courts, legislators and commentators have little idea

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228. *See* U.C.C. § 2-302 & cmt. 1 (1952).

229. *See, e.g.*, Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1751) ("[Unconscionability] may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains: and of such even the common law has taken notice . . . .").

230. *See* Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L. J. 287, 289-90 (2000) (discussing development and history of unconscionability doctrine); William B. Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121, 124-25 (1967) ("[T]he notion of unconscionability, although that word was not then used to describe it, may be traced in the English common law at least as early as 1663." (citing James v. Morgan, 83 Eng. Rep. 323 (1663) (refusing to enforce contract calculating purchase price of horse based upon 2 pence for first nail in horse's shoes, doubled for each of additional 31 nails))); Carol B. Swanson, *Unconscionable Quandary: U.C.C. Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 361 (2001) ("Two centuries before the [U.C.C.] made the unconscionability doctrine available at law, the courts had woven public policy and ideas from equity and tort into innovative principles that would save consumers from unfair bargains."); Teeven, *supra* note 224, at 136-43 (surveying history of unconscionability doctrines since fifteenth century).

231. *See, e.g.*, KARL LLEWELLYN, THE COMMON LAW TRADITION 364-65 (1960) (preferring explicit prohibition on enforcement of unconscionable contracts contained in U.C.C. § 2-302 to past practice of using ambiguous justifications to overturn contracts because "[c]overt tools are never reliable tools." (quoting Karl Llewellyn, Book Review, 52 HARV. L. REV. 700, 702-03 (1939) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937))); Leff, *supra* note 107, at 527 (1967) (purpose of U.C.C. § 2-302 explicit authorization to invalidate unconscionable contracts was to avoid "skewing of legal doctrine that may be caused by an emotional pressure to get a more heartwarming particular result").

232. *See* U.C.C. § 2-302 cmt. 1 (1989).

how to deal with bargaining power disparities. With respect to unconscionability, for instance, many jurisdictions observe that inequality of bargaining power alone is sufficient for a determination of procedural unconscionability. Thus, in *Williams v. Walker-Thomas Furniture Co.*,[233] the court first defined unconscionability "to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[234] According to *Williams*, "gross inequality of bargaining power" could negate the meaningfulness of choices available to the weaker party.[235] Other courts limit inequality of bargaining power as one of several elements of proce-

233. 350 F.2d 445 (D.C. Cir. 1965).

234. *Id.* at 449.

235. *Id. Williams* further observed that defects in the manner in which the contract was formed—such as lack of opportunity to understand the terms or the fact that key terms were "hidden in a maze of fine print and minimized by deceptive sales practices"—could also negate the weaker party's meaningful choices in entering the contract. *See id.* Although *Williams* primarily discussed bargaining power disparities in the context of meaningfulness of choice, later courts and commentators have generally reformulated this inquiry as requiring both procedural unconscionability and substantive unconscionability. *See, e.g.*, SLAWSON, *supra* note 42, at 141 ("Instead of 'absence of meaningful choice,' one now says, 'procedural unconscionability,' and instead of [terms] 'unreasonably favorable to the other party,' one now says, 'substantive unconscionability.'"); Leff, *supra* note 107, at 533-41 (distinguishing between procedural and substantive prongs of unconscionability analysis). According to *Williams*, absence of meaningful choice in the contracting process could arise from either gross inequality of bargaining power or from contracting defects that caused the weaker party to enter the agreement without opportunity to understand or discern the terms of the contract. *See id.* at 449-50. The absence of meaningful choice standard has come to be understood as procedural unconscionability, while *Williams*' inquiry into the reasonableness or fairness of the contract terms themselves parallels the substantive element of the unconscionability test. *See also* Weaver Bros., Inc. v. D.C. Rental Hous. Comm'n, 473 A.2d 384, 388 (D.C. Cir. 1984) (describing disparity in bargaining power and terms unreasonably favorable to the stronger party as two elements of test for unconscionability (citing, among others, Williams v. Walker-Thomas Furniture, Inc., 350 F.2d 445, 449-50 (D.C. Cir. 1965))); Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 58 (Ariz. 1995) ("Under the procedural rubric come those factors bearing upon . . . the real and voluntary meeting of the minds of the contracting party: age, education, intelligence, business acumen and experience, *relative bargaining power*, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question." (emphasis added) (quoting Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D.Mich. 1976)); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 866-67 (Cal. Ct. App. 2002) (procedural unconscionability addresses manner of obtaining agreement to disputed term, including unequal bargaining power); Ahern v. Knecht, 563 N.E.2d 787, 792 (Ill. App. Ct. 1990) ("Factors relevant to finding contract unconscionable include gross disparity in the values exchanged or gross inequality in the bargaining positions of the parties together with terms unreasonably favorable to the stronger party."); Northwest Acceptance Corp. v. Almont Gravel, Inc., 412 N.W.2d 719, 721-23 (Mich. Ct. App. 1987) (assessing unconscionability under two-prong test: (1) "[w]hat is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply . . . [and] (2) [i]s the challenged term substantively unreasonable?" (quoting Allen v. Mich. Bell Tel. Co., 171 N.W.2d 689, 692 (Mich. Ct. App. 1969))).

dural unconscionability.[236] Other courts address inequality of bargaining power as one of several factors to be weighed in the unconscionability analysis. For example, *Wille v. Southwestern Bell Telephone Co.*[237] listed "unequal bargaining power" as one of ten factors courts should consider in assessing unconscionability in general.[238]

The Restatement (Second) of Contracts § 208 and U.C.C. § 2-302 imply that bargaining power disparities are a necessary but not sufficient element of a successful unconscionability defense. With respect to sales contracts, the drafters' comments to § 2-302 attempt to clarify the role of inequality of bargaining power in the unconscionability analysis:

> The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.[239]

Likewise, *comment d* explicitly indicates that bargaining power disparities are one indication of unconscionability:

> Weakness in the bargaining process. A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. *But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party*, may confirm indications that the transaction involved elements of deception or compulsion, *or may show that the weaker party had no meaningful*

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236. *See, e.g.*, Gillman v. Chase Manhattan Bank, 537 N.Y.S.2d 787, 791 (N.Y. 1988) (procedural element of unconscionability comprises lack of meaningful choice and focuses on "such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power") (internal citation omitted).

237. 549 P.2d 903, 906-07 (Kan. 1976).

238. *See also* Layne v. Garner, 612 So. 2d 404, 408 (Ala. 1992) ("In addition to finding that one party was unsophisticated and/or uneducated, a court should ask (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms are unreasonably favorable to one party, (3) *whether there was unequal bargaining power among the parties*, and (4) whether there were oppressive, one-sided, or patently unfair terms in the contract.") (emphasis added); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 181 (Iowa 1975) ("[A] court considering a claim of unconscionability should examine the factors of assent, unfair surprise, notice, *disparity of bargaining power*, and substantive unfairness.") (emphasis added).

239. U.C.C. § 2-302 cmt. 1 (1989) (internal citation omitted).

> *choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.*[240]

But while § 208 prominently relies upon inequality of bargaining power as evidence of an unconscionable transaction, neither the text of § 208 nor the comments thereto make any attempt to define that concept. For example, *comment d* addresses all of the indicia of weaknesses in the bargaining process in terms of the relationship between the stronger party and the weaker party to the allegedly unconscionable contract, without any definition of what constitutes a bargaining power disparity that would make one party "stronger" and the other "weaker."

> Factors which may contribute to a finding of unconscionability in the bargaining process include the following: *belief by the stronger party* that there is no reasonable probability that *the weaker party* will fully perform the contract; *knowledge of the stronger party* that *the weaker party* will be unable to receive substantial benefits from the contract; *knowledge of the stronger party* that *the weaker party* is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.[241]

Of the criteria described by *comment d*, only the last—the "stronger" party's knowledge that the "weaker" party cannot protect its interests—appears to deal with elements of inequality of bargaining power.[242] But the use of the qualitative determinations—"stronger" and "weaker"—to describe the parties before addressing the allegedly weaker party's ability to protect its interests suggests that the determination of stronger and weaker is to be made before assessing physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement.[243] Consequently, while inequality of bargaining power remains a necessary but not sufficient condition to a determination of unconscionability under both the U.C.C. and the common law, neither the U.C.C. nor the Restatement have defined standards for determining that condition.

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240. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) (emphasis added).
241. *Id.* (emphasis added).
242. *See id.*
243. *See id.*

B. Modern Judicial Attempts to Define Inequality of Bargaining Power

Modern American courts have largely failed to infuse the concept of inequality of bargaining with legally coherent meaning. The judicial inquiry can be divided into two rough categories.[244] First, many courts address inequality of bargaining power in terms of the weaker party's lack of meaningful alternatives, necessity,[245] the nature of the good or service,[246] or inability to negotiate terms.[247] Second, courts often employ a host of potential factors relating to characteristics of the parties and char-

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244. There are, of course, other categories and characterizations for the judicial inquiry. High pressure sales practices, for example, may be said to give rise to bargaining power asymmetries even if the court does not explicitly address power issues *per se*. *Cf.*, Kugler v. Romain, 279 A.2d 640, 649 (N.J. 1971) (high pressure door-to-door sales tactics implicitly contributing to exploitation of uneducated, inexperienced, low income consumers). But while it is possible to infer a bargaining power disparity from such alternative measures, courts appear generally to have settled upon the two categories discussed herein as appropriate for explicit recognition of bargaining power asymmetries.

245. *See, e.g.*, Ransburg v. Richards, 770 N.E.2d 393, 400-02 (Ind. Ct. App. 2002) (residential lessees are in an unequal bargaining position with landlords because of essential and public nature of residential housing); Crawford v. Buckner, 839 S.W.2d 754, 758 (Tenn. 1992) ("[A]s a result of the essential nature of the service and the economic setting of the transaction, a residential landlord has a decisive advantage in bargaining strength against any member of the public who seeks its services.").

246. *See, e.g.*, Wolf v. Ford, 644 A.2d 522, 526 (Md. 1994) (party offering essential service to the public "possesses a decisive advantage of bargaining strength against any member of the public who seeks his services" (quoting Winterstein v. Wilcom, 293 A.2d 821, 825 (Md. Ct. Spec. App. 1972))); Allen v. Mich. Bell Tel. Co., 171 N.W.2d 689, 694 (Mich. Ct. App. 1969) ("[W]here goods or services used by a significant segment of the public can be obtained from only one source, or from limited sources on no more favorable terms, an unreasonable term in a contract for such goods or services will not be enforced as a matter of public policy.").

247. The focus on lack of alternatives and inability to negotiate terms appears most often in the context of the procedural prong of an unconscionability determination, specifically where the court attempts to make a finding regarding "oppression" by the allegedly stronger party against the weaker party. *See, e.g.*, Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001) ("[Procedural unconscionability] is manifested by (1) 'oppression,' which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) 'surprise,' which occurs when the supposedly agreed-upon terms are hidden in a document."); Ellis v. McKinnon Broadcasting Co., 23 Cal. Rptr. 2d 80, 83-85 (Cal. Ct. App. 1993) (employing nearly identical analysis to determination of whether employment contract was contract of adhesion and whether parties had inequality of bargaining power sufficient to create oppression and procedural unconscionability); Votto v. Am. Car Rental, Inc., 35 Conn. L. Rptr. 17, 2003 WL 21716003, at *2 (Conn. Super. Ct. June 16, 2003) ("The concept that a contract of adhesion should be interpreted and enforced differently from an ordinary contract has evolved from cases which have involved contractual provisions drafted and *imposed by a party enjoying superior bargaining strength* . . . ." (quoting Madden v. Kaiser Found. Hosps., 552 P.2d 1178, 1186 (Cal. 1976)) (emphasis added); *cf.* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 265 (3d Cir. 2003) (determining that a contract of adhesion "generally" satisfies the procedural prong of an unconscionability analysis).

acteristics of the transaction to imbue the inequality of bargaining power doctrine with standards to guide the exercise of judicial discretion. Typical characteristics of individual parties relied upon by courts[248] to support an inference of inequality of bargaining power include wealth,[249] business sophistication,[250] education or knowledge,[251] race,[252] gender,[253] "size" of the parties,[254] monopoly power,[255] and consumer status.[256] And as a final alternative, many courts eschew standards for

248. For a survey of common party attributes found to contribute to inequality of bargaining power, see 2A RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 2-302:101 to 2-302:131 (3d ed. 1997).

249. *See, e.g.*, Klos v. Polskie Linie Lotnicze, 133 F.3d 164, 168 (2d Cir. 1997) (describing contracts of adhesion as "standard-form contracts offered by *large, economically powerful corporations to unrepresented, uneducated, and needy individuals* on a take-it-or-leave-it basis . . . ." (quoting Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826, 831 (S.D.N.Y. 1996))) (emphasis added).

250. *See, e.g.*, Weaver v. Am. Oil Co., 276 N.E.2d 144, 147-48 (Ind. 1971) (declaring indemnification term in franchise agreement unconscionable in part because of franchisee's lack of business sophistication and education); Graziano v. Tortora Agency, Inc., 359 N.Y.S.2d 489, 491-92 (N.Y. Civ. Ct. 1974) (finding lease term not unconscionable because tenant was corporation, and tenant's principal was "licensed as a real estate broker, is a knowledgeable, sophisticated businessman and well known as such in the community").

251. *See, e.g.*, 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 meaningfulness of that party's choice in entering contract); Albert Merrill Sch. v. Godoy, 357 N.Y.S.2d 378, 381-82 (N.Y. Civ. Ct. 1974) (disproportionate education levels and weaker party's unfamiliarity with technical and legal English, together with deceptive practices, create inequality of bargaining power).

252. *See* Kugler v. Romain, 279 A.2d 640, 643, 652-54 (N.J. 1971) (sale of educational books at price two and a half times higher than retail price to "minority group consumers and consumers of limited education and economic means" held unconscionable and deceptive trade practice); Adams v. John Deere Co., 774 P.2d 355, 360 (Kan. Ct. App. 1989) (noting bargaining power is "as much a function of market power as it is of size").

253. *See, e.g.*, Ahern v. Knecht, 563 N.E.2d 787, 793 (Ill. App. Ct. 1990) (female homeowner ignorant about air conditioner repair who felt "intimidated" by defendant repairman had inferior bargaining power); *cf.* Waters v. Min Ltd., 587 N.E.2d 231, 232 (Mass. 1992) (female plaintiff characterized as "naive, insecure, vulnerable in contract matters, and unduly influenced by" ex-convict defendant boyfriend who had "introduced her to drugs" without specific finding of disparity of bargaining power).

254. *See, e.g.*, Am. Cloak & Suit Mfrs. Ass'n v. Brooklyn Ladies' Garment Mfrs.' Ass'n, Inc., 255 N.Y.S. 614, 616 (N.Y. App. Div. 1931) ("In the cloak and suit industry we have no giant corporations like those in the steel and motor fields. The individual employer is quite powerless to bargain on his own terms with a powerful labor organization . . . ."); Royal Indem. Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520, 524-25 (S.D.N.Y. 1974) ("There is no showing that these giant industrial organizations were of unequal bargaining power."). Although courts regularly refer to disparate "size" as creating an inequality of bargaining power, it is unclear what "size" really means in this context. In connection to institutions and business organizations, size may refer to wealth or the number of members within that organization.

255. *See, e.g.*, Kennedy, *Motives in Contract*, *supra* note 47, at 607-08. *But see* POSNER, *supra* note 15, at 102-04.

256. *See, e.g.*, Seabrook v. Commuter Hous. Co., 338 N.Y.S.2d 67, 69-70 (N.Y. Civ. Ct. 1972) (residential lessee is a consumer, does not deal on equal terms with landlord, and cannot

assessing inequality of bargaining power, relying instead upon a "we-know-it-when-we-see-it" approach.[257] The inconsistency with which different courts approach these separate analyses and the fact that few courts or commentators have analyzed the relative importance of these factors to the question of bargaining power disparities mean that there is no predictable judicial standard for determining inequality of bargaining power. As a result, "inequality of bargaining power" can be fairly described as a doctrine in search of content and substance. After almost a century of searching, the doctrine remains obscure.

1. Bargaining Power Disparities, Meaningful Choices and Opportunities to Negotiate

As noted, issues of inequality of bargaining power are most often explicitly raised in the context of the doctrine of unconscionability and the related concept of adhesion contracts. Specifically, inequality of bargaining power often is used as a proxy for procedural unconscionability.[258] A contract is procedurally unconscionable when defects in contract formation render the agreement "oppressive" or the party claiming unconscionability is "unfairly surprised" by the terms of the agreement.[259] Oppression is deemed to occur "if an inequality of bargaining power between the parties precludes the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the con-

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be expected to comprehend lengthy and complex lease provisions); *cf.* El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 62-63 (Tx. Ct. App. 1997) *rev'd on other grounds*, El Paso Natural Gas Co. v. Minco Oil & Gas, Inc., 8 S.W.3d 309 (Tex. 1999) (status as merchant will not invalidate unconscionability defense, but such status may be considered in unconscionability analysis). The doctrine has been invoked with success in the latter setting. Although courts have acknowledged that commercial entities may be able to raise successful defenses based upon doctrines such as unconscionability that are related to inequality of bargaining power, it is still rare for courts to find an inequality of bargaining power between merchants. *See* Mallor, *supra* note 42, at 1066.

257. *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, beyond noting presence of fine print and that one party was insurance company, that owner of fertilizer plant lacked bargaining power in contracting with insurer).

258. "[U]nconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 265 (3d Cir. 2003) (internal citations omitted). Although some courts have held that gross disparity between the contract price and the value received may be give rise to unconscionability standing alone, courts generally require both procedural unconscionability, i.e., oppression or unfair surprise in contract formation, and substantive unconscionability, i.e., terms that unreasonably favor one party, to hold a contract unconscionable. *See, e.g., id.*

259. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003) (presence of oppression or unfair surprise was central to the court's analysis of whether contract was procedurally unconscionable).

tract."[260] Similarly, adhesion contract doctrine explicitly incorporates inequality of bargaining power by defining adhesion contracts as those presented on a "take-it-or-leave-it" basis by a party with stronger bargaining power to a party with weaker bargaining power.[261] In both situations, courts rely upon (1) the absence of meaningful alternatives or some degree of "necessity," and (2) inability to negotiate or alter the terms of the proffered contract as evidence of inequality of bargaining power.

a. Meaningful Alternatives

In some ways, the lack of meaningful alternatives inquiry—often described in terms of need or necessity[262]—addresses whether the apparently weaker party actually consented to the terms or was coerced into agreeing through some species of fraud or duress.[263] Lack of meaningful alternatives and need are readily apparent in cases of extreme necessity, such as contracts for the rescue of ships at sea and provision of life-saving services. These cases may potentially represent real inequalities of bargaining power where the weaker party literally faces a choice between loss of life and acceptance of the proffered terms.[264] But such cases

260. *Id.*

261. *See, e.g.*, Pardee Constr. Co. v. Super. Ct., 123 Cal. Rptr. 2d 288, 292-95 (Cal. Ct. App. 2002) (employing identical analysis for contract of adhesion and inequality of bargaining power analysis for purpose of determining applicability of unconscionability and reasonable expectations doctrines). The determination that a particular contract is adhesive often satisfies the question of whether the contract is procedurally unconscionable. "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." *Alexander*, 341 F.3d at 265 (internal citation omitted). "An adhesion contract is defined as a standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms." Lytle v. Citifinancial Servs., Inc., 810 A.2d 643, 658 (Pa. Super. Ct. 2002) (internal citation omitted). The determination that a particular contract is adhesive often satisfies the question of whether the contract is procedurally unconscionable. *See, e.g.*, *Ingle*, 328 F.3d at 1172 ("Therefore, because Circuit City presented the arbitration agreement to Ingle on an adhere-or-reject basis, we conclude that the agreement is procedurally unconscionable.").

262. *See, e.g.*, Northwest Acceptance Corp. v. Altmont Gravel, Inc., 412 N.W.2d 719, 723 (Mich. Ct. App. 1987) ("Depending on the nature of the goods or services and the purchaser's needs, doing without may or may not be a realistic alternative."); Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445-46 (Cal. 1963) ("As a result of the essential nature of [medical services], in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.").

263. *See supra* notes 93-97 and accompanying text; *cf.* United States v. Bethlehem Steel Corp., 315 U.S. 289, 300 (1942) ("*Duress.* The word duress implies feebleness on one side, overpowering strength on the other.").

264. *See, e.g.*, James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1633-1637 (1981) (discussing bargaining power disparities in context of sea rescue cases as means to promote substantial notions of justice and fairness within forced exchanges); William M. Lan-

rarely involve a contractual model of bargaining[265] and thus represent a marginal issue within the problem of inequality of bargaining power. Since apparently absolute disparities of bargaining power occur only in rare cases, the importance of such disparities for discriminatory purposes is likely minimal.

Leaving aside the question of inequality of bargaining power raised in "absolute" situations, however, it is clear that courts lack a consistent approach to assessing either the alternatives truly available to the weaker party or the weaker party's ability to negotiate terms. In contrast to the stark choices available to the captain of a sinking ship or the bleeding accident victim on the sidewalk, bargaining power situations generally arise because of a subjective desire by one party for what another party can provide.[266] Bargaining power in many cases is thus largely a matter

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des & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 128 (1978) (arguing, inter alia, in favor of judicially imposed price for sea rescues on basis that judicial intervention imposes economically efficient outcome and prevents overinvestment in rescue equipment that would be made if rescuers could command prices "bargained" in forced exchanges). Even in the forced exchange situation, however, it is fallacious to argue that the captain of the ship in distress has no bargaining power. Harsanyi described the assumption that the rescuer would be able to extract any consideration for the rescue up to the value of the rescued ship as the "blackmailer's fallacy." *See* Harsanyi, *supra* note 172, at 232-33. Harsanyi observed that such a proposition is fallacious, however, because it implicitly assumes that the blackmailer has all of the bargaining power in the situation and will be able to extract any terms up to the value of the rescued ship or the total cost of the proposed blackmail to the victim. *Id.* In reality, the blackmailer will profit at any price and rationally could choose to take less than the full value of the initial demand. *Id.* Thus, the situation of apparently absolute bargaining power disparities raises the possibility that our thinking on bargaining power has been fundamentally flawed. Too often courts and commentators fall into a narrative trap of assigning bargaining weakness to a party who fits into the expected mold of "weaker party." In the vast majority of situations, the party who successfully dons the guise of "weaker party" before the court is subsequently entitled to claim that he had *no* power to affect the outcome of the bargaining process. *See, e.g.*, *Northwest Acceptance Corp.*, 412 N.W.2d at 723 (finding inequality of bargaining power because lessor of capital equipment executed lease contract on expedited basis and claimed he felt he "had a gun to his head"). But, as the blackmailer's fallacy demonstrates, there are actually very few situations in which bargaining is not possible and very few situations in which that process does not involve at least the potential for a give and take between the parties.

265. *See, e.g.*, Landes & Posner, *supra* note 264, at 83-85. Landes and Posner analyzed appropriate compensation for rescue across a broad range of fact patterns, including, for example, (1) emergency medical services; (2) jettison of cargo by a ship at risk of sinking, or rescue of a sinking ship by a salvor; (3) rescue of a drowning swimmer; (4) return of lost property; and (5) trespass by a ship owner seeking refuge from a storm and observed that such situations are governed by several distinct doctrinal regimes ranging from restitution, admiralty, tort, contract, and property law. *Id.* The variety of distinct doctrines governing in such cases of apparently absolute bargaining power illustrates that such cases rarely involve matters of pure contract doctrine. The necessities or situations giving rise to the apparently absolute disparities raise issues that cannot be measured under a contract model of offer, acceptance, consideration and capacity.

266. *See supra* notes 118-22, 168-69 and accompanying text.

of individual choice and preference.[267] Given the dynamic, changing nature of parties' developing preferences and subjective desires between the initial moment of desire and the execution of a contract, the key to assessing bargaining power on the basis of meaningfulness of alternatives often depends upon the time frame in which the court assesses those desires.

At one extreme, some courts assess the alternatives available *before* that party actually decided to enter a contract with the allegedly stronger party. This approach maximizes the possible alternatives that the allegedly weaker party could have explored rather than accept the proffered terms and generally justifies a conclusion that the apparently weaker party did not lack meaningful alternatives. In *Deminsky v. Arlington Plastics Machinery*,[268] for instance, the court held that the plaintiff did not suffer from an inequality of bargaining power because there were alternatives available to the plaintiff in determining whether to purchase plastic recycling machinery from the defendant manufacturer. First, the plaintiff's president conceded that he had considered purchasing the machinery from other suppliers, but chose the defendant manufacturer because of its location and offer to sell used machinery.[269] Second, the court emphasized that the plaintiff could simply have exercised it's power to walk away from the deal altogether.[270]

Likewise, in *Ryan v. Dan's Food Stores*,[271] the Utah Supreme Court held that an employee had meaningful alternatives to signing a boilerplate, pre-printed employment contract providing for at-will employment.[272] The court explicitly rejected the employee's claims that he was

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267. *See supra* notes 173-75 and accompanying text (assessing role of preferences and subjective value in determining relative bargaining power of parties); *cf.* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) (Danaher, J., dissenting) (discussing subjective preferences in terms of "[w]hat is a luxury to some may seem an outright necessity to others"); Blau, *supra* note 55, at 293 (noting that as individuals become accustomed to receiving regular rewards, a later loss of those rewards would be subjectively perceived as a loss, not a return to the status quo ex ante).

268. 638 N.W.2d 331, 342-43 (Wis. Ct. App. 2001).

269. *Id.*

270. *Id.* ("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.").

271. 972 P.2d 395, 403-04 (Utah 1998).

272. The *Ryan* court actually applied a six-factor test for procedural unconscionability, of which the availability of meaningful alternatives was only the fifth factor.

> Factors bearing on procedural unconscionability include: (1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement; (2) whether there was a lack of opportunity for meaningful negotiation; (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position; (4) whether the terms of the agreement were explained to the weaker party; (5) *whether the aggrieved party had a meaning-*

coerced into signing the employment contract by the employer's refusal to give him his paycheck until he read the employment handbook and agreed to its terms. The court emphasized the meaningful alternatives available to the employee. He could have (1) signed the acknowledgement form and received his paycheck; (2) refused to sign the form and receive his paycheck;[273] or (3) signed the form, received his paycheck, quit, and sought employment elsewhere as the at-will terms explicitly authorized him to do.[274]

Importantly, the *Deminsky* and *Ryan* courts emphasized not only the existence of positive alternatives to the proffered bargains, but also that the parties had the ability to walk away from the deal altogether.[275] This "walk-away" power represents the ultimate caveat to claims of inequality of bargaining power—there is always a choice, always an alternative to entering the deal.[276] That choice may be one among relatively unpleasant choices, but that alone cannot defeat the meaningfulness of the choice. But courts rarely acknowledge the power simply to do without or to seek alternatives to the proffered bargain.

At the other end of the spectrum from *Deminsky* and *Ryan*, courts suggest that availability of alternatives to the weaker party is irrelevant

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ful choice or instead felt compelled to accept the terms of the agreement; and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions.

Id. at 403 (quoting Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996) (emphasis added)). The court acknowledged that because the agreement was presented by the employer on a preprinted form, the employee lacked an opportunity to negotiate the at-will term, but concluded that this inability to negotiate terms in a form contract could not alone give rise to procedural unconscionability. *Id.* at 404.

273. Had the employer continued to withhold Ryan's paycheck, the court noted that Ryan could have sued and recovered attorney's fees pursuant to UTAH CODE ANN. §§ 34-28-3, 34-27-1. *Id.*

274. *See id.*; *see also* Dean Witter Reynolds, Inc. v. Super. Ct., 259 Cal. Rptr. 789, 795 (Cal. Ct. App. 1989) ("If 'oppression' refers to the 'absence of meaningful choice,' then the existence of a 'meaningful choice' to do business elsewhere must tend to defeat any claim of oppression," holding that sophisticated investor had meaningful choice in competing IRAs). In reality, the *Ryan* court's ordering—sign, get paycheck, quit, and seek other employment—ignores that employees routinely seek to improve their bargaining power with current and prospective employers by seeking other employment *while they are still employed.* Such actions provide the employee substantial bargaining strength with prospective employers because there is no pressure to accept the proffered employment terms besides the inducement of the terms themselves and the employee's willingness to remain at the current employment. Similarly, employees who have an alternative job offer in hand are in a much stronger bargaining position with respect to their current employers if they wish to renegotiate the terms of their employments.

275. *Cf.* FISHER ET AL., *supra* note 171, at 99-102 (advocating that negotiating parties develop Best Alternative To a Negotiated Agreement ("BATNA") criteria to assist determination of when to walk away from offered deal).

276. *See id.*; *see also* Dalzell, *supra* note 25, at 238-39.

and often define availability of meaningful alternatives to exclude the power to abandon a transaction.[277] Instead of looking to what parties could have accomplished had they actually attempted to exercise bargaining power, many courts assess available alternatives at the point that the weaker party has decided to contract with the other party. These courts then assume that subjective determination eliminates the possibility of contracting with other providers.

For example, in *Pardee Construction Co. v. Superior Court*,[278] the court held that the first-time homebuyer plaintiffs lacked meaningful alternatives to the defendant developer's purchase and sale agreement, once they had decided to purchase a home within the defendant's development. The court determined that the inequality of bargaining power between the homebuyers and the developer was oppressive, despite the developer's argument that the buyers should have been required to submit evidence that they "were unable to buy similar homes elsewhere under purchase contracts that did not include judicial reference provisions."[279] Rather, the court held that the parties' economic positions and the fact that the developer had a large development eliminated the buyers' alternatives and deprived them of meaningful choices:

> [A]s potential purchasers of entry-level homes, *plaintiffs stood in an economic position well below Pardee, the developer of hundreds of homes in the master plan development.* As also discussed, since judicial reference provisions were contained in all agreements for purchase of homes in the entirety of Pardee's master plan development of several hundred units, *plaintiffs had no meaningful choice with respect to accepting those provisions.*[280]

The court further reasoned that the unique nature of real property meant that plaintiffs were not able to go elsewhere and seek different terms.[281] The mere fact that the plaintiffs had determined to purchase a

277. *See* Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002) ("Moreover, in a given case, a contract might be adhesive *even if the weaker party could reject the terms and go elsewhere.*") (quoting Villa Milano Homeowners Ass'n v. Il Davorge, 102 Cal. Rptr. 2d 1, 5 (Cal. Ct. App. 2000)) (emphasis added, internal quotation marks omitted).

278. 123 Cal. Rptr. 2d 288, 294 (Cal. Ct. App. 2002).

279. *Id.*

280. *Id.* (emphasis added, citation omitted); *see also id.* at 292-93 (holding that purchase and sale agreement was contract of adhesion because of inequality of bargaining power).

281. *See id.* at 293. *But cf.* Lake County Trust Co. v. Wine, 704 N.E.2d 1035, 1040 (Ind. Ct. App. 1998) (finding that "corporate landlord" of mobile home park did not exercise unequal bargaining power in terminating tenants' ground leases because, among other reasons, "the residents of Williamsburg were free to execute a lease with a different landlord if the terms of the lease were unacceptable").

unique property was thus sufficient to eliminate any obligation on the part of the plaintiffs to shop elsewhere.[282]

In *Northwest Acceptance Corp. v. Almont Gravel, Inc.*,[283] the Michigan Court of Appeals likewise focused on lack of alternatives existing *after* the allegedly weaker commercial equipment lessee determined to lease a rock crusher from the lessor.[284] Relying on the lessee's statements that he had been forced to sign the lease after a 45-minute meeting in a restaurant without opportunity to read, study or consult others, and that the lessee felt he "had a 'gun to his head,'" the court attempted to define availability of meaningful alternatives:

> Implicit in the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered. Where goods and services can only be obtained from one source (or general sources on noncompetitive terms) the choices of one who desires to purchase are limited to acceptance of the terms offered or doing without. Depending on the nature of the goods or services and the purchaser's needs, doing without may or may not be a realistic alternative.[285]

But beyond the lessee's assertions that "he felt he had a gun to his head" and that he inadvisably entered a bargain that later turned sour, *Northwest Acceptance* merely states that the lessee originally contacted the lessor after seeing an advertisement for the rock crusher in a trade magazine and decided to lease the machine after meeting with the lessor.[286] The court thus offers no basis to discriminate between bad business decisions that should be enforced and situations involving oppression through inequality of bargaining power.

As *Pardee Construction*, and *Northwest Acceptance* demonstrate,[287] courts often ignore the walk-away power described in *Deminsky* and

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282. *See also* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003) ("the availability of other options does not bear on whether a contract is procedurally unconscionable") (citation omitted).

283. 412 N.W.2d 719 (Mich. Ct. App. 1987).

284. *Id.* at 720, 723. *Northwest Acceptance* potentially falls within a relatively small class of cases in which a merchant successfully asserted an unconscionability defense to a commercial contract with another merchant. The lessee was an asphalt paving business that sought to lease a rock crusher to supply aggregate for its first large state highway job. *See id.* It is not clear from the opinion, however, whether the lessor was more sophisticated, larger, better financed, or otherwise endowed with any traditional indicia of superior bargaining power.

285. *Id.* at 723 (quoting Allen v. Michigan Bell Tel. Co., 171 N.W.2d 689, 692 (Mich. Ct. App. 1969)).

286. *Id.* at 720.

287. *See also* Powertel, Inc. v. Bexley, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999) (holding that cellular telephone customers had no meaningful alternatives to accepting contract

Ryan. Even in cases where abandoning the proffered deal may not be a realistic alternative, courts artificially limit the alternatives that can be considered within the bargain. Instead of focusing on possible actions available to both parties to an agreement, many courts limit the meaningful alternatives inquiry solely to the alternatives existing *after* the weaker party has determined to transact with the stronger party, but *before* the parties actually executed the agreement. At that point, the only alternatives are the possible universe of terms within the transaction. By limiting the meaningful alternatives inquiry to the terms of the transaction at issue, these courts have conflated the availability of meaningful alternatives with the question of whether the weaker party was able to negotiate.[288]

b. Opportunity for Negotiation

The opportunity for negotiation inquiry, however, is similarly flawed because courts have failed to articulate what it really means for terms to be offered on a "take-it-or-leave-it basis" or without opportunity for negotiation. Rarely do courts ask whether a party could have negotiated had he or she tried to do so. Instead, courts look primarily to whether a party actually did negotiate or whether the agreement was presented in a manner suggesting that the offeror would not negotiate.

For example, in *Ellis v. McKinnon Broadcasting Co.*,[289] the court rejected the defendant-employer's argument that the contract at issue was not oppressive because the plaintiff-employee had and actually exercised

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amendment mandating arbitration given costs to consumers in cancelling current service contracts, losing current cellular numbers, and contracting with new service providers).

288. The *Ingle* court made the conflation of the ability to negotiate and absence of meaningful alternatives inquiries explicit by finding the fact that the employer gave prospective employees three days to consider an arbitration agreement was irrelevant to the question of whether the agreement was oppressive:

> Circuit City argues that because Ingle had sufficient time—three days—to consider the terms of the arbitration agreement, the court should not find this agreement procedurally unconscionable. We disagree. The amount of time Ingle had to consider the contract is irrelevant. . . . [T]he availability of other options does not bear on whether a contract is procedurally unconscionable. Rather, when a party who enjoys greater bargaining power than another party presents the weaker party with a contract without a meaningful opportunity to negotiate, oppression and, therefore, procedural unconscionability, are present.

Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003) (internal citations omitted). Notably, *Ingle* contrasts sharply the Ninth Circuit's decision in Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001), where the court explicitly rejected an unconscionability defense because the defendant, among other reasons, "had adequate time to pursue other alternatives."

289. 23 Cal. Rptr. 2d 80, 83-85 (Cal. Ct. App., 1993).

the opportunity to negotiate many of the contract terms.[290] There, the parties orally negotiated an employment contract specifying the employee's commission rate, starting date, monthly draw, guaranteed salary, and standards for payment of the monthly draw out of collections.[291] The employer subsequently presented the employee with a written contract characterized as a "formality which all employees signed," but which contained a merger clause and additional terms specifying that the employee would not be paid commissions on advertising fees received after the employee's termination.[292]

The court held that the new terms were oppressive and therefore procedurally unconscionable despite that the employee actually had an opportunity to read the agreement and in fact negotiated several of its terms. According to the court, "[t]he mere fact that certain terms of a standardized contract vary among inferior parties does not demonstrate that the objectionable provision was actively negotiated nor eliminate the possibility that such a term is unconscionable."[293]

Likewise, in *Stirlen v. Supercuts, Inc.*,[294] the court held that an employment contract between Supercuts and Stirlen was oppressive and procedurally unconscionable because Stirlen—the vice president and chief financial officer of Supercuts—lacked a meaningful opportunity to negotiate, despite that he actually did negotiate several terms of the agreement.

> Supercuts maintains that the contract here is not adhesive because it did not have superior bargaining strength. It emphasizes that Stirlen was not a person desperately seeking employment but a successful and sophisticated corporate executive Supercuts sought out and "hired away" from a highly paid position with a major corporation "by offering him an annual salary of $150,000, and then agreeing to remunerative 'extras' not included in the standard executive employment agreement" such as generous stock options, a bonus plan, a supplemental retirement plan, and a $10,000 "signing bonus."[295]

Disregarding that Stirlen actually negotiated the financial terms of his employment contract, the court held that the Supercuts standard employment agreement gave Stirlen "no realistic ability to modify the

290. *Id.* at 84. Specifically, the employee negotiated his starting date, commission rate and amount of draw, among other terms. *See id.*

291. *Id.* at 81.

292. *Id.* at 82.

293. *Id.* at 84 (citation omitted).

294. 60 Cal. Rptr. 2d 138, 145 (Cal. Ct. App. 1997).

295. *Id.* at 146.

terms"[296] Consequently, the court determined the employment agreement was adhesive and thus procedurally unconscionable.[297]

But the mere fact that a party *does not* negotiate does not logically require the conclusion that the party *could not* negotiate. In contrast to *Stirlen* and *Ellis*, the court in *First Financial Insurance Co. v. Purolator Security, Inc.*[298] specifically held that the plaintiff's failure to attempt to negotiate did not compel the conclusion that the plaintiff could not negotiate. The *First Financial* plaintiff executed the defendant security company's form contract with exculpatory clauses limiting liability in case of burglary, and plaintiff believed all other security companies required similar terms.[299] Consequently, the plaintiff averred that it had no choice but to sign the contract.[300] The court held these allegations insufficient to show that the plaintiff actually lacked an opportunity to negotiate:

> [Plaintiff's] affidavit does not deny that the contract was entered into with full knowledge of the exculpatory provisions. [Plaintiff] asserts that all security companies use contracts containing similar provisions; however, he does not indicate whether the currency exchange attempted to negotiate with defendant Purolator or one of its competitors to change those provisions. Under these circumstances it is difficult to conclude that the provisions were unconscionably forced upon the currency exchange.[301]

Thus, while some courts, such as *Ellis* and *Stirlen*, appear willing to declare inequality of bargaining power, oppression, and procedural unconscionability on the bare finding that the allegedly weaker party did not negotiate some terms of the agreement, others such as *First Financial* impose higher standards before concluding that the weaker party lacked an opportunity to negotiate.[302] As the distance between these possible standards demonstrates, a failure to negotiate demonstrates only that the weaker party did not attempt to negotiate for a better deal. Such a failure, however, does not show that the terms were not negotiable.

The bald assertion that some contracts or contract terms are non-negotiable or are presented on a take-it-or-leave-it" basis is misleading.

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296. *Id.* at 146.
297. *Id.*
298. 388 N.E.2d 17, 21-22 (Ill. App. Ct. 1979).
299. *Id.* at 22.
300. *Id.*
301. *Id.*
302. *See also* Lamoille Grain Co. v. St. Johnsbury & Lamoille County R.R., 369 A.2d 1389, 1391 (Vt. 1976) (holding no oppression where plaintiff successfully negotiated change to price term in lease but failed to read remainder of lease).

Truly non-negotiable contracts or terms are in fact likely to be rare.[303] On one level, to say that a term is "non-negotiable" actually means that the proponent of the term would demand more for altering the term to one preferred by the other party than the other party is willing to pay.[304] In other words, a non-negotiable term is one that the proponent has decided to treat as a "blue chip" bargaining position—one that cannot be bargained away without destroying the deal.[305] Creating non-negotiable terms is thus part of a rational bargaining strategy employed to some degree by *every* bargainer.

As a consequence of the universality of non-negotiable terms, the legal significance of one party's refusal to bargain unless the other party acquiesces to the first party's preferred terms is unclear. Any term can be monetized to reflect the risk the terms seeks to allocate, regardless of

303. *Cf.* Schwartz & Scott, *supra* note 131, at 553-54 (arguing that between commercial entities, bargaining power is fixed prior to transaction and "is exercised in the division of the surplus, which is determined by the price term. Parties jointly choose the contract terms so as to maximize the surplus, which the price may then divide unequally").

304. *See* Leff, *supra* note 107, at 546 (noting "[t]here is no clause in a contract that is *needed* by a party" but rather only clauses that are useful to a party and—if excluded from the bargain—would merely be replaced by an increase in the price charged) (emphasis added, internal citations omitted); *cf.* POSNER, *supra* note 15, at 102-103 (observing that monopolist is not likely to differ from competitive sellers with respect to non-price terms). For example, buyers who regularly purchase large quantities of goods or services from a particular buyer generally—but not always—will have the ability to negotiate terms in a manner unavailable to the average consumer. Admittedly, there are some truly non-negotiable terms, but in analyzing the efficacy of inequality of bargaining power as a tool for legal discrimination, it makes sense to limit non-negotiability to those cases in which no amount of money or other compensation could convince a party to negotiate. Typically, this will occur only in situations where the subjective value placed upon a particular term approaches the infinite—for example, the proposed sale of a favorite child, family heirloom, and so on. Outside of such subjectively infinite values, the only real limitation on the negotiability of any contract term is the value the party desiring to change that term places upon the change.

305. Although a complete survey of the literature is beyond the scope of this article, standard works on negotiation tactics often recommend that prospective negotiators identify roughly three types of contract terms before beginning the negotiation: (1) blue chip or mandatory terms which must be part of any deal; (2) desirable but not necessary terms; and (3) bargaining chips that can be freely bargained away. *See, e.g.*, CRAVER, *supra* note 132, at §4.01[2][a] ("Most legal representatives either formally or informally divide client goals into three basic categories: (1) essential; (2) important; and (3) desireable."); HENRY S. KRAMER, GAME, SET, MATCH: WINNING THE NEGOTIATIONS GAME 45-47 (2001) (defining "primary objectives," "secondary objectives," and "smokescreen objectives" for negotiation planning process). Fisher and Ury depart from this standard by eschewing "bottom line" terms in favor of establishing a "Best Alternative To a Negotiated Agreement" ("BATNA"), against which to assess offers, but the effect is still to establish a point below which a party will refuse to contract. *See* FISHER ET AL., *supra* note 53, at 97-103; *see also* BARNHIZER, *supra* note 140, at 73-77, 236-47 (1997) (adapting diagnostic methods of Eastern military strategists to creation of pragmatic definitions of victory and openness to creative solutions and recommending avoidance of fixed negotiation positions).

whether the term is negotiated or part of a form contract.[306] While many attempts by parties will end in a flat refusal to negotiate on certain terms,[307] other terms—particularly price—are often negotiable.[308] The assertion that "courts err when they treat a contract consisting largely of form terms as they would a negotiated deal simply because one of the terms has in fact been bargained out"[309] may often be reversed. Where the parties are free to bargain on some terms, nothing justifies a court in determining that what was, or could have been, bargained does not compensate for what was not.

For example, the increase in contract value that an individual consumer could obtain by attempting to negotiate away from standardized terms is often de minimis; the time and effort expended in so doing would not exceed the expected value of the preferred term.[310] The couple attempting to purchase cruise tickets, for example, would obtain little benefit at the moment of contracting by attempting to negotiate an exception to standard terms printed on the back of the ticket requiring litigation of all disputes in Florida.[311] Unless they are bad actors intent upon engaging in fraud or similar misconduct, the forum selection clause is a classic example of Rakoff's "invisible terms," about which the nondrafting party does not care at the moment of contracting because the risks and benefits are too small to evaluate.[312] But precisely because those risks are small enough that one party does not care sufficiently to attempt to negotiate, changes in price or other visible terms that the ap-

306. *See* sources cited *supra* note 304.

307. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1225 (1983) (stating that penetrating hierarchical structure of business organizations to find agent with authority to negotiate standard terms is costly and in many instances "there may in fact be no one at any level who is willing to bargain").

308. *See* Schwartz & Scott, *supra* note 131, at 553-54 (arguing that business-to-business contracts will usually choose terms that maximize joint surplus which parties will then divide through price term).

309. Rakoff, *supra* note 307, at 1254-55.

310. *See id.* at 1226 (noting rational decision by consumers not to incur costs of attempting to negotiate away from standard form contracts).

311. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 597 (1991) (Stevens, J., dissenting) (noting that "only the most meticulous passenger is likely to become aware of the forum selection provision" printed on back of cruise ticket that passengers received after purchasing cruise).

312. Rakoff, *supra* note 307, at 1226, 1250-51. Rakoff acknowledges that "for most consumer transactions, the close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous" and that most consumers faced with form contracts lack the legal advice and experience to make sense of many contract terms. *Id.* at 1226. Consequently, most consumers will rationally allocate their energies to understanding, shopping for, and negotiating the terms most important to them—i.e., price, warranty terms, immediacy of impact—which Rakoff called "visible" terms. *Id.* at 1226, 1250-51. Invisible terms, by contrast, include all other terms that might be included in a form contract. *See id.* at 1250-51.

parently weaker party is able to negotiate or shop may compensate for the increased risk expressed in the invisible terms. Or more precisely, some improvement in the negotiable terms may be sufficient to compensate a buyer for whatever uncertainty remains in the contract. There is a price at which a reasonable consumer would—if explicitly asked—agree to most common standardized terms. If the contract price or other negotiable terms can be improved sufficiently through shopping or negotiating, then the value of that improvement should compensate for the additional risk placed upon the consumer.[313]

On another level, however, the determination that a term is non-negotiable or is offered on a "take-it-or-leave-it basis" takes on a connotation of moral judgment, rather than a device for legal discrimination.[314] Such judgments imply that a refusal to compromise is inappropriate or wrongful when practiced by an apparently stronger party. Thus, certain bargaining behaviors, including presenting consumers with pre-printed form contracts[315] or informing potential employees that they must agree to the terms outlined in the employee handbook,[316] are subject to an essentially moral condemnation as unfair or oppressive. But given that every party comes to the bargaining table with non-negotiable terms, that one party acquiesced to another's non-negotiable terms does not justify judicial intervention into those terms.

2. Bargaining Power and Status

The meaningfulness of choice and opportunity for negotiation inquiries focus upon the contracting process and attack directly the propo-

313. *Cf.* SLAWSON, *supra* note 42, at 26 (describing bargaining power as the power to value the transaction more accurately than the other party and the ability to contract more efficiently than the other party). Both of Slawson's characteristics of bargaining power—which he attributes almost entirely to the producers of goods and services—relate directly to the cost of those goods and services to the purchaser. *See id.* Likewise, Epstein describes bargaining power solely in terms of costs—inequality of bargaining power exists where one party to a contract can claim a greater share of the surplus between what one party is willing to pay and what the other party is willing to accept. *See* Epstein, *Contract at Will*, *supra* note 116, at 974-75.

314. *See* Leff, *supra* note 107, at 527 (discussing "the skewing of legal doctrine that may be caused by an emotional pressure to get a more heartwarming particular result"); Kennedy, *Motives in Contract*, *supra* note 47, at 614 ("The most common justification for compulsory terms—in tort law as well as in contract—is that there was inequality of bargaining power between the parties.").

315. *See, e.g.*, Kennedy, *Motives in Contract*, *supra* note 47, at 616 (describing use of adhesion contracts as potential source of bargaining power); SLAWSON, *supra* note 42, at 30-31; *see also* Freidrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

316. *See* Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 403-04 (Utah 1998).

sition that the parties to the contract are participating in and consenting to a market transaction. In contrast to these transactional characteristics, individual, status-based characteristics relied upon by many courts apparently approach inequality of bargaining power by asserting that certain classes of individuals are largely incapable of treating with others in a market-based transaction.[317] Specifically, the status-based inquiry asserts that a form of market failure occurs when parties with disparate characteristics—such as poverty or wealth, lack of education or business sophistication, consumer or merchant—attempt to transact.

Admittedly, the distinction between status-based heuristics on the one hand, and the meaningfulness of choice and ability to negotiate inquiries on the other hand, is largely artificial. Instead, courts often imply a substantial overlap between the transactional characteristics and particular individual characteristics. Business sophistication, for example, may support an inference that the party had other meaningful choices to the proffered transaction.[318] Likewise, a lack of education may justify a conclusion that the party lacked meaningful choices in determining whether to enter a deal, simply because she did not know of the existence of those choices.[319] And monopolization of a particular market may cre-

317. Kronman provides an excellent example of the temptations faced by courts dealing with apparently weak classes of parties in the context of adhesive consumer contracts. *See* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 770-71 (1983). In that context, Kronman observed, courts and legislatures are often inclined to intervene in contract relationships to imply contract terms intended to counteract the perceived imbalance of bargaining power between the consumer and the merchant provider of goods and services. *See id.* As providers react to these implied terms by redrafting their contracts to disclaim such terms, courts and legislatures often step in again to protect the consumer by making the implied terms non-disclaimable on the assumption that consumers as a class are incapable of protecting their own interests. *See id.*

318. In *Dean Witter Reynolds, Inc. v. Super. Ct.*, for instance, the court held that the realtor—a self-described "sophisticated investor"—should have been able to comprehend the challenged term in an individual retirement account contract and could have shopped at competing institutions that did not have the challenged term. 259 Cal. Rptr. 789, 798 (Cal. Ct. App. 1989) (stating that "the 'oppression' factor of the procedural element of unconscionability may be defeated, if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable"); *see also* Gillman v. Chase Manhattan Bank, N.A., 534 N.E.2d 824, 828 (N.Y. 1988) (holding experience and education of party claiming unconscionability to be relevant to alleged lack of meaningful choice); State v. Wolowitz, 468 N.Y.S.2d 131, 145 (N.Y. App. Div. 1983) (same).

319. *See, e.g.*, Layne v. Garner, 612 So. 2d 404, 408 (Ala. 1993) (noting that rescission of contract for unconscionability is "usually reserved for the protection of the *unsophisticated and uneducated*") (emphasis added) (quoting Marshall v. Mercury Fin. Co., 550 So. 2d 1026, 1028 (Ala. Civ. App. 1989)).

ate the power to dictate the terms and prices to other contracting parties.[320]

But courts also employ status-based characteristics as a direct proxy for bargaining power disparities without reference to meaningfulness of choice or opportunity to negotiate. In *Weaver v. American Oil Co.*,[321] for instance, the court held that the defendant gas station franchisor had superior bargaining power because the plaintiff lacked a high-school education and was unable to understand the legal significance of a lease term requiring indemnification for negligent acts by the defendant-lessor.[322] Other cases have directly linked inequality of bargaining power with gender, poverty, race, employment, and consumer status.[323]

The use of status-based characteristics to determine contract rights between two parties is often useful in the judicial decision making process. Leff noted with respect to unconscionability analysis that discriminating among broad classes "on the basis of some common supra-personal characteristics" saves substantial judicial resources by narrowing the inquiry to whether a party before the court shares important characteristics with either a protected or a disfavored class.[324] Such discrimination on the basis of gross generalizations is the bread and butter of both courts and legislatures, and without it the modern administrative state would likely collapse under the weight of billions of individualized, subjective inquiries.

But the use of status-based characteristics as proxies for inequality of bargaining power raises at least three fundamental issues—(1) over- or under-enforcement of contracts; (2) secondary economic, social, or psychological impacts upon persons within status classifications deemed by courts and commentators to lack bargaining power; and (3) "fossilization" of particular status-based power classifications leading courts and commentators to disregard dynamic changes in the bargaining power of groups and individuals over time. First, as with all status-based classifications, employing stereotypes as a determinant for relative contract rights raises substantial possibilities of over- and under-enforcement of contracts:

> When faced with the difficulties inherent in deciding the bargaining fairness of any given transaction, the equity courts, in working out *their* unconscionability doctrine, similarly leaned heavily on rela-

320. *See, e.g.*, POSNER, *supra* note 15, at 102-04 (economic analysis of monopoly power with respect to contract).

321. 276 N.E.2d 144, 145-46 (Ind. 1972).

322. *See id.*

323. *See supra* notes 249-56 and accompanying text.

324. Leff, *supra* note 107, at 555-56.

> tively gross classifications. In effect, they 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. And it is arguable that sometimes they were wrong; not all old ladies or farmers are without defenses. Put briefly, the typical has a tendency to become stereotypical, with what may be unpleasant results even for the beneficiaries of the judicial benevolence.[325]

Status-based characteristics such as gender, poverty, and education will thus only coincidentally capture actual inequalities of bargaining power, guaranteeing that a post hoc judicial review based upon these characteristics will imperfectly reflect the actual bargaining power between the parties.[326] Reliance on these factors, however, raises the specter of promoting status-based rights within contract[327] and unguided judicial discretion. For example, courts rarely find unconscionability in cases involving contracts between merchants, regardless of the relative size, wealth, business exigencies or other factors that may affect the parties' bargaining power.[328] Rather, the beneficiaries of unconscionability

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325. *Id.* at 556.

326. Leff illustrates the problem of over- and under-enforcement with reference to the rule prohibiting minors from executing binding contracts—although most legislatures have decided that minors are incapable of consenting to a contract, that legislative determination is merely a proxy for deciding whether some individuals are capable of forming consent. *See id.* at 555-56. Some minors will be extremely mature for their age and possess all the mental and emotional faculties necessary to exercise consent, while some who have attained their majority may never possess the required maturity. *See id.*

327. *See, e.g.*, Mark Petit, Jr., *Freedom, Freedom of Contract, and the 'Rise and Fall'*, 79 B.U. L. REV. 263, 278-79 (1999) (noting risk of paternalism inherent in legislative "corrections" to freedom of contract regime). Admittedly, some status-based rights are inevitable and even directly flow from basic principles of contract law themselves. Infancy, for example, provides minors the right to reject otherwise legitimate contracts for any reason. The status of infancy represents part of the core of contract—we enforce contracts to which the parties have objectively consented. Because infants are legally incapable of consent except in specialized circumstances, we limit their obligations even when otherwise objectively reasonable. *See* Kronman, *supra* note 317, at 787 (discussing limitations on enforcement of contracts with minors). As Duncan Kennedy observed, such exceptions are not antithetical to a freedom of contract regime, but rather are part of the core doctrine necessary to legitimate the system. *See* Kennedy, *Motives in Contract*, *supra* note 47, at 577.

328. *See, e.g.*, Morant, *supra* note 7, at 245-46, 266 (noting that small businesses are often subject to actual disparities of bargaining power in dealing with vendors and other sophisticated bargainers but are usually denied access to contract doctrines otherwise available to consumers and other parties presumed to have little bargaining power); Adler & Silverstein, *supra* note 26, at 48 ("In fact, the courts have generally been unreceptive to unconscionability claims by middle class purchasers or by merchants against other merchants."); Mallor, *supra* note 42, at 1067 (noting "virtual presumption against unconscionability" commonly asserted by courts assessing enforceability of contracts between merchants); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 479 (1995) ("A consensus exists among courts and commentators that [U.C.C.] Section 2-302 is more likely to

determinations are most often members of particular classes—consumers, the poor, and women.[329] The source of this disparity may largely be attributed to courts' explicit or implicit use of inequality of bargaining power as a necessary precondition to unconscionability.[330] This critique of status-based determinations of relative bargaining power, however, is relatively unconvincing—courts regularly rely upon proxies and heuristics to streamline the judicial decisionmaking process. So long as the errors are merely marginal and do not excite reproach or perceptions of injustice, such marginal over- and under-enforcement of contracts is not remarkable.[331]

Second, the potential economic and psychological effects upon the class of individuals who are deemed to lack bargaining power may have a potentially drastic impact upon the ability of individuals within those classes to escape their perceived lack of bargaining power. Repeated ju-

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be available to consumers than to merchants."); *see also* FMC Fin. Corp. v. Murphree, 632 F.2d 413, 420 (5th Cir. 1980) ("While Illinois courts will readily apply the unconscionability doctrine between consumers and skilled corporate sellers, they are reluctant to re-write the terms of a negotiated contract between businessmen."). *Cf.* Kerr-McGee Corp. v. N. Utils., Inc., 673 F.2d 323, 330 (10th Cir. 1982) (contract between public gas utility and natural gas producers held not unconscionable where contract was product of experienced negotiators and parties negotiated terms over several months); Graziano v. Tortora Agency, Inc., 359 N.Y.S.2d 489, 491-92 (N.Y. Civ. Ct. 1974) (holding that unconscionability defense was unavailable to corporate tenant and sophisticated principal). *But see* SLAWSON, *supra* note 42, at 25, 143 (asserting that modern courts do not discriminate against merchants on the basis of bargaining power).

329. *See* Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework For U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 30-31 (1981) (discussing dangers of "creating an overbroad category of consumers entitled to the presumption of non-assent" with respect to standard form contracts); Adler & Silverstein, *supra* note 26, at 48 ("The vast majority of successful unconscionability claims involve poor, often unsophisticated, consumers challenging oppressive adhesion contracts foisted on them by retail merchants or credit sellers.").

330. *See* Mallor, *supra* note 42, at 1068-70 (asserting inequality of bargaining power is generally a necessary but not sufficient justification for unconscionability); Adler & Silverstein, *supra* note 26, at 29 (discussing situations in which inequality of bargaining power will "produce inequities so pronounced that the law must step in to protect the weak"); CALAMARI & PERILLO, THE LAW OF CONTRACTS § 9.40 (4th ed. 1998) (stating that "inequality of bargaining power is an important element in the unconscionability determination"); Reiter, *supra* note 100, at 368-70 ("The courts are concerned with preventing the exaction of too great an advantage from positions of power, irrespective of whence the power derives.").

331. Notably, however, the *reason* for generalized perceptions that courts are not unjustly imposing unjust outcomes upon the parties may itself be unjust. The "legal myth" that large providers of goods or services with a relatively poor public image, such as insurance or tobacco companies, have greater bargaining power or grossly disparate bargaining power with those who purchase or depend upon those entities may foster a tendency by courts and the public to perceive any judgment against those entities to be just. The relationship between bargaining power disparities and the concept of legal myths will be explored in a future article. *See supra* note 15 (discussing need for further study of whether bargaining power is a useful legal concept).

dicial declarations that poor, uneducated, female consumers, for example, lack bargaining power vis à vis providers of goods or services[332] may create a legal identity for members of that class of individuals that potentially could bleed over into how those individuals develop their own self-identities with respect to other actors in the marketplace.[333] Similarly, such continued declarations of powerlessness by the legal system may affect those individuals' perceptions of self-entitlement to participate in the market and thereby alter their economic or social situation.[334] Additionally, at least one commentator has suggested that a tendency by courts to interfere too often with party autonomy in contract may have negative psychological effects upon the affected individuals.[335]

Third, and most importantly, many status-based classifications apply a static, outcome-based analysis to a determination of whether a given class lacks or possesses bargaining power. By freezing a particular class of individuals within a perceived framework of bargaining power attributes, courts may end up ignoring the dynamic nature of actual power relationships. Whether power relationships are altered because of broad social gains—or losses—by any particular group or class or because of the individual efforts of one of the contracting parties, a sophis-

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332. *See, e.g.*, Ahern v. Knecht, 563 N.E.2d 787, 792 (Ill. App. Ct. 1990) (implying that elderly female consumer with limited knowledge of air conditioner repair lacked bargaining power in dealing with aggressive repairman); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965) (suggesting that single mother with seven children may have lacked bargaining power in dealing with merchant).

333. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-13 (1988):

> The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as neutral. The stories of the outgroups aim to subvert that ingroup reality. In civil rights, for example, many in the majority hold that any inequality between blacks and whites is due either to cultural lag, or inadequate enforcement of currently existing beneficial laws—both of which are easily correctable. For many minority persons, the principle instrument of their subordination is neither of these. Rather, it is the prevailing *mindset* by means of which members of the dominant group justify the world as it is, that is, with whites on top and browns and blacks at the bottom.

334. *See* Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 447-48 (1994). Harrison suggests that "social class and the resulting sense of entitlement have an impact on the terms of private orderings" and thus individuals from higher social classes (who have a correspondingly higher sense of entitlement) are able to affect the terms of exchanges with individuals with lower socio-economic standing to favor the higher class individual. *Id.* at 447. *Cf.* Gordley, *supra* note 264, at 1621 (stating that "if a court steps in too often and too readily, the parties will lose their incentive" to bargain toward the market price of the goods or services at issue).

335. *See* Feldman, *supra* note 113, at 528 (discussing negative psychological impact upon parties when courts interfere with party autonomy).

ticated legal model of inequality of bargaining power must retain the capacity to recognize such changes.

For example, courts may fail to discern that the consumer-merchant power disparities described in *Henningsen*[336] or *Williams*[337] have changed dramatically since those cases were decided forty or fifty years ago. Consumer insurance contracts provide one of the best examples of the potential for radically altered power relationships. Specifically, consumers are no longer completely helpless with respect to insurance contracts—traditionally a paradigmatic case of a bargaining power disparity between insurer and consumer.[338] The Internet permits consumers to obtain in minutes competing price quotes for numerous levels of coverage from hundreds of potential insurers.[339] Nor are consumers restricted solely to shopping between insurers on the basis of price—consumers can, with a few minutes of research, shop on the basis of many different terms of coverage and obtain ratings of different aspects of customer relations with the provider.[340]

Even more importantly, insurance consumers can obtain substantial reputational information regarding prospective insurers from both government and privately run Web sites. Reputational information is crucial to promoting competition among suppliers on non-price terms because consumers must rely upon a firm's reputation for satisfying consumer

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336. *See supra* notes 177-80 and accompanying text.

337. *See supra* notes 233-35 and accompanying text.

338. *See, e.g.*, Allstate Ins. Co. v. Hirose, 884 P.2d 1138, 1147 (Haw. 1994) (holding that "insurance policies are contracts of adhesion") (quoting Sturla, Inc. v. Fireman's Fund Ins. Co., 684 P.2d 960, 964 (Haw. 1984)); Dean Witter Reynolds, Inc. v. Super. Ct., 259 Cal. Rptr. 2d 789, 796 (Cal. Ct. App. 1989) (describing insurance contracts as paradigm adhesion contracts); Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 567 (Pa. 1983) ("[I]n light of the manifest inequality of bargaining power between an insurance company and a purchaser of insurance, a court may on occasion be justified in deviating from the plain language of a contract of insurance.").

339. The number of Internet-based insurance shopping services is too large to include a comprehensive list. Some of the apparently leading competitors include SelectQuote Insurance Services, *at* http://www.selectquote.com (last visited Oct. 12, 2004) (specializing in term life insurance quotes and purporting to compete based upon accuracy of quotes); InsWeb Insurance Services, Inc., *at* http://www.insweb.com (last visited Oct. 12, 2004) (offering competing quotes from hundreds of insurers); Insurance Shopping Network, *at* http://www.insurecom.com (last visited Oct. 12, 2004) (purporting to review prices among "thousands of insurance companies"); ReliaQuote, Inc., *at* http://www.reliaquote.com (last visited Oct. 12, 2004) (same).

340. *See, e.g.*, Consumer Reports, *HMO or PPO: Picking a Managed Care Plan* (October 2003), *available at* http://www.consumerreports.org/main/content/display_report.jsp?FOLDER%3C%3Efolder_id=344515&ASSORTMENT%3C%3East_id=333147&CONTENT%3C%3Ecnt_id=329181&bmUID=1071613628776 (last visited Oct. 12, 2004). *Cf.* Bianco, *supra* note 213 (discussing increased power of small groups of consumers in segmented markets and describing attempts by producers to customize products and services to meet demands of targeted markets).

needs[341] as a proxy for the "fairness" of the firm's contracts.[342] Although little empirical information is available, the perceived wisdom among consumer relations specialists is that one satisfied customer will typically cause one additional customer to come through a seller's doors,[343] but a single dissatisfied customer will typically cause several additional customers to avoid the seller.[344] While consumers may not be able to negotiate or shop non-price insurance contract terms effectively, they will pay attention to such proxies as firm reputation for customer satisfaction as a substitute for the uncertain terms contained in the contract.[345]

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341. Professors Ernst Fehr and Klaus M. Schmidt, for example, have proposed a model of fairness in exploiting bargaining power that suggests that firm reputation for fairness in some situations "may explain why some firms do not fully exploit their monopoly power." Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817, 817 (1999). Fehr and Schmidt point out, however, that the importance of such reputational inputs in restraining "unfair" behavior by firms depends largely upon the business context within which the firm operates, including whether the transaction takes place in a competitive market or a bilateral bargaining situation. *Id.* at 817-820, 825.

342. *See, e.g.*, Epstein, *Contract at Will*, *supra* note 116, at 967-68 (discussing propensity for reputational damage to limit firm's ability to abuse bargaining power in employment context); *but see* Darr, *supra* note 36, at 1848 ("In some segments of the market, bargaining power occurs not because of inadequate numbers of players, but because information becomes relatively costly to acquire."); Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 778-80 (1982) (discussing market failures with respect to New York City retailers specializing in "one shot sales" allowing huge markups because consumers lack accurate price information); DiMatteo, *supra* note 21, at 292 (high search costs may lead consumers to contract with first firm they approach regardless of contract terms); SLAWSON, *supra* note 42, at 27-28 (arguing reputational effects are often insufficient to change producer contracting behavior in favor of consumers).

343. *Cf.* TECHNICAL ASSISTANCE RESEARCH PROGRAMS, INC., COCA-COLA COMPANY, MEASURING THE GRAPEVINE: CONSUMER RESPONSE AND WORD OF MOUTH 13-14 (1981) (reporting that "complainants whose problems were not satisfactorily resolved said they told twice as many people about their negative experiences than satisfied complainants told about their positive interaction" and concluding that "negative word-of-mouth is a powerful deterrent to sales").

344. *See, e.g.*, Robert Johnston, *The Effect of Intensity of Dissatisfaction on Complaining Behavior*, 11 J. CONSUMER SATISFACTION, DISSATISFACTION AND COMPLAINING BEHAV. 69-77 (1998) ("One often quoted 'statistic' suggests that dissatisfied customers tell on average ten others."); L. Jean Harrison-Walker, *E-Complaining: A Content Analysis of an Internet Complaint Forum*, 15 J. OF SERVICES MARKETING 397, 399 (2001) ("The tendency of dissatisfied customers to engage in negative word-of-mouth often results in the communication of derogatory information about the seller to a dozen or more friends and acquaintances.") (internal citation omitted); John Goodman, *Basic Facts on Customer Complaint Behavior and the Impact of Service on the Bottom Line*, COMPETITIVE ADVANTAGE, June 1999, at 2, *available at* http://www.tarp.com/research.asp ("On average, twice as many people are told about a bad experience than they are about a good experience."); *cf.* JULIA TIPLER, SUCCESSFUL NEGOTIATING: THE ESSENTIAL GUIDE FOR THINKING AND WORKING SMARTER 15 (2000) (noting likelihood of dissatisfied consumers informing others of dissatisfaction and warning others away from doing business with supplier perceived to have failed to act in good faith).

345. Admittedly, reputational data may not help those who have the initial unfortunate experiences that lead to a poor firm reputation. *See* Benjamin Klein, *Why Hold-Ups Occur: The*

Even if these seat-of-the-pants "statistics" are not true, they are widely accepted and acted upon by firms.[346] Before the information age, firms could be content that a single disgruntled individual might feel compelled to inform only a handful of others that, say, his 1995 GMC pickup went through several manual transmissions before it reached 100,000 miles. Everything is different now. Numerous private "Corporate Complaint Sites"[347]—including the imaginatively named "AllstateInsuranceSucks.com,"[348] and "Allstate or Allsnake: You be the Judge,"[349] as well as the less-imaginatively named "Fraud and Racketeering by the Insurance Industry" Web site[350]—record hundreds of horror stories about individual consumer dealings with various insurers.[351] Similarly, many state insurance regulators now post data regarding consumer complaints and bad faith denials by insurers.[352] Cumulatively, these sites receive hundreds of thousands of hits, meaning that consumers now have greater access than ever before to competitive information

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Self-Enforcing Range of Contractual Relationships, 34 ECON. INQUIRY 444, 449-50 (1996) (discussing role of negative reputation for transactors perceived to have engaged in hold-ups in raising "costs of doing business in the future"). As Klein points out, however, firms should compare the expected short-term gain from opportunistic hold-up behaviors with expected losses from future private sanctions based upon reputational losses resulting from such hold-ups. *See id.* Consequently, the threat of future private sanctions based upon reputation may still restrain some firms from engaging in opportunistic behavior. *Cf.* Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349, 351-358 (1981) (assessing role of extra-legal institutional and reputational mechanisms in reducing transaction costs among traders operating in legal regimes with poorly developed contract enforcement mechanisms).

346. *See* sources cited *supra* note 344.

347. *See* Charles Wolrich, *The Best Corporate Complaint Sites*, FORBES.com, August 21, 2002, *at* http://www.forbes.com/2002/08/21/0821hatesites_print.html.

348. http://www.allstateinsurancesucks.com (last visited Oct. 12, 2004).

349. http://allstateinsurance.org/default.html (last visited Oct. 12, 2004).

350. http://graham.main.nc.us/~bhammel/ins.html (last visited Nov. 19, 2004).

351. For example, one such educational/charitable organization—FBIC ("Fight Bad Faith Insurance Companies")—has compiled extensive legal resources and information regarding the performance of individual insurance companies from numerous sources relating to bad faith refusals of coverage by insurers. *See* http://www.badfaithinsurance.com (last visited Oct. 12, 2004). Indeed, on the basis of my research in this area, I will be switching insurance companies as soon as the demands of the current publication cycle are past.

352. The Michigan Department of Labor & Economic Growth Office of Financial and Insurance Services, for instance, maintains Web sites detailing information on insurance company complaint statistics (http://www.michigan.gov/cis/0,1607,7-154-10555_12902_12912---,00.html (last visited Oct. 12, 2004)), insurance company complaint ratios (http://www.michigan.gov/cis/0,1607,7-154-10555_12902_12916---,00.html (last visited Oct. 12, 2004)), prohibitions and enforcement actions (http://www.michigan.gov/cis/0,1607,7-154-10555_12902_12920---,00.html (last visited Oct. 12, 2004)), and insurance financial information (http://www.michigan.gov/cis/0,1607,7-154-10555_12902_18956---,00.html (last visited Oct. 12, 2004)).

necessary to shop between numerous potential insurers.[353] The dramatic reduction in consumer information costs allowed by the Internet and similar information retrieval systems means that information-based bargaining power disparities between consumers and producers of goods and services are less pronounced than in previous high-information cost regimes.

The point is not that consumers have somehow achieved equality with producers because of the Internet.[354] Such parity is unlikely ever to exist for a prolonged period given the substantial edge manufacturers have in evaluating their repetitive contract costs and risks.[355] Market imperfections will always create some bargaining power disparities that no consumer will be able to counteract.[356] And finally, in a market economy, it is neither possible nor desirable to eliminate all bargaining power disparities—as long as bargaining exists, so too will variations in the ability of social actors to achieve their preferred goals at a lower cost than other actors.[357]

Rather, the point is that courts unnecessarily limit themselves to a dead-hand vision of class-based power relationships when they fixate upon such rules as proxies for bargaining power disparities. At a certain

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353. For a broad analysis of the effects of the Internet upon individual power within the American market economy, see generally ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW (1999).

354. *See, e.g.*, SLAWSON, *supra* note 42, at 25-35 (discussing ability of producers, through superior knowledge of their product and market, to impose unfair terms upon consumers and asserting that consumer information sources are inadequate to remedy the apparent disparity of bargaining power); *but see* THOMPSON, *supra* note 131, at 24 ("The wealth of information available for free on thousands of Web sites has nearly leveled the playing field for car buyers and sellers. Some would even say the buyer now has the advantage.").

355. *See* SLAWSON, *supra* note 42, at 25-35.

356. For example, Barry Reiter notes that in many contexts, consumers may have substantial power to affect relations with producers despite the apparently harsh terms of form contracts:

> [I]n many fields nominally delegated to private autonomy, the market and other related pressures operate to produce socially acceptable levels of performance. While contracts as written may well seem to be quite harsh, few businesses could survive if the harsh terms reflected the level of performance that the term-imposer anticipated delivering, (or more importantly, the level of performance actually achieved).

Reiter, *supra* note 100, at 362. But Reiter further notes that such extra-contractual pressures on producer behavior do not resolve gross power imbalances in all instances, particularly with respect to fly-by-night providers who are unaffected by market pressures and markets in which the transaction costs of seeking or proving redress are extreme. *See id.* at 362-63; *see also* FISHER ET AL., *supra* note 53, at 97 ("No method can guarantee success if all the leverage lies on the other side.").

357. *See* 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.").

point, the actual power disparities shrink to the point that the margin of error and degree of disparity make the expenditure of judicial resources to regulate that relationship inefficient. In the insurance context, for instance, the competition among insurers created by the Internet may have drastic consequences for the consumer-insurer relationship that would increase consumer power in many circumstances.[358] Likewise, it cannot seriously be argued that the class or status-based power relationships that courts used as proxies for inequality of bargaining power are unchanged even from a decade ago. Not all of these changes will have resulted in a rebalancing of bargaining powers, but mere stereotypes substantially unchanged from decade to decade cannot accurately reflect the nuances of bargaining power over time.

V. REFORMING THE DOCTRINE OF INEQUALITY OF BARGAINING POWER

The dialectic of bargaining power disparities likely is permanently entrenched in the vocabulary of contract law.[359] The historical development of the doctrine, steeped in the quasi-Marxist language of class warfare and labor relations,[360] raises political barriers to attempts by courts or legislatures to curtail claims by litigants that traditionally benefit from claiming disempowered status.[361] Courts likely will continue using the doctrine to attempt to police power relationships between contracting parties for the foreseeable future, both on an explicit basis as with the doctrine of unconscionability and on a less visible basis as with interpretation and the parol evidence rule.[362]

But the substantial disconnect between the practical analysis, understanding and exercise of power contrasted with the assessment of power by the legal system demands a deeper investigation into the reasons for that disconnect and the potential for resolving it. Current legal approaches to problems of bargaining power asymmetries are deeply flawed. The courts' focus upon availability of meaningful alternatives, opportunities for negotiation, and the status of the contracting parties is superficial and, as discussed above, fundamentally tactical. Each of these

358. Indeed, some recent consumer-oriented negotiation texts have incorporated the dramatic increase in potential consumer power wrought by the Internet into their advice on preparing for a negotiation. *See, e.g.*, THOMPSON, *supra* note 131, at 24 ("By the time you see car dealers, you should know as much as they do . . . . The wealth of information available for free on thousands of Web sites has nearly leveled the playing field for car buyers and sellers. Some would even say the buyer now has the advantage.").

359. *See supra* notes 15 and 223.

360. *See supra* notes 224-27 and accompanying text.

361. *See supra* notes 225-41 and accompanying text.

362. *See* sources cited *supra* Part II and accompanying text (discussing importance of inequality of bargaining power within numerous contract doctrines).

three main legal approaches to analyzing power examines only a narrow band of party behaviors, tactics and psychology while failing to account for power from less obvious sources or forms. Moreover, each of these three approaches ignores the characteristics of power discussed in Part III—power is omnipresent, complex and dynamic. Consequently, courts should develop a more sophisticated approach to analyzing problems of bargaining power that more closely follows the practical analysis of power.

A. Assessing Power Strategically

As a legal concept, inequality of bargaining power requires a shift in the fundamental paradigms supporting judicial analysis of the phenomenon. Current assessments of bargaining power approach power from a tactical standpoint, as if the court were examining the parties' positions on a chessboard at an arbitrary point in the game and declaring a winner. Such a tactical approach to power is misleading and ultimately fruitless. For every oppressive bargaining tactic that a court identifies, the market will find another to take its place. The tactical focus on bargaining power disparities focuses upon discrete moments in time and fixed relations between the parties, both in terms of the individual contract before the court and in terms of the moment at which the court will assess the parties' relative strengths. Ultimately, tactics will change but the underlying issue will remain.

The tactical approach to assessing and regulating bargaining power disparities virtually ignores the omnipresence, complexity and dynamism of power. The legal tactical approach to power fails to account for the fact that all parties have power of some kind. Thus, courts often err by assuming that party characteristics or the subject matter of the transaction wholly eliminated the ability of the apparently weaker party to consent to the bargain.[363] Similarly, legal decisionmakers and commentators often ignore the complex nature of bargaining power in favor of overly simplistic models based in gross status classifications, superficial examinations of alternatives, or just unfounded knee-jerk conclusory assertions of bargaining power disparities. Rather than acknowledge that real power contests also involve hidden, deceptive and unexercised forms of power, the legal system remains wedded only to the most obvious conceptions of power. Finally, courts ignore the dynamic nature of power by focusing

363. *See supra* note 130 and accompanying text (discussing tendency of courts to view residential lease transactions as creating an inherent bargaining power deficiency in the prospective tenant because the transaction involved a necessity such as housing).

on fixed characteristics that fail to account for the role of party choice in creating the apparent power imbalances.

To conform the legal analysis of power to the actual and practical use of power by parties acting in the real world, courts should abandon the tactical approach to power and develop a more strategic framework in which to assess bargaining power. A strategic analysis must first acknowledge that the practical use of bargaining power is complex and thus assess forms or arise from sources not immediately obvious from a superficial review of the transaction and the relative status of the parties. Second, courts should recognize that all parties to a transaction have some form of power by assessing the options reasonably available to the parties that could have altered the power relationship. Finally, courts should analyze bargaining power as it changes dynamically throughout the parties' bargaining process, not simply at a single period within that relationship.

1. Assess All Forms of Power

If courts continue to attempt to police inequality of bargaining power, they should abandon fixed, status-based approaches to bargaining power and adopt a standard that promotes inquiry into the full array of possible forms of bargaining power. Importantly, current approaches to the inequality of bargaining power doctrine and contract doctrines that explicitly assess bargaining power disparities as an element already permit an open and wide-ranging inquiry.[364] Indeed, some courts do address these alternate forms of power, albeit on a haphazard basis.[365]

But without an explicit acknowledgment that power depends at least as much upon intangible, unseen factors such as subjective perceptions of the other side's resources by the parties, unspoken risk assessments, error, willingness or lack of willingness to use power, and so on, courts are likely to miss significant aspects of the power relationship. Simply because visible displays of power are often the easiest to prove does not mean that the rest of the power equation is unimportant. Rather, an honest analysis of any power relationship requires courts to recognize the potential for all forms of power—the hidden, the deceptive, the unexercised—to affect the bargaining power of the parties.

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364. *Cf.* John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 938-40 (1969) (noting intentional use of vague terms and standards by Karl Llewellyn in drafting unconscionability rule of U.C.C. § 2-302).

365. *See supra* Part IV.B.

If visible real power provides such an incomplete and changeable picture in practical contexts, such as military and business endeavors,[366] where interested parties possess both incentive and resources to measure opponents' power—there is far less reason for courts to rely primarily on manifestations of the power relationship in their post hoc assessments. Judicial over-reliance upon visible, real power is comparable to the old saw about the man searching for his keys under a street lamp. Passersby, upon learning the keys were dropped in a nearby dark alley, asked why he was wasting time looking under the street lamp. "Because the light's better over here," the searcher replied. Bargaining power is not just the visible or the real. Hidden and deceptive power are integral to the bargaining process.[367] Likewise, power can arise from many different sources beyond obvious ones like status, education, wealth or gender.[368] Consequently, the attention paid to whether a particular term was actually bargained or whether a party was poor or had less formal education than the other, or if one of the parties had substantial business experience, shows only a small part of the power relationship between the parties.

The crucial issue here is the purpose of judicial attempts to regulate the practical effects of bargaining power disparities by assessing the relative bargaining powers of contracting parties and assigning legal consequences to gross disparities of bargaining power. If that purpose is to enforce a normative moral rule that justifies modification of contractual duties created under a bargaining power asymmetry, then the courts clearly should reform the legal standards for assessing bargaining power to conform accurately to power relations as they actually existed.

Nor is it a sufficient argument in favor of the status quo to charge that such an undertaking would be beyond the capabilities of the courts or prohibitively expensive. Clearly, increasing the judicial inquiry into sources and forms of power not readily observable would increase the cost of proving a disparity of bargaining power. But ease of proof cannot be relevant to actual measures of power where so much of the use of power must remain hidden, deceptive and/or unexercised to be effective and where sources of power can vary so widely depending on situation and context.[369] Given the gaping holes in current judicial approaches to analyzing bargaining power, the suggestion that courts should continue

366. *See supra* Part III.B.2.b.

367. *See supra* Part III.B.2.b.

368. *See supra* Part III.B.2.a.

369. *Cf.* Norton, *supra* note 42, at 502-04. "[N]ormal ethical standards are sometimes abandoned in negotiations . . . [and] people do not always bargain the way they live." *Id.* at 504.

to rely upon flawed heuristics and gut instincts to assess relative bargaining power misses the point. The solution to the question of how to assess bargaining power inexpensively is *not* to create arbitrary heuristics that are incapable of accurately assessing power relations. Such false remedies only obscure what should be the real debate—whether courts should be making any attempt at all to assess and regulate the effects of bargaining power asymmetries.

2. Assess Not Just What the Parties Did, But What They Reasonably Could Have Done to Improve Their Bargaining Power

To paraphrase Sun Tzu, power is a statement of potentiality, not actuality.[370] For Sun Tzu, the key to obtaining a preferred outcome—i.e., crushing one's opponent like an insect—was the accurate assessment of one's own and one's opponent's positions before engaging the enemy and then adjusting one's strategy as the situation required or allowed.[371] Power comprised the means of achieving a preferred outcome, and the use of power necessarily envisioned and operated within a dynamic and unfolding process. The study of power as a practical phenomenon has primarily addressed this central issue of how parties can accurately assess the power relationship and then alter it to suit their own preferences.

Compared to this practical concept of power, the legal concept of bargaining power is unsophisticated and "flat." Judicial analysis of bargaining power promotes and perpetuates a view of power that artificially limits the ability of decision makers to assess accurately the real power relationship between the parties. First, the judicial approach to analyzing power often begins and ends with an initial determination that one of the parties was "weak" while the other was "strong." Following that initial determination, the inquiry ceases,[372] and courts fail to check whether the party could have done anything to alter the power relationship. At the level of individual cases, once the court determines that a party is "weak" or "strong," individual strategies or events that significantly alter bar-

370. *See* SUN TZU, *supra* note 163, at 89-91 ("[T]he victories of good warriors . . . are not flukes because they position themselves where they will surely win, prevailing over those who have already lost. . . . Therefore a victorious army first wins and then seeks battle . . . .").

371. *See supra* notes 162-66 and accompanying text.

372. *See, e.g.*, Pardee Constr. Co. v. Super. Ct., 123 Cal. Rptr. 2d 288, 292-94 (Cal. Ct. App. 2002) (determining that first-time homebuyers lacked bargaining power in dealing with developer after homebuyers had subjectively determined to purchase home in developer's subdivision); *see supra* notes 239-41 and accompanying text (observing that Restatement (Second) of Contracts § 208 cmt. d identifies power disparities on the basis of what the "stronger" party does to or knows about the "weaker" party without standards for determining which of the parties is "stronger" or "weaker").

gaining power rarely enter the post hoc assessment to test the parties' power relationship, even if a party had the capacity to alter that relationship.

This judicial failure to look beneath the superficial indications of power carries additional consequences on the macro level. Stereotypes of the weak and the strong have largely frozen themselves into the judicial consciousness.[373] Thus, even when societal, economic, political, technological or other developments alter or adjust the actual balance of power between classes of actors,[374] courts largely fail to acknowledge those developments in assessing bargaining power. For example, modern consumers, even though they likely continue to lack bargaining parity with producers of goods and services, nonetheless have gained access to informational, political, and legal tools not imagined forty years ago.[375] In contrast, small businesses may be losing substantial bargaining power in the modern domestic and global economy as large firm mergers accelerate and foreign competition increases. The rapid socio-economic changes wrought by processes of globalization have increased competition and permitted business giants the ability to dictate terms and prices to their small-scale suppliers.[376]

Second, the legal approach to inequalities of bargaining power in many cases ignores party responsibility in creating and maintaining that power relationship. Specifically, the judicial analysis of power does not ask whether the first-time homebuyers in *Pardee Construction Co.* could have improved their bargaining power.[377] Nor does the judicial analysis inquire into whether the employees in *Ellis* and *Stirlen* could have negotiated further or otherwise improved their bargaining position.[378] Instead, courts tend to ignore what parties could reasonably have done to change the balance of power and look at what actually happened—so long as the party receives an initial conclusion that it was "weaker" than the other party to the relationship.[379]

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373. *See supra* notes 38-48 and accompanying text (discussing unavailability of IBP-based defenses to merchants and the middle class, reserving those doctrines primarily for the poor, the consumers, and the uneducated).

374. *See supra* notes 338-57 and accompanying text (discussing impact of lowered information costs for consumers in shopping for insurance contracts).

375. *See supra* notes 339-56 and accompanying text.

376. *See, e.g.*, Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect: An Empire Built on Bargains Remakes the Working World*, L.A. TIMES, Nov. 23, 2003, at A1 (describing ability of Wal Mart negotiators to dictate contract terms and prices to would be suppliers).

377. *See supra* notes 278-82 and accompanying text.

378. *See supra* notes 289-302 and accompanying text.

379. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (assessing unconscionability in terms of weaker and stronger parties without explanation of how court should identify "weak" party and "strong" party).

In contrast, courts commonly decry attempts by so-called "sophisticated businesspersons" to gain judicial assessment of their bargaining power relative to a more sophisticated party,[380] even though similar contract terms and bargaining would be closely scrutinized if applied to a traditionally protected class of "weak" parties. Caveat emptor is alive and well in such situations regardless of the power realities. As a consequence, classes of contracting parties traditionally viewed as "strong" or at least "not-weak" will often be prevented from demonstrating that a real inequality of bargaining power in fact existed because the courts' initial, unsophisticated take on their bargaining power is determinative.[381] Likewise, members of presumptively "weaker" classes of bargainers—such as consumers, the poor, and those lacking higher education—have a strong claim to the protection of inequality of bargaining power doctrines even if they could reasonably and at minimal cost have improved their bargaining position.[382]

In many cases these status-based determinations will be correct—poor, uneducated consumers often lack bargaining power, and sophisticated, financially healthy businesses often are sufficiently savvy to avoid gross power disparities.[383] But the key question is whether the parties

380. *See, e.g.*, Geldermann & Co. v. Lane Processing, Inc., 527 F.2d 571, 576-77 (8th Cir. 1975) (rejecting claim of unequal bargaining power by allegedly sophisticated party who read and understood contract terms before signing); Kerr-McGee Corp. v. N. Utils., Inc., 673 F.2d 323, 330 (10th Cir. 1982) (rejecting unconscionability claim where "experienced negotiators for both parties entered into an agreement after several months of give-and-take"). *But cf.* Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 146 (Cal. Ct. App. 1997) (finding inequality of bargaining power between chief financial officer and employer); Northwest Acceptance Corp. v. Almont Gravel, Inc., 412 N.W.2d 719, 721-24 (Mich. Ct. App. 1987) (finding inequality of bargaining power between business owners).

381. *See, e.g.*, Morant, *supra* note 7, at 237 ("Contractual equity . . . can be quite limited, particularly for small businesses. Rules that offer possible relief from inequitable bargains apply more readily to consumers rather than business entities."); Edwards, *supra* note 42, at 455-56 (same).

382. *See* Hillman, *supra* note 329, at 30-31 ("Some consumers have the power to compare prices or resist purchases.").

383. As a result, this Article does not suggest that courts should ignore such heuristics altogether if they continue to use inequality of bargaining power as a relevant factor in contract disputes. As Blake Morant observed in commenting on an earlier draft of this Article, one possible way to preserve the usefulness of status-based power assessments would be to have courts explicitly refine their analyses of bargaining power to use such status-based heuristics as triggers for a more searching inquiry into the parties' relative power. Importantly, adopting a more sophisticated and nuanced approach to bargaining power would not bar recognition of systemic power imbalances that may be relevant to individual cases. Rather, a more sophisticated approach to bargaining power should acknowledge the potential that some actors within a traditionally disadvantaged class or a traditionally "strong" class will have special advantages or disadvantages that must also be assessed. *Cf. supra* note 324 and accompanying text; Hillman, *supra* note 329, at 30-31 (asserting that status-based characteristics applied without distinction "would nullify a principal advantage of judicial intervention: the opportunity to evaluate the facts of particular cases").

suffered some actual disability that the law should redress through doctrines employing the legal concept of inequality of bargaining power or whether one of the parties simply made a bad deal. If a party, through improvidence, haste, negligence or just plain bad luck executed a losing contract, courts generally will not remove the consequences of that bad bargain.[384] On the other hand, many courts have accepted a norm permitting or even requiring intervention where bargaining power disparities or other flaws in the contracting process impair the ability of the disadvantaged party to express true consent to the agreement.[385]

Consequently, the importance of party responsibility to the actual power equation, along with the dynamic and changeable nature of the power relationship, requires that courts assess whether the parties could reasonably have altered that relationship.[386] While there is arguably a justification for regulating bargains imposed as a result of gross disparities of bargaining power,[387] that justification is diminished where the ap-

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384. *See, e.g.*, Nelson v. Rice, 12 P.3d 238, 243 (Ariz. Ct. App. 2000) ("Courts should not assume an overly paternalistic attitude toward the parties to a contract by relieving one or another of them of the consequences of what is at worst a bad bargain . . . .") (citation omitted); Adams v. John Deere Co., 774 P.2d 355, 359 (Kan. Ct. App. 1989) ("It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences *per se* of uneven bargaining power or even a simple old-fashioned bad bargain.") (citation omitted); *cf.* ANDERSON, *supra* note 248, at § 2-302:92 ("[U.C.C. § 2-302] is not designed to relieve a person from what proves to be a bad bargain, for the principle is not aimed at 'disturbance of allocation of risks because of superior bargaining power.'") (quoting Sinkoff Beverage Co. v. Jos. Scholitz Brewing Co., 273 N.Y.S.2d 364 (N.Y. App. Div. 1966)).

385. *See* Mallor, *supra* note 42, at 1072 (noting relationship between inequality of bargaining power from exploitation of weaker party's necessity and lack of consent by weaker party); *cf.* ANDERSON, *supra* note 248, at § 2-302:104 (discussing negation of party choice resulting from inequality of bargaining power).

386. Such a notion of conditioned rights based upon party responsibility is described at length in Weinreb's secular theory of natural rights. Thus, for Weinreb—as for most of us—the statement that a party can control whether an event occurs or does not occur is also a statement that a party is responsible for the occurrence or non-occurrence of that event. *See* Lloyd L. Weinreb, *A Secular Theory of Natural Law*, 72 FORD. L. REV. 2287, 2292-94 (2004) ("The notion of human responsibility requires that our acts be free, that is to say self-determined and not determinate."). Where a party exercises a right to determine its conduct—as when a thief steals a wallet or a contracting party chooses not to employ power at his or her disposal—it follows as a matter of course that the party is responsible for the consequences of that action where that choice is self-determined. *See id.* at 2295-97 (observing that thief exercising right to liberty to determine his conduct to steal a wallet is responsible for that conduct if it is self-determined and therefore responsible for that act). For an in-depth analysis of Weinreb's analysis of the relationship between rights and individual responsibility, see generally LLOYD L. WEINREB, OEDIPUS AT FENWAY PARK: WHAT RIGHTS ARE AND WHY THERE ARE ANY (1994).

387. *See*, SLAWSON, *supra* note 42, at 23-26 (asserting inequality of bargaining power as moral justification for contract reformation); Overby, *supra* note 107 at 620-22 (arguing in favor of paternalist judicial interventions into private contracts to enforce international norms of sustainable economic development); Kessler, *supra* note 315, at 640-42 (arguing for greater

parently weaker party forbore taking reasonable action to improve its power.[388] Likewise, where a party could do little to improve its bargaining power, to the extent that a gross disparity of bargaining power justifies contract reformation, it follows that the party that lacked power through no fault of its own has a stronger claim for reformation.

The practical effect of the incorporating a reasonableness inquiry into the legal bargaining power analysis would be to refine and limit the impact of the broader inquiry into non-obvious forms and sources of power, suggested above, to those cases where the weaker party actually lacked power rather than merely failed to use it. It is thus unlikely that a reasonableness inquiry would significantly affect current analyses of the bargaining power of traditionally "weak" parties because the typical inquiries already indicate that those parties lack reasonable options to improve their bargaining power. Most consumers, for example, will continue to lack the education, business sophistication, finances, time, information or other resources that would permit reasonable steps to improve their bargaining power when faced with an adhesion contract. At the margins, courts may require greater party responsibility depending on the significance of the transaction or the enhanced abilities or resources of the party before the court as those factors render greater expenditures of resources to improve bargaining power reasonable. Likewise, the reasonableness inquiry may incorporate socio-economic or technological changes that increase the tools that a typical consumer may reasonably apply to increase her bargaining power into the legal analysis of bargaining power. Overall, however, traditionally disadvantaged parties will likely continue to lack reasonable means of improving their bargaining power.

The primary benefit of requiring courts to investigate whether the parties could have taken reasonable steps to improve their bargaining power would instead refine the more complicated analysis of whether traditionally "strong" or "non-weak" parties such as small businesses and middle income consumers actually lacked bargaining power[389] or merely

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judicial intervention in reforming contracts of adhesion to prevent powerful industrial and commercial interests from "impos[ing] a new feudal order" upon weaker consumers).

388. *See* Jan Narveson, Consumers' Rights in the Laissez-Faire Economy: How Much Caveat for the Emptor?, 7 CHAP. L. REV. 181, 199 (2004) (arguing in favor of limited version of *caveat emptor* in regulating consumer transactions that holds consumer responsible for decisions within her control—"there must be a region in which the consumer makes his own decisions and takes responsibility for them").

389. As Schwartz and Scott recently argued, firm to firm transactions typically adopt a model of contract negotiation that more closely resembles the Willistonian model involving negotiation over time and relatively equal bargaining power. *See* Schwartz & Scott, *supra* note 131, at 544-45 (identifying firm to firm transactions as the "main subject of what is commonly called contract law" where firms are defined as comprising "sophisticated economic

made a bad bargain. By expanding the initial question of whether a party lacked bargaining power to include hidden, deceptive and unexercised forms of power, and to examine non-obvious sources of power, courts increase the opportunities for parties to claim a lack of bargaining power. Forcing courts to consider whether those parties could have taken reasonable steps to improve their bargaining position would limit improper claims of bargaining power disparities where the apparently weaker part merely made a bad judgment in negotiating its contract.

3. Assess Bargaining Power Before, During and After the Execution of the Contract

The point in the parties' relationship at which a court assesses their bargaining power is critical on two fronts. First, as discussed above, the relative bargaining power of the parties can shift throughout their interaction.[390] But courts have no consistent approach to the point at which they will assess inequality of bargaining power. Some courts, for example, analyze relative bargaining power at the time of the initial offer.[391] Others look to the bargaining power existing at the time of contracting[392] or even at the eventual outcome of the parties' bargain.[393] Given the dy-

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actors" that "understand how to make business contracts"). Such a model is inherently more complex with respect to bargaining power disparities than contracts involving traditionally "weak" parties, and involve more opportunities for the parties to adjust their relative bargaining power.

390. *See supra* notes 162-212 and accompanying text (discussing dynamic nature of power relationship).

391. *See, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003) (finding procedural unconscionability upon mere presentation of standard form employment agreement by employer to employee).

392. *See, e.g.*, L & E Corp. v. Days Inns of Am., Inc., 992 F.2d 55, 59 (4th Cir. 1993) (assessing unconscionability as a function of "grossly unequal bargaining power at the time the contract is formed") (citations omitted); Lang v. Derr, 569 S.E.2d 778, 781 (W.Va. 2002) ("The second factor normally considered in determining whether a contract is unconscionable is whether the parties were in unequal bargaining positions *at the time they entered into the contract.*" (emphasis added)).

393. Price unconscionability cases may provide an example of situations in which the outcome of the parties' interaction is used as a surrogate for their bargaining power. Typically, courts acknowledge that a finding of unconscionability must be supported by both procedural and substantive unconscionability. *See supra* note 235 and accompanying text. In price unconscionability cases, however, courts regularly hold that the substantive unfairness of the challenged provision is so great that there is no need to assess procedural unconscionability. *See, e.g.*, Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145 (Cal. Ct. App. 1997); Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995) (noting that substantive unconscionability alone may support finding of unconscionability); Vockner v. Erickson, 712 P.2d 379, 382-83 & n.8 (Alaska 1986) (explaining that procedural and substantive elements of unconscionability must be assessed on sliding scale such that great substantive unconscionability alone may justify finding that contract is unconscionable); Bracey v. Monsanto Co., Inc., 823 S.W.2d 946, 953 (Mo. 1992) (same). Notably, however, substantive unconscionability cases often include

namic nature of the power relationship on the level of individual contracts, the choice of timing for analysis will significantly affect that analysis.

Second, the choice of timing rule is indicative of whether courts are measuring relative bargaining power or something else. In practical terms, bargaining power refers primarily to the *ability* to affect an outcome. Measuring relative bargaining power means measuring the parties' potential to obtain their preferred terms in a transaction. While the outcome of the parties' interaction may evidence the parties' relative bargaining power, that is only true where the parties have used their bargaining power to realize that outcome. But where parties have failed to take reasonable steps to protect themselves against their opponent's bargaining tactics, the outcome of their transaction does not say anything about their actual bargaining power. In this sense, a judicial focus upon the outcome of the transaction does not measure bargaining power, but rather whether the outcome offends the judge's sense of fair play or distributive ethics.

To the extent that courts purport to regulate disparities in bargaining power, and not merely substantive unfairness or some violation of their internal sense of fair play and distributive justice, inequality of bargaining power as a legal concept must adopt a timing rule that accurately reflects the power relationship throughout of the bargaining process. There is no single point at which relative bargaining power can be assessed that reflects the parties' actual potential to obtain their preferred terms throughout the contract process. Depending on the context of the transaction, the parties' relative bargaining power may wax and wane between the moment of execution, the moment the parties begin negotiations, or at various points during the negotiations. While each of these points has some relevance to the parties' actual bargaining power, they also provide an arbitrarily incomplete picture of the power relationship.

A timing rule focused upon the moment of execution, as that applied in *Pardee Construction*[394] for instance, would provide information regarding the parties' relative bargaining power at the crucial moment the legal obligation came into being and also provides an easy, bright line standard for when to assess bargaining power. But such a rule also ignores whether one of the parties could or should have backed out of the

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indicia of oppression or unfair surprise or other evidence of unequal bargaining positions in the substantive analysis. *See Maxwell*, 907 P.2d at 59-60 (noting that substantive unconscionability may be shown by oppression and unfair surprise). Consequently, price unconscionability cases arguably rely solely upon the unfair outcome of the bargain to establish a presumption of inequality of bargaining power or other procedural problems without requiring evidence of any procedural failings in the transaction.

394. Pardee Constr. Co. v. Super. Ct., 123 Cal. Rptr. 2d 288, 294 (Cal. Ct. App. 2002).

deal at an earlier point, reasonably should have invested in greater information before execution, "negligently" failed to engage in reasonable due diligence regarding readily available alternatives or the terms of the deal, or taken other steps to improve its bargaining power. Likewise, a timing rule such as that applied in *Northwest Acceptance*,[395] looking to the time the allegedly weaker party first started shopping for the equipment through the parties' negotiations accounts for the power of the parties to abandon the deal or seek alternatives but does not account for costs incurred in searching and negotiating, nor does it account for the forms or sources of power brought to bear during the negotiation.

The balancing test required by a multi-point timing rule is clearly more complex than any of the bright-line timing rules discussed above. The rule must identify salient points in the parties' interaction at which to assess relative bargaining power and then weigh the varying importance of the power balance at each of those times.[396] In this analysis, the outcome of the bargaining process—the terms of the agreement—will be only one indicium of whether a bargaining power disparity existed. In addition, courts should also examine evidence of the parties' bargaining positions throughout their interaction, including points at which the parties could have altered the power relationship. Although the terms of the bargain will continue to be highly indicative of bargaining power disparities, parties that unnecessarily place themselves in a weakened bargaining position at a point in the process at which they had other alternatives[397] should be less able to claim the protections of doctrines based upon bargaining power disparities.

B. A Program for Future Study

Refining the judicial analysis of bargaining power disparities within doctrines where bargaining power is an explicit element of analysis only

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395. Northwest Acceptance Corp. v. Almont Gravel, Inc., 412 N.W.2d 719, 721-23 (Mich. Ct. App. 1987).

396. Such a balancing calculation—as with virtually every aspect of the attempt to conform legal analysis of bargaining power with the practical reality of that phenomenon—is context sensitive. Significant transactions taking place over time, such as the home purchase in *Pardee Constr. Co.*, 123 Cal. Rptr. 2d at 294, and the heavy equipment purchase in *Northwest Acceptance*, 412 N.W.2d at 723, will usually involve multiple salient periods in which the buyers could have taken reasonable steps to improve their bargaining power including shopping for other contracts, reading the proffered contract, seeking legal advice, or attempting to bargain or obtain more time for review. Less significant transactions or transactions occurring over a short time frame would involve fewer salient periods for such assessments.

397. *Cf. Pardee Constr. Co.*, 123 Cal. Rptr. 2d at 292-94 (assessing bargaining power only after prospective home purchasers had made subjective decision to purchase home in defendant's development).

resolves a small part of the general incoherence of inequality of bargaining power as a legal concept. Beyond the specific failings of courts to harmonize the actual exercise of bargaining power with the judicial analysis of that phenomenon, the primary failing in the current jurisprudence regarding inequality of bargaining power is that, despite a century of development, the doctrine remains essentially a rhetorical device that has infected analysis throughout the law of contracts.[398] An honest and complete investigation of the appropriate role of bargaining power disparities within contract law should focus primarily upon three issues. First, courts and commentators have largely failed to agree even on the terms of the debate over the place—if any—that a doctrine of inequality of bargaining power should occupy within contract law. Specifically, it is not clear whether inequality of bargaining power represents an overt decision-making criterion concerned with discerning the actual relative bargaining power of the parties or whether the doctrine is merely a cover for a deeper sociological inquiry about wealth, power and status. Second, substantial work remains in identifying the implicit and explicit roles that bargaining power plays throughout contract law. And finally, inequality of bargaining power may ultimately prove unworkable as an outcome determinative legal standard because of the inherent indeterminacy of the concept. Beyond the incredible complexity involved in assessing relative bargaining power based upon observable factors, the concept of bargaining power may promote systemic cognitive errors and biases based entirely upon the powerful narratives and motifs invoked by that concept.

1. Acknowledging the Debate Over the Proper Role of Inequality of Bargaining Power Within Contract Doctrine

The significant disconnect between the legal analysis of bargaining power disparities and attempts to assess, maximize and exercise power in non-legal contexts indicates one of three primary possibilities.[399] One possibility is that the judicial system just has not caught up with what is known about power in other contexts. As noted above, the systematic study of power by the social sciences is a relatively recent phenomenon.[400] The final incorporation of the inequality of bargaining power doctrine into the general law of contracts coincided within a few decades

398. *See supra* notes 225-41 and accompanying text.

399. There are almost certainly other explanations for the substantial disconnect between the judicial picture of the power phenomenon and the analysis of power in other contexts. The three theses discussed here, however, offer possible insights that are particularly useful to creating a rational basis upon which to discuss power in the judicial context.

400. *See* Dahl, *supra* note 49, at 79 (describing the systematic study of power as "very recent").

of the beginnings of the systematic study of power in the social sciences and the legal academy's systematic approach to negotiation tactics.[401] Consequently, the legal concept of bargaining power disparities may have been almost completely incorporated into contract law by the time studies of power began to reveal the difficulty and uncertainty inherent in assessing relative bargaining power in social interactions.

An alternative thesis suggests that Leff's argument regarding the value of status-based characteristics in assessing legal criteria can apply profitably to bargaining power disparities.[402] Weighing and assessing relative bargaining power is expensive to parties during the time of contract negotiation and execution.[403] The costs of accurately developing that same information post hoc through the adversarial process certainly would be greater than at the time of contracting and likely prohibitive in many cases. Consequently, courts may rely on a two-dimensional approximation of power because the costs of developing greater information regarding the parties' actual balance of power would be too great. Further, the common perception that the legal doctrine of inequality of bargaining power is explicitly relevant to only a few areas[404] may diminish incentives to promote such development of standards for assessing and weighing relative bargaining power.

A third—and much more cynical—possibility begins with the recognition that bargaining power disparities may mean different things to different actors within the legal system. Some actors may be using the legal concept of inequality of bargaining power as an approximation of some general and common societal or judicial understanding of the practical concepts of bargaining power, and measurement of bargaining power. That sense represents an essentially moral judgment by the legal system that gross disparities of bargaining power between transacting parties can so corrupt the contracting process that the resultant agreement is tainted and should not merit the legal protection accorded contracts that more closely adhere to the traditional Willistonian paradigm of contract formation. In this sense of the term, gross disparities of bargaining power may interrupt whatever theoretical basis of enforceability—the parties' wills, the objective manifestations of assent, or the parties' con-

401. *See id.*; *see also supra* notes 225-41 and accompanying text. Specifically, inequality of bargaining power entered the general law of contract beginning in the 1930s and culminating with the 1952 promulgation of U.C.C. § 2-302, while the systematic study of power as a social phenomenon appears to have begun in earnest in the late-1950s and early '60s.

402. *See supra* notes 324-26 and accompanying text.

403. *See* Adler & Silverstein, *supra* note 26, at 10-11 ("Given the numerous factors, both subtle and obvious, required for the calculation [of parties' relative bargaining power during negotiations], the task may prove impossible.").

404. *See supra* notes 24-44 and accompanying text.

sent to the bargain—judicial decision makers would require to uphold the contract.

But other legal actors may be using inequality of bargaining power in a wholly unrelated sense as merely a device to permit the free rein of judges' paternalist or redistributionist impulses. In this sense, inequality of bargaining power provides an apparently overt justification for the judge to accomplish covert primary goals.[405]

If this second thesis is correct, then clearly the rhetoric of "inequality" and "bargaining power" merely confuses and obfuscates the debate over whether paternalist or redistributionist impulses are appropriately exercised by judicial decision makers. As Duncan Kennedy implicitly acknowledges, that debate can only proceed if all sides mean the same thing by "inequality of bargaining power."[406] Accordingly, substantial positive analysis of current judicial and scholarly treatments of the legal concept must be developed to determine whether the debate over the proper use of inequality of bargaining power is appropriately framed in terms of "power," "bargaining power," and "inequality," or in the terms of distributive justice and the propriety of paternalist impulses.

2. Empirical Analysis of the Importance of Inequality of Bargaining Power Through Contract Doctrine

Additional research and study is required to identify the actual role of bargaining power disparities within the law of contracts. Specifically,

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405. *See, e.g.*, Stephen F. Williams, Book Review, 25 UCLA L. REV. 1187, 1211 (1978) (reviewing MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977)).

> Of course, when a party escapes from contractual ties on the basis of alleged inequality of bargaining power, he is better off; and since he is typically less prosperous than the other party, it appears that the court has struck a blow for equality. The middle class judge is thus able to leave the bench that evening enjoying the warm inner glow of a Robin Hood.

Id.

406. *See* Kennedy, *Motives in Contract*, *supra* note 47, at 615-24. Kennedy observes on the one hand that "[t]here are a number of different things people seem to be referring to when they identify a situation as involving unequal bargaining power." *Id.* at 615 (noting (1) the "public" nature of an industry; (2) the use of adhesion contracts by the seller; (3) size; (4) monopoly power; (5) necessity; and (6) shortage as possible, but ultimately unjustifiable, tests for presence of inequality of bargaining power). Kennedy further notes that the use of inequality of bargaining power to justify imposition of compulsory contract terms "masks [the paternalist motive] by presenting as a defense of the weak what is often in fact a critique of their spending habits." *Id.* at 623. Given the covert distributionist motives of some legal actors (and the anti-distributionist motives of others), there is little point in even debating the standards to apply unless the covert rules are made overt. *Cf. id.* ("The doctrine [of inequality of bargaining power] exists not in a vacuum but as a weapon in the war against the conservative program of reinforcing all kinds of social hierarchy.").

bargaining power disparities are relevant to many contract doctrines beyond those that explicitly employ the legal concept as an element. For example, the empirical analyses of the impact of bargaining power disparities on application of the parol evidence rule by Lawrence, and Childres and Spitz demonstrate the potential for disparate treatment of similarly situated entities in that context.[407] Similarly, Morant's empirical analysis of the impact of bargaining power disparities upon small businesses demonstrates that the failure to extend the protection of contract doctrines based upon inequality of bargaining power to small businesses can impose substantial costs upon those parties despite real bargaining power disparities they face in dealing with vendors and customers.[408]

Despite such empirical studies, the full legal impact of bargaining power disparities between litigants is unclear. The study of inequality of bargaining power as a legal concept has proceeded little beyond Lord Denning's intuition that disparities of bargaining power may be one of the first order moral rules that underlies many contract defenses.[409] The potential impact of inequality of bargaining power narratives upon the judicial decision making process requires identification of the affected doctrines and the extent of that impact.

3. Myth, Cognitive Bias and the Subconscious Narrative of Inequality of Bargaining Power

The rhetoric of inequality, bargaining, and power is a powerful narrative. On one level, as discussed above, bargaining power issues pervade contract law and potentially affect disputed outcomes across a wide range of contract doctrines. Inequality of bargaining power as a legal concept implicates notions of fairness, equity and justice, and often justifies judicial intervention into facially valid contracts. This article attempts to identify flaws in current judicial approaches to this rational, conscious conception of the legal doctrine of inequality of bargaining power and suggests potential means for improving the courts' ability to assess asymmetries of bargaining power.

But the concept of inequality of bargaining power also operates on subconscious levels that straddle the line between purely legal analysis of the problem and the practical application of power between contracting parties. First, the correlation between bargaining power disparities and recent advances in legal decision theory may provide a more reasoned

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407. *See* sources cited *supra* note 34 and accompanying text.

408. *See* Morant, *supra* note 7, at 246, 267.

409. *See* Lloyds Bank Ltd. v. Bundy, 1975 Q.B. 326, 339 (Eng. C.A. 1975); *see also supra* notes 20-23 and accompanying text.

basis for incorporating a doctrine of inequality of bargaining power into the law of contracts.[410] Specifically, to the extent legal decision theory can identify and quantify systematic exploitation of cognitive biases and errors by experienced bargainers to manipulate the inexperienced, the courts may be able to police those manipulations as an abuse of bargaining power asymmetries. Alternatively, the indeterminacy involved in application of recent advances in legal decision theory to contract law, and the costs of paternalist contract interventions suggested by some scholars[411] may provide a justification for removing the doctrine from contract altogether.[412]

Second, beyond the potential relationship between inequality of bargaining power and cognitive bias, bargaining power disparities may also profitably be analyzed as "legal myths."[413] The adversarial process has often been described as the trading of competing stories or narratives that suggest a legal outcome in the proponents' favor.[414] Myths likewise are narratives that operate both on a conscious and a subconscious level. At the conscious level, myths tell stories—for example the descent of Theseus into the labyrinth and Orpheus into the underworld—that are entertaining in themselves and are recounted often for their narrative values alone. But on the subconscious level, myths communicate powerful archetypes and motifs against which the listener often lacks defenses. The stories contained in myths thus often communicate essential truths about the deepest levels of the human psyche at a level below the conscious mind's ability to rationalize and evaluate.[415]

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410. *See, e.g.*, Paul Bennett Marrow, *The Unconscionability of a Liquidated Damage Clause: A Practical Application of Behavioral Decision Theory*, 22 PACE L. REV. 27, 53-69, 95-99 (2001) (advocating that courts deem intentional manipulation of known cognitive biases in contract formation to be procedurally unconscionable).

411. *See id.*

412. *See* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 86-87 (2002) (arguing that legal decision theory's bounded rationality model of human behavior that assumes different individuals apply cognitive biases with "uncanny consistency" is incorrect in light of growing empirical evidence that cognitive biases vary widely among different individuals); *cf.* Feldman, *supra* note 113 (surveying arguments of behavioral economics in favor of greater judicial intervention in contracts to counter problems of bounded rationality in contract formation and arguing that overregulation could have significant negative impacts on party psychological well-being).

413. *See supra* note 331 and accompanying text.

414. *See* Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 393 (1991) ("The central question [of litigated cases] is often whether a richly textured human episode occurred, and if so, its nature."); *cf.* MY COUSIN VINNY (Twentieth Century Fox 1992) (describing the use of evidence to create narratives that compel a decision in the proponent's favor and that display gaps in the narrative propounded by the opposing side).

415. *See generally* Carl G. Jung, *Approaching the Unconscious*, *in* MAN AND HIS SYMBOLS (Carl G. Jung ed., 1964) (discussing wider, symbolic, and unconscious aspects and

The problem with myths in the legal setting is that they raise significant potential for undermining the reliability and rationality of the legal decision making process. Unlike "legal fictions"—conceptual devices that act as known short form descriptions for complex analogical arguments—legal myths inappropriately influence legal outcomes on a subconscious level against which neither party can respond. Subconscious biases and influences are a fact of life in the legal system.[416] But, particularly where those biases are identifiable and systemic, exposing those biases to rational evaluation promotes the ability of the legal system to respond appropriately to the truths or falsehoods underlying those biases.

Inequality of bargaining power provides a unique avenue for exploration into the impact of such legal myths upon legal analysis. The underdog and the Robin Hood motifs occupy a powerful place in the mythos of American law.[417] Similarly, legal commentary and analysis often recognizes the propensity for the judicial system to provide special treatment to those perceived—rightly or wrongly—to lack power compared to their adversary.[418] Legal myth thus opens a psychological and anthropological window of analysis into the question whether the legal system can or should respond to perceived power differences between bargaining parties.

VI. CONCLUSION

Bargaining power disparities will always exist. In the worlds of business, politics, war, economics, and all other human relationships, social actors strive with one another to maximize their respective abilities to influence the outcome of their interactions. While there remain substantial questions regarding the appropriate legal consequences to attach to bargaining power asymmetries, it is clear that current standards are insufficient guides to determine the existence and extent of such dispari-

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meanings of symbols and concepts perceived on a conscious level); JOSEPH CAMPBELL, THE INNER REACHES OF OUTER SPACE: METAPHOR AS MYTH AND AS RELIGION (1986) (exploring relationship between mythic motifs and human psychology).

416. *See supra* note 218 and accompanying text.

417. The ubiquitous "widow and orphan" problem, for example, is often employed to explain decisions that appear otherwise unjustifiable under existing doctrines. *See, e.g.*, Leff, *supra* note 107, at 527. Llewellyn implicitly acknowledged the importance of discerning the impact of such influence upon the judicial decisionmaking process by explicitly espousing the unconscionability doctrine of U.C.C. § 2-302 as an overt mechanism for policing inappropriate contracting behavior that judges had previously addressed only through covert mechanisms. *See* LLEWELLYN, *supra* note 231, at 364-65; Spanogle, *supra* note 364, at 940.

418. *See, e.g.*, Leff, *supra* note 107, at 527, 536-37 (noting that equity law is replete with "dramatic vignettes with which the Chancellors were continually faced—the abused old and unsophisticated young, the slicker and the farmer, the money lender and the expectant heir").

ties. To the extent that courts attach legal consequences to such power struggles, they must develop and employ more sophisticated standards that reflect the omnipresent, complex and dynamic reality of power.