The Relevance of Race and Disparity in Discussions of Contract Law

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I. INTRODUCTION

Teaching contracts to eager first-year students comprised my primary goal upon entry into the legal academy. This decision not only sprung from the realization that contract law comprised a dynamic course which greatly accommodated the socratic style of teaching so suited to my pedagogical preference, but it also conjured significant fascination as well as intellectual honesty.1 Once granted the opportunity to teach this dynamic field to fledgling law students, my strategy was clear: teach contracts generically, devoid of emotion and "controversial" topics.

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1. For more than fourteen years, my practice of law either focused primarily upon, or included some aspect of, contract law. I functioned as the contracts attorney for a major military installation during my service in the United States Army Judge Advocate General's Corps. Moreover, my practice with the law firm of Braude, Margulies & Rephan of Washington, D.C., and the General Counsel's office of the Washington Metropolitan Area Transit Authority entailed a significant amount of contract litigation and advisory work. I elucidate these facts not only to explicate my rationale for teaching contracts, but also to underscore my interest and competence in the field. See Blake D. Morant, Contracts Limiting Liability: A Paradox With Tacit Solutions, 69 Tul. L. Rev. 715, 719 n.15 (1995) [hereinafter Morant, Contracts Limiting Liability]; Blake D. Morant, Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer, 18 HASTINGS COMM. & ENT. L.J. 453, 463 n.29 (1996) [hereinafter Morant, Contractual Rules and Terms].
such as race, gender, ethnicity, or class.  

Discussion of contract law and its function presents the illusion of empiricism, highlighted by clearly defined rules that serve practical goals focused upon market preservation. Contractual rules are designed to: guide parties in the formation of prospective bargains; encourage the creation of bargains by minimizing transaction costs; fill certain gaps in established bargains where consent is bona fide notwithstanding the parties' failure to articulate certain facets of their bargain; allocate resources; and create rights and duties, the enforcement of which provides surety to potential bargainers. Given these seemingly impartial goals which beg resistance to subjective factors influencing bargains, it would appear unnecessary, if not imprudent, to delve too deeply into normative functions that defy objectivity.

Before actually teaching the discipline, my read of these impartial objectives led to a steadfast belief that the law of contracts was reflec-

2. My "avoidance" rationale stemmed both from my own sensitivity to these issues, apprehension of student response, and my commensurate responsibility to control backlash without jeopardizing free expression of ideas in the class.


8. The classical theory of contract law tends to de-emphasize considerations of fairness and equity, in favor of more rigorous adherence to rules of formation and establishment of intent through the renowned "meeting of the minds" requirement. See infra notes 59, 71-75 and accompanying text.
tive of objectivity and, consequently, devoid of human foibles. With underpinnings supported in some degree by modern economic thought, the study of "bargains" seemed academically safe and politically neutral. My function in the classroom would have been to impart the nuances and complexities of contract law as marketplace theory, without the intrusion of human emotion and subjective reasoning.

Yet the operation of contractual rules within the reality of human conduct belie the facade of objectivity. Rules of law do not constitute panaceas for transactional ills, and should be scrutinized to ensure


10. See Cass R. Sunstein, Problems with Rules, 83 Cal. L. Rev. 953, 957 (1995) ("Often rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved."). Professor McAdams seems to echo this sentiment regarding this pejorative characteristic of rules. See Richard H. McAdams,
their efficacy. This truism of imperfect objectivity led to the rise of
the neoclassicists in the field. Indeed, contract law manifests compli-
cations reflecting the individuals who originated the rules of that dis-
cipline, as well as those governed by and impacted by those rules.
Nonetheless, my method of teaching contracts remained unchanged:
portray contracts as an empirical doctrine, mostly governed by rules of
efficiency. As I began to dissect the reasons for this aversion, my rea-
soning and goal became even more steadfast: teach law—pure law, and

Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003, 1007 (1995). Although he speaks in terms of “law” as opposed to “rules,” the rationale remains analogous. See id. He explains his thesis within the context of racial discrimination as it relates to individualized sacrifices on behalf of groups. See id. Professor McAdams notes that notwithstanding the crudeness of law, it may nonetheless significantly influence individual perceptions and attitudes. See id. at 1081.

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

Id.

11. See Morant, Contractual Rules and Terms, supra note 1, at 462; see also Sunstein, supra note 10, at 1023.

12. See Jay M. Feinman, The Significance of Contract Theory, 58 U. Cin. L. Rev. 1283, 1285-89 (1990) for an explanation of neoclassical theory of contract law; see also Oliver E. Williamson, Transaction-Cost Economics: The Governance of Contractual Relations, 22 J.L. & Econ. 233, 235-38 (1979) (noting not only the characteristics of neoclassical theory, but also delineating the distinctions between neoclassical theory of contract law, classical theory of contract law, and relational contracting); see also Daniel A. Farber, Contract Law and Modern Economic Theory, 78 NW. U. L. Rev. 303, 319-22 (providing a cogent explanation of the “neoclassical” model of contract theory, which, inter alia, supports the enforcement of bargained promises). More specifically, a significant amount of scholarship has been dedicated to the neoclassical theory of contract law, as it relates to the traditional, contractual paradigm. See Melvin Aron Eisenberg, The Responsive Model of Contract Law, 36 Stan. L. Rev. 1107, 1111 (1984) (indicating that neoclassical contract theory should be elaborated in order to ensure that the theory encompasses principles that are “intellectually coherent and sufficiently open-textured to encompass the complex and evolving realities of contract as a social institution”) [hereinafter Eisenberg, The Responsive Model]; see also infra notes 71-73, 79-83 and accompanying text. See generally Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741 (1982) [hereinafter Eisenberg, The Bargain Principle]; Melvin Aron Eisenberg, The Principles of Consideration, 67 Cornell L. Rev. 640 (1982) [hereinafter Eisenberg, The Principles of Consideration]; Melvin Aron Eisenberg, Donative Promises, 47 U. Chi. L. Rev. 1 (1979) [hereinafter Eisenberg, Donative Promises].
avoid discussions of race, gender, discrimination, and other sensitive issues that would overly complicate matters and stray away from the primary object of imparting law. Moreover, because of my fear of inflammatory reaction, incitement of rancorous discourse, and distraction from the seemingly more important goal of imparting contractual doctrine, this sterile approach appeared most prudent.

Although I garnered success as a teacher overall, my experience as well as "reality" in teaching contracts prompted reexamination of my strategy. Obliteration of subjective notions, imbued in motivation and perception, failed to provide complete explanation and analysis of certain decisions. Moreover, my avoidance strategy violated a cardinal credo that judicial decisions should be evaluated contextually, as well as literally, in order to gain complete comprehension of its reasoning.

In motivating the students to dissect the constructs of contract law, their analysis of cases or problems would be incomplete without the consideration of all factors influencing the application of contractual rules. To ignore subjective issues of race, gender, or issues of disparity would be disingenuous when in fact such factors (perhaps not by them-

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13. In the fall of 1996, I received the University of Toledo College of Law's "Outstanding Professor Award." Also, the Black Law Students Association awarded me the "Outstanding Professor of the Year Award."

14. See infra notes 148-61 and accompanying text.

15. See infra note 107 and accompanying text.

16. See infra Part IV.B (discussing the "incomplete" analysis of the unfairness to the plaintiff in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)). It is also significant to note that in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), and City of Richmond v. J. A. Croson, Co., 448 U.S. 469 (1989), landmark cases respectively invalidating federal and state affirmative action schemes in government contracting programs, the United States Supreme Court failed to factor into its decisions the operation of motivation and perception in the parties' transactional conduct.

selves) impact both analysis of factual situations and outcome of disputes. My "avoidance" approach\(^{18}\) was tacitly reflective of "colorblindness,\(^{19}\) which at the least would be misleading and, at most, deleterious to the complete comprehension of reasoned analysis.\(^{20}\)

While race and issues of disparity may be tacitly or overtly excluded from discussion, they could not be completely excised given my very presence in the classroom.\(^{21}\) Moreover, the advent of famous United States Supreme Court cases such as *City of Richmond v. J.A. Croson Co.*\(^{22}\) and *Adarand Constructors, Inc. v. Pena,*\(^{23}\) each of which in-

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18. See supra note 2 and accompanying text.
20. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 144-46 (1992) (contradicting the "colorblindness" thesis, Professor Derrick Bell recognizes scholarship that critiques seemingly "race-neutral" legal rules in terms of its impact upon disadvantaged ethnic groups as being endemic to the critical race theory movement).
21. As an African-American male, it seems impossible for the class to ignore concepts of race given my own presence in the classroom. To disregard those perceptions, as well as compromise the analysis, when issues of race were factors in the discussion of controversies was not only ludicrous but academically deficient.
22. 488 U.S. 469 (1989) (O'Connor, J., for a plurality) (invalidating the City of Richmond's minority set-aside program, notwithstanding its success in boosting partici-
cluded contract rights as its genesis and were notoriously familiar to my students, also implored race as a potential issue in contract law.  

petition by minority contractors who had historically been underrepresented in city contracts). In its review of Richmond’s program, the Court mandated that the need for affirmative action in state contracting be clearly and unequivocally established:

Proper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.

Id. at 510 (O’Connor, J., for a plurality).

Those who sought to continue their set-aside programs had to justify their need with studies that empirically and objectively demonstrated either the existence of discrimination, or, at the very least, the “disparate” position of minority contractors in the bargaining context. Id. (O’Connor, J., for a plurality). In effect, the Court established a strict scrutiny standard for such programs, as well as an omnipresent requirement that such programs be narrowly-tailored. See id. (O’Connor, J., for a plurality).

23. 115 S. Ct. 2097 (1995). Pursuant to CROSON, strict scrutiny of minority contracting set-aside programs had been confined to state programs only. See supra note 21 and accompanying text. ADARAND broadened the analysis’ application to encompass federal set-aside programs as well. See ADARAND, 115 S. Ct. at 2098, 2100. In ADARAND, a subcontractor was the low bidder on a solicitation for the installation of guardrails on a federal highway construction project in Colorado. See id. at 2102. Despite its low bid, the subcontractor was rejected by the prime contractor given the latter’s requirement to share a percentage of its contracting work with a minority subcontractor. See id. The prime contractor took this action pursuant to regulations promulgated by the Federal Highway Administration. See id. While the focus of ADARAND was not about set-asides per se, the case impacted such programs through the strict scrutiny challenge of federal regulations that provided incentives for individuals to meet minority contracting goals. See id.

In striking down regulatory incentives for minority participation, the decision in ADARAND imposed more stringent, constitutional scrutiny for federal, race-based set-aside programs. See id. at 2102-05. Federal affirmative action contracting programs that were premised upon racial classifications must have survived strict scrutiny, served a “compelling governmental interest,” and were “narrowly-tailored” to achieve that interest. Id. at 2117. The Court subjected federal programs to the type of heightened scrutiny that had previously been reserved for state and municipal affirmative action programs. See supra note 22 and accompanying text. The federal government could no longer practice affirmative action merely because of a general perception of past discrimination, irrespective of Congress’ proclamation. See ADARAND, 115 S. Ct. at 2117.

24. Responses to ADARAND were diverse. See ASSOCIATED GENERAL CONTRACTORS OF AMERICA ISSUES OPEN LETTER TO PRESIDENT CLINTON, PR Newswire, Oct. 24, 1995, available in LEXIS, News Library. The President of the Associated General Contractors of America thanked President Clinton for suspending prime contract set-asides in order to
News of the *Croson* and *Adarand* decisions and my obvious ethnicity raised my students’ consciousness of race within the context of the pedagogy. Moreover, my original strategy of objectivity became disingenuous given the realities of certain transactions wherein race may be a factor in parties’ decisions about potential bargains. Race may possibly affect decisionmakers’ thought processes in adjudicating contract disputes.  

After discovering this conflict, my teaching methodology incorporated discussions of race and other issues of disparity when they appeared to influence the analysis of contractual rules within given situations.

Issues of race generally conjure thoughts of *Williams v. Walker-Thomas Furniture Co.* and the concept of unconscionability. Yet discussions of issues peculiar to disadvantaged groups are not necessarily confined to unconscionability. Indeed, monumental decisions in the area of contracts, while masked in concepts other than contract theory, implicate various aspects of contractual theory as it relates to the analysis of bargains as a whole.

This Article proposes that those who teach, research, or practice contract law should broaden their perspective to ensure that the dynamics of human perception and disparity based upon race, gender, and class are explored in case analyses when these issues play a role in the

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conform with *Adarand* and urged him to further suspend other preferential measures in government contracting. *See id.* But see *Earl Graves Statement on Adarand Decision*, PR Newswire, June 12, 1995, *available in LEXIS*, News Library. Earl Graves, Publisher and CEO of Black Enterprise Magazine stated that *Adarand* was “far from being the decisive blow on the issue of the merits of affirmative action” and vowed to ensure the decision did not go unchallenged. *Id.*

25. *See infra* notes 71, 150-60 and accompanying text.

26. 350 F.2d 445 (D.C. Cir. 1965); *see infra* Part IV.B. for an analysis of *Williams*.

27. *See infra* notes 180-200 and accompanying text for an analysis of the unconscionability doctrine.

28. *See infra* notes 180-200 and accompanying text.

29. *See supra* notes 22-23 and accompanying text.

30. *See supra* notes 22-23 and accompanying text. Significantly, the Court’s reasoning in *Adarand* and *Croson* focused primarily upon the white contractor’s equal protection rights as guaranteed by the Fifth and Fourteenth Amendments respectfully. *See supra* notes 22-23 and accompanying text. In those cases, the Court appears to have minimized possible influences of perceptual modalities of race by imposing a strict scrutiny standard on evaluations of affirmative action programs designed to rectify past discriminatory practices and compensate for present marketplace biases. *See supra* notes 22-23 and accompanying text.

31. *See infra* notes 148-55 and accompanying text.
analysis of legal rules. When relevant, issues of disparity should be considered and analyzed, not as exclusive determinants, but as possible contributing components to the thought processes that lead to the formation and breakdown of bargains. To ignore matters of race, gender, or any type of disparate treatment because of contract law's objective facade would be both myopic and misleading. Cases should be examined in view of the applicable rules of law, as well as the modalities of perception that influence bargainers in the conception, negotiation ('preformation'), formation, and subsequent performance of contracts.

Raising the specter of human perception in contracting, this Article challenges, or perhaps attempts to enhance, the contemporary contractual paradigm that is presently dominated by traditional or 'classical' contractual notions of personal autonomy and freedom and the objective manifestation of assent. Part II elucidates the paradigm's emphasis on consent and promissory exchange as justifications for the enforcement of bargains. Harbored in the constructs of the classical model, a subset of which is the bargain principle, lies an antithetical paradox. Objective manifestations of assent, together with the existence of exchanged promises, may doctrinally merit enforcement of agreements; yet the essentiality of true or authentic assent should overshadow enforcement of bargains burdened by deleterious opportunism, negative perception, or other distortions of the bargaining process.

Subsequent to the portrayal of the classical model, Part III explores the operation of contractual motivation, a surprisingly ignored phenome-

32. To consider issues of disparity as the sole rationale for all decisions involving individuals so situated could be equally disingenuous. See infra notes 263-70 and accompanying text.
33. See supra note 211-23, 240, 252-62 and accompanying text.
34. See infra notes 154-60 and accompanying text.
35. See infra notes 71-78 and accompanying text.
36. See infra note 66. As a point of clarity, the terms "assent" and "consent" are synonymous terms that may be used interchangeably in this Article. Because they share connotations, the use of either term should not modify the analysis herein.
37. See infra notes 85-95 and accompanying text.
38. See infra notes 60-70 and accompanying text.
39. See infra notes 91-100, 136-39 and accompanying text.
40. See infra note 185 and accompanying text.
41. See infra notes 202-05 and accompanying text.
42. See infra Parts II, IV.
non that significantly impacts the genesis of bargains. Examination of motivation not only provides insight into the formulation of parties’ goals and expectations, but also elucidates the function of perception within the bargaining process. This revelation lays the groundwork for the consideration of race and issues of disparity within transactional processes.

In Part IV, the Article discusses the final leg of the contractual paradigm, paternalism. As a functional nexus between the sometimes harsh consequences of the classical model and the bargain principle, and the operation of disparity within the bargaining context, paternalistic intervention into seemingly valid agreements represents an imperfect yet necessary device which polices the legitimacy of consent. Unconscionability, as a subset of paternalism, is shown as a suitable vehicle for injecting issues of race and disparity into discussions of contractual analysis; however, the doctrine’s suitability for this task is awkward given its amorphous definition. This Article attempts to rectify this problem through an examination of the doctrine’s purpose, which should provide a more cogent justification for the inclusion of disparity issues. The often-discussed case of Williams v. Walker-Thomas Furniture Co. is reviewed by highlighting its surprising de-omission of race in both the facts and reasoning. Scrutiny of the Williams case and the unconscionability doctrine in general should provide insight into ways in which issues of race may be included in a court’s discussion once the foundational relevance of that issue has been established.

Discussion of the contractual paradigm should reveal a critical pos-

43. See infra notes 148-61 and accompanying text.
44. See Morant, Contractual Rules and Terms, supra note 1, at 466-72.
45. See infra notes 154-55 and accompanying text.
46. See infra notes 150-55 and accompanying text.
47. See infra notes 162-85 and accompanying text.
48. See infra notes 71-83 and accompanying text.
49. See infra notes 116-21 and accompanying text.
50. See infra notes 197-201 and accompanying text.
51. See infra notes 162-79 and accompanying text.
52. See infra notes 180-202 and accompanying text.
53. See infra notes 180-202 and accompanying text.
54. See infra notes 186-205 and accompanying text.
55. 350 F.2d 445 (D.C. Cir. 1965); see infra Part IV.B. for an analysis of Williams.
56. See infra notes 206-18 and accompanying text.
57. See infra notes 219-35 and accompanying text.
tulate: comprehension of the dynamic forces that produce a “contract”\textsuperscript{58} create a symbiosis. Individual components of the paradigm tend to coalesce due to their concerted goal of substantiating consent. Despite their seeming irrelevance within the stark rigidity of “renewed” classicism,\textsuperscript{59} matters of race and disparity become inexorable considerations in the enforcement of bargains if genuine consent is at all critical. This push for “true” consent, devoid of cognitive operations of negative perception, supports this Article’s ultimate thesis: when race is pertinent or possibly influential within the analysis of cases, it is imperative, as well as academically honest, for teachers and scholars to consider the impact of race or disparity within discussions of applicable contractual rules.

II. THE DOMINANCE OF CONSENT WITHIN THE CONTRACTUAL PARADIGM

A. The “Triad” of the Contractual Paradigm

Reluctance to include issues of race and disparity in discussions of contractual problems may stem from the rigidity of the bargain principle\textsuperscript{60} that has dominated the law of contract for most of the twentieth century. This has occurred, notwithstanding marketplace inequities that make the blanket applicability of the principle potentially awkward.\textsuperscript{61} Yet the bargain principle,\textsuperscript{62} with its emphasis upon the objective establishment\textsuperscript{63} of assent\textsuperscript{64} and the exchange of promises,\textsuperscript{65} comprises neither the sole genesis of contracts, nor the exclusive rationale for their

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 74-78 and accompanying text.
\item See infra notes 71-84 and accompanying text.
\item See Larry A. DiMatteo, The Norms of Contract: The Fairness Inquiry and the \textquotedblleft Law of Satisfaction\textquotedblright—A Nonunified Theory, 24 Hofstra L. Rev. 349, 361 (1995). DiMatteo provides a detailed explanation of the bargain principle from an historical perspective and quoting Professor Egan’s explanation of its popularity:

The strict bargain principle of contract law developed in response to the rise of the free market. The bargain principle’s real appeal was its ease of administration. Theorists and courts found that rigid rules applied in an objective manner required a lot less inquiry and thought than attempting to inject equity and fairness into a consensual transaction.

Id. at 363 (footnote omitted); see also Eisenberg, The Bargain Principle, supra note 12, at 741; Goetz & Scott, supra note 9, at 1261; infra notes 114-21 and accompanying text.
\item See infra notes 188 and accompanying text.
\item See supra note 60 and accompanying text.
\item See infra note 12 and accompanying text.
\item See infra notes 66-67, 89 and accompanying text.
\item See supra note 60 and accompanying text.
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enforcement.

Transactions generally correspond to a correlative paradigm that contains concepts that work in concert to define the goals, expectations, and performances of the parties. These significant, interrelated concepts that justify the parties’ agreement include: consent, which comprises the parties’ assent to the ultimate bargain and embodies their expectations and comprises an essential foundational element in contract law, motivation, a largely ignored concept within the paradigm, provides the impetus for parties to seek out other bargainers and perhaps sheds light upon the workings of disparity within the bargain; and paternalism, which serves as the decisionmaker’s check on the parties’ motivation and confirms the validity of consent. Comprehension of this triad within the bargaining context not only illustrates the dynamics of the parties’ exchange, but also provides a key to understanding the parties’ goals and expectations. These three concepts also serve to demonstrate the potential operation of disparity within these bargains.

B. Historical Context of Contract Theory

Classical or traditional theory of contract law has as its infrastructure the strict adherence to procedural aspects of bargain formation; as

66. The term “assent” is generally synonymous with the word “consent,” which connotes a party’s cognitive volition to enter into an agreement. See Elizabeth S. Scott, Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy, 1986 Duke L.J. 806, 844 n.131 (illustrating that “assent” has been described as “knowledgeable agreement”). Consent is defined as “willingness in fact for conduct to occur.” RESTATEMENT (SECOND) OF TORTS § 892(1) (1979); see also BLACK’S LAW DICTIONARY 305 (6th ed. 1990) (defining consent as “[a] concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith”).

67. “Consent” or “assent” has been noted to be a key concept in the establishment, and ultimate enforcement, of a contractual arrangement. See Peter H. Schuck, Rethinking Informed Consent, 103 Yale L.J. 899, 900 (1994) (acknowledging that “[c]onsent is the master concept that defines the law of contracts in the United States”).

68. See infra notes 148-61 and accompanying text.

69. See infra notes 162-85 and accompanying text for a more comprehensive delineation of the concept of “paternalism.”

70. The specific identification of motivation, consent and paternalism is not meant to suggest that they comprise the sum total of all concepts within the contractual paradigm. Indeed, other complex notions such as efficiency, breach and damages also play significant roles. This Article, however, focuses on motivation, consent and paternalism, given their particular applicability to, and effect upon, publishing and other similar contracts that contain indemnity provisions.
a result, parties who conformed to the process of forming agreements,\textsuperscript{71} including the requisite elements of mutual assent and consideration, gain security in the axiom that their resultant bargain would be enforced. Such enforcement was inherently mandatory, irrespective of considerations of fairness or marketplace inequities.\textsuperscript{72} Self-governance and private autonomy undergird the classical theory, elaborated by the belief that private parties were in the best positions to fashion bargains appropriate for their needs. As a consequence, there is no need for paternalistic intervention since autonomous individuals, exercising their free will and driven by their own preferences, will ostensibly formulate an agreement which is fitting and deserved.\textsuperscript{73}

This traditional notion imbued in the classicist’s mold developed the "promise" as its focal point, together with need for "consideration."\textsuperscript{74} The reality of intent became a regulatory device through the subjective finding that there must have been a “meeting of the minds” of parties to an enforceable agreement.\textsuperscript{75} Given the inherent difficulties associated with proof and opportunism,\textsuperscript{76} the subjective theory gave way to a more objective determination of assent. Consequently, the intent to contract could be proven through manifestations demonstrated by the parties’ conduct within the context of the bargain’s origination.\textsuperscript{77} Eventually, the objective manifestation of assent, combined with the requirement that the parties mutually exchange promises, formed the bargain principle, which seems to dominate most contractual jurisprudence today.\textsuperscript{78}


\textsuperscript{72} In spite of the rigidity of the classical theory, the presence of such irregularities as duress, fraud, undue influence, would limit or prevent enforcement of the resultant agreement. See 1 E. Allan Farnsworth, Contracts § 3.6, at 168 (2d ed. 1990).

\textsuperscript{73} See id.

\textsuperscript{74} Restatement of Contracts v (1932); see also 1 Samuel Williston, A Treatise on the Law of Contracts § 22 (3d ed. 1957).


\textsuperscript{76} See infra note 185 and accompanying text.

\textsuperscript{77} Restatement (Second) of Contracts §§ 17, 19, 75 (1979).

\textsuperscript{78} See infra notes 85-96 and accompanying text.
The advantages of the bargain principle were readily apparent: it provided certainty and objectivity to the enforcement of bargains. It also appeared to offer a certain simplicity, with emphasis placed upon the contextual manifestations of assent, together with the exchange of promises among the parties.

Cracks in this obdurate doctrine began to surface with the emergence of the "neoclassicists." They believed that certain promises, which were not reciprocated with an exchange of a similar promise, could nonetheless be enforced. Although the neoclassicists retained the spirit of conventional classicism with an allegiance to the creed of individual autonomy and freedom of contract, they also recognized the contextual elements which prevent the absoluteness of the bargain principle. Concepts of fairness and equity became more prevalent in

79. See supra note 12 and accompanying text. See generally Lon Fuller, Consideration and Form, 41 COLUM. L. REV. 799 (1941).

80. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). A promise that could be enforced if it induced reliance under prescribed circumstances is commonly referred to as "promissory estoppel." See id. It has been eschewed as a blow to the reality of true contract. See generally GRANT GILMORE, THE DEATH OF CONTRACT 57 (1974) (stating that "[Holmes' and Williston's] theory of contract . . . [has] . . . gone into its protracted period of breakdown almost from the moment of its birth").

81. The formalism of "freedom of contract" mandates that contracts be enforced as authored by the parties. See Samuel Williston, Freedom of Contract, 6 CORNELL L.Q. 365, 366 (1921) (noting that metaphysical and political philosophers of the late eighteenth century advocated the merit of freedom. Professor Williston also notes that the concept of "freedom" constitutes a definitive base of the Declaration of Independence and remains reflective of Jeffersonian democracy, i.e., thereby facilitating individual action and minimizing governmental activity or interference.); see also Lochner v. New York, 198 U.S. 45, 53 (1905) (indicating that an individual's right "to make a contract in relation to his business . . . [constitutes a] liberty of the individual protected by the Fourteenth Amendment"); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 1-36 (1962); Darby Dickerson, Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments, 41 VAND. L. REV. 129, 138 (1988) (noting that courts will honor parties' freedom to contract, thereby allowing exculpatory clauses absent legislation to the contrary); Duncan Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 570 (1982) (recognizing that "[f]reedom of contract is freedom of the party from the state as well as freedom from imposition by one another"); Note, Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics, 97 HARV. L. REV. 978 (1984). But see Morant, Contractual Rules and Terms, supra note 1, at 469-70 (noting that "[p]resent views of 'the freedom of contract' recognize it may have limitations").

82. See Lon Fuller, Consideration and Form, supra note 79, at 814-17; see also ROBERT E. SCOTT & DOUGLAS L. LESLIE, CONTRACT LAW AND THEORY 149 (2d ed. 1993). Recognition of equitable doctrines such as unconscionability also contributed to
decisions relevant to contractual enforcement. As delineated in greater detail below, closer examination of "renewed classicism" and the bargain principle reveals its critical failure to accommodate realism with the context of the parties' motivation to negotiate and ultimately formulate binding agreements. This finding provides the entree into the examination of the impact of race and other issues of disparity upon the bargain.

C. The Operation of Consent and the Bargain Principle

Bargained-for exchanges are categorized as "contracts" because they appear to involve an exchange of promises. As emphasized by the

diminished adherence to the bargain principle. See infra notes 186-205 and accompanying text.

83. See generally Ralph James Mooney, The New Conceptualism in Contract Law, 74 OR. L. REV. 1131 (1995) (observing that the emerging emphasis upon fairness in contract law paralleled the twentieth century push for equity or the "new vision of government" typified by President John F. Kennedy's election in 1960).

84. See id. at 1132, 1204-06 (1995) (noting the revival of the traditional classical postulate of individualism and autonomy, recognizing a "retreat" from "American contract law['s]" emphasis upon equity and fairness as symbolized in the Adarand and Croson cases, and observing a new "conceptualism" that emphasizes "definitions" categories, and syllogistic logic).

85. See Metro Comm. Co. v. Ameritech Mobile Comm., Inc., 984 F.2d 739, 744 (6th Cir. 1993) (observing that the prerequisites for contract formation are offer, acceptance, and consideration); Tsiatsios v. Tsiatsios, 663 A.2d 1335, 1339 (N.H. 1995) (stating that "[o]ffer, acceptance, and consideration are essential to contract formation"); Serand Corp. v. Owning Realty, Inc., No. C-941010, 1995 WL 653846, at *2 (Ohio Ct. App. Nov. 1, 1995) (stating that the elements of an effective contract are offer, acceptance and consideration); Jenkins v. County of Schuylkill, 658 A.2d 380, 383 (Pa. Super. Ct. 1995) (stating that "[i]t is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds"); see also RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) (defining a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"). The Uniform Commercial Code provides a probative definition of "contract" as the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201(11) (1996). See Orvill C. Snyder, Contract—Fact or Legal Hypothesis?, 21 Miss. L.J. 304 (1950), for a more detailed description of the variety of definitions of the term "contract"; see also Dennis Patterson, The Pseudo-Debate Over Default Rules In Contract Law, 3 S. CAL. INTERDISC. L.J. 235, 236 n.3 (1993) (acknowledging efficiency theory as a descriptive tool in contract law, and adopting the Restatement's definition that "[a] contract is not a certain sort of promise. Rather, a contract is a promise for the breach of which the law provides a remedy").
classical theorists, contract law and its resultant rules have a bifurcated purpose: to sustain bargains that conform to the constraints of these rules; and to ensure that bargains resulted from the parties’ voluntary assent. To a significant degree, a crucial element in the probability of enforcement of these bargains is the reality and genuineness of the parties’ assent. Consent or manifestation of assent to a bargain comprises a compulsory, if not dispositive element of their agreement. Authentic consent also establishes the parties’ expectations which are derivatively associated with their motivational goals.

The notion of assent relates directly to the concept of voluntariness within the bargaining process. Consensual arrangements should be enforced if the parties’ entry into the bargain was truly voluntary. This requirement comprises a credo of the classic theorists who place significant emphasis upon the manifestation of assent and the presence of consideration. If these latter two elements are present, strict enforce-

86. See supra notes 71-78 and accompanying text.
87. See Robert A. Hillman, An Analysis of the Cessation of Contractual Relations, 68 CORNELL L. REV. 617, 653 (1983) (stating that “the very purpose of a contract is to ensure performance”); Steven R. Salbu & Richard A. Braham, Strategic Considerations in Designing Joint Venture Contracts, 1992 COLUM. BUS. L. REV. 253, 305 (noting that the purpose of contract law is “perform[ing] the traditional legal role of enunciating the terms [in the contract] . . . and helping to ensure performance or to fashion a remedy in the absence of performance”); see also Henry N. Butler & Barry D. Baysinger, Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transactional-Cost Economics, and Organization Theory, 32 EMORY L.J. 1009, 1038-39 (1983) (noting that “the underlying principle of both the classical and neoclassical [contract law] systems is that the function of a system of law is ‘to enhance the utilities created by choice-generated exchange but not necessarily those created by other kinds of exchange,’” such as restructuring a contract, long after the offer and acceptance to uphold the relationship of the contracting parties (quoting Macneil, Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 NW. U. L. REV. 854, 872 (1978) (footnote omitted))).
88. See 1 E. ALLAN FARNSWORTH, CONTRACTS, supra note 72, § 3.1, at 160 (stating that “[t]he first requirement [for a valid contract]. . . . of assent, is implicit in the principle that contractual liability is consensual”); see also JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 29, at 51 (3d ed. 1990) (observing that “[a] basic question of contract law is whether two or more parties arrived at an agreement, i.e., whether the parties have expressed their mutual assent concerning their future conduct”).
89. For the purposes of this Article, the terms “consent” and “assent” are synonymous, and, therefore, share the same connotation.
90. See infra note 96.
91. See infra notes 130-61 and accompanying text for more discussion of the operation of motivation within the contractual paradigm.
92. See supra notes 71-83 and accompanying text. My assertions here are not
ment of the resultant agreement must ensue. Employment of rules relevant to contract law implicitly reflect the belief that their utilization will provide an enforcement mechanism for their proposed allocation of risks. Such rules will commensurately protect the proposed bargain.\textsuperscript{94} Consent comprises a resultant manifestation of the freedom of contract notion.\textsuperscript{95}

Genuine "consent" to a bargain can be viewed as the moralistic foundation for the enforcement of voluntary exchanges.\textsuperscript{96} Perhaps the most ardent supporter of the significance of consent within the bargaining process must be Professor Randy E. Barnett.\textsuperscript{97} To Barnett, the consent theory of contract not only undergirds the "objective" approach to the determination of contractual intent, but also comprises a more effective determinant of contractual obligations.\textsuperscript{98} Of course, other theories of contractual obligation, including party-based theories (such as will and reliance theories); standards-based theories (such as efficiency and fairness); and process-based theories (such as bargain theory), enjoy sig-

\textsuperscript{93} See supra notes 71-83 and accompanying text.

\textsuperscript{94} See Goetz & Scott, supra note 9, at 1265 (noting that "bargained-for" promises tend to maintain the "value-enhancing" exchanges between the parties). Professors Goetz and Scott state that "[s]uch promises are thus seen as fully enforceable under the compensation rule in order to protect and encourage value-maximizing resource allocation." See id.; see also RESTATEMENT (SECOND) § 76, cmt. b (1979) (noting that "[b]argains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action and exercise of judgment and as a means by which productive energy and product are apportioned in the economy"); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 442 (4th ed. 1971).

\textsuperscript{95} See supra text accompanying notes 60-129.

\textsuperscript{96} See Randy E. Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 291-94, 297-309 (1986) [hereinafter Barnett, A Consent Theory of Contract] (providing a compelling argument that the "consent theory" of contracts constitutes a "moral component that distinguishes valid from invalid rights transfers" of alienable rights); Randy E. Barnett, . . . And Contractual Consent, 3 S. CAL. INTERDISC. L.J. 421, 424 (1993) [hereinafter Barnett, Contractual Consent]. Professor Barnett further states that the consent theory not only provides a foundation for the "objective" approach to the determination of contractual intent, but also constitutes a more effective theory to substantiate the enforcement of bargained for exchanges. See id. at 430, 435-37; see also supra note 67.

\textsuperscript{97} See Barnett, A Consent Theory of Contract, supra note 96, at 291-300 (arguing that the "consent theory" constitutes a moral component that distinguishes valid from invalid transfers of alienable rights).

\textsuperscript{98} See id. at 291-94, 297-309.
nificant support.99 These theories accurately portray an aspect of the contractual obligation, however, they include fundamental shortcomings such as definitional ambiguities, and vague parameters such as reasonableness or public policy. As a result, Professor Barnett emphasizes the utility of the consent theory of contract, which not only adopts an objective approach to discerning contractual intent, but also fosters a mandate of enforceability that avoids the need to deal in vague concepts.100

To this author, the consent theory morally refines the freedom of contract notion and, thereby, relates compatibly with the neoclassical theory of contracts.101 As a result, Barnett’s depiction of the consent theory complements the evaluative process commensurate with that of the neoclassicists;102 that is, enforceability based upon the reality of assent. The genuineness of that assent, however, may be questionable given certain externalities.103

Of course, the enforcement of bargains may be justified by other theories,104 yet the reality of assent represents a critical consideration in the viability of seemingly efficacious bargains.105 Acknowledgment of this factor, however, does not evince that consent represents the sole arbiter of enforcement. Economic and relational theories of contract

99. See id.
100. See id.
101. See supra notes 71-78 and accompanying text.
102. See supra notes 71-78 and accompanying text.
103. See infra notes 191-205 for a discussion of unconscionability.
104. See Barnett, A Consent Theory of Contract, supra note 96, at 271-91. For an excellent survey of the various theories, such as efficiency, relational, and consent theory, which are relevant to the enforcement of contractual obligations, see generally Symposium, Default Rules and Contractual Consent, 3 S. CAL. INTERDISC. L.J. 1 (1993) (providing a comprehensive and thorough review of the various theories of contract as they relate to default rules).
105. See 1 E. ALLEN FARNSWORTH, supra note 72, § 3.1, at 161. This, of course, does not signify a rejection of “consideration” as a concept affecting enforceability of bargains. See Calamari & Perillo, supra note 75, at 185-87 (stating that one of the fundamental precepts of contract law is that consideration is required for the enforcement of an enforceable contract as well as any subsequent modifications or agreements); Susan L. Martin, Note, Platinum Parachutes: Who’s Protecting the Shareholder, 14 HOFSTRA L. REV. 653 (1986) (reinforcing the notion that, according to common law, an enforceable contract requires consideration).

With regard to contract modifications, the black letter rule is that a contract may not be modified without consideration. See United States v. Stump Home Specialties Mfg., 905 F.2d 1117, 1121 (7th Cir. 1990); Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1285 (7th Cir. 1986); see also infra Part IV, notes 162-270 and accompanying text.
may also yield factors which support enforcement of certain bargains.\textsuperscript{106} In fact, the push for true or legitimate consent comports with the neoclassical theory of contract law which seeks to enhance and facilitate voluntary exchanges.\textsuperscript{107}

In many bargains, the existence of consent may appear self-evident. B, buyer, contracts with S, seller, to provide a widget for B’s use. The

\begin{flushright}
106. See Morant, \textit{Contractual Rules and Terms, supra} note 1, at 496-502 (delineating relational theory as justification for the elimination indemnification provisions in publication contracts).

107. Barnett’s concept of consent theory is compatible with the neoclassical theory of contract law. See Barnett, \textit{A Consent Theory of Contract, supra} note 96, at 297-309. I am quite moved by Professor Barnett’s view of the importance of consent as a legitimizing force behind the enforcement of bargained for exchanges. See also Barnett, \textit{Contractual Consent, supra} note 96, at 444. The author states that:

\begin{quote}
a consent theory of contract is a theory \textit{about} law to be sure. But if it is a correct view of justice and if our contract law happens as a contingent matter to be basically just, then a consent theory of contract is, in some sense, \textit{of} the law of contracts as well. . . .
\end{quote}

I maintain (though I could be wrong) that lurking beneath our law of contract is a tacit understanding that obligations should not, except in extraordinary situations, be imposed on persons without their consent. Barnett, \textit{Contractual Rules and Terms, supra} note 96, at 444.

I advance a hybrid notion that the neoclassical theory of contract is compatible with the consent theory postulated by Professor Barnett. Yet, I acknowledge the applicability of efficiency notions that enters into many bargains. See \textit{id.} at 428. Economic analysis encompasses the notions of efficiency that “may provide us with consequentialist reasons why consent is a prerequisite of contract that, taken together with other reasons, provide a normative justification for requiring such contractual consent.” \textit{Id.; see also} Richard Cruswell, \textit{Default Rules, Efficiency, and Prudence, 3 S. Cal. Interdisc. L.J.} 289, 296-97 (1993) (indicating that the individual parties to a transaction are in the best position to determine what choices are more suitable for their needs and therefore provide a better determinant of what is efficient).

While I subscribe to the preliminary importance of consent as a justification for enforcement of the bargain, I also acknowledge other factors, such as efficiency, which may also be probative. As noted by an astute observer, the Empire State Building may not have been completed if every single aspect of every agreement needed in the construction of that building had to be documented by clear and expressed consent to each and every aspect. It is interesting to note that Professor Barnett also recognizes the applicability of efficiency notions in the enforcement of contracts. See Barnett, \textit{Contractual Consent, supra} note 96, at 428 (“[E]conomic analysis may provide us with consequentialist reasons why consent is a prerequisite of contract that, taken together with other reasons, provide a normative justification for reacquiring such contractual consent. But a consent to be legally bound is what gets contract off the ground . . . .” (footnote omitted)). I recognize a certain hybrid consent wherein consent remains the paramount consideration with regard to enforceability.
initial impression leads to the assumption that assent is manifest, particularly if their bargain is reduced to writing. S creates a pre-form agreement, replete with complex terms and conditions designed to protect S’s interests and hopefully fulfill B’s basic expectations. B presumably reads and understands this document; both parties sign the agreement. Each believes that their motivational goals will be realized, irrespective of the objective manifestation of their bargain—a pre-formed contract. Yet that realization may be illusive at best once performance occurs.

Voluntary transactions, similar to the bargain between B and S above, often strive, through terms of an agreement, to allocate duties and liabilities. Various legal principles tend to guide such allocations. The common law of torts comprises a dominant tool that dictates how duties and liabilities are allocated. Tort law requires that tortfeasors who violate the rules of negligence compensate the victim(s) of their breach(es) of duty. Parties to an agreement often attempt to alter traditional tort law allocation of duties and liabilities through consummation of an agreement, which redistributes these liabilities. Employ-

108. This hypothetical is loosely based on the facts of Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). See infra notes 197-270 and accompanying text which details the facts of the case. The key point that I wish to make here is that objective manifestations of intent can be misleading. Indeed, the reality of assent may be confirmed through the examination of contextual factors, such as the parties’ bargaining positions, their comprehension of the nuances of the transaction, and the operation of their cognitive perceptions. See infra notes 197-270 and accompanying text.

109. See Jones III v. United Metal Recyclers, 825 F. Supp. 1288, 1294 (W.D. Mich. 1993) (indicating that an individual consumer’s tort remedy is derived either from a duty imposed by law or from policy considerations that allocate the risk of dangerous and unsafe products to the manufacturer and seller rather than the consumer); see also PROSSER, supra note 94, at 399-442; Troy McNemar, Publisher Liability for Torts Arising from Advertisements: Eimmann v. Soldier of Fortune Magazine, Inc., 39 U. KAN. L. REV. 477, 477 (1991) (“Citizens of the United States depend on the judicial system to compensate them when they are injured by another’s unreasonable conduct. The law of torts allocates these losses to the party that is responsible for the injury.”); Glenn G. Morris, Business Associations, 50 LA. L. REV. 211, 215 (1989) (noting that duties are imposed under tort law generally to avoid or at least properly allocate the economic loss of personal injury).

110. The cause of action for negligence generally includes: a duty owed by the tortfeasor to the victim to exercise a prescribed standard of care; a commensurate breach of that duty; a causal link between the breach of duty; and the resultant injury. Generally, the claimant must prove all of these elements in order to recover under a cause of action of negligence. See RESTATEMENT (SECOND) OF TORTS § 281 (1965); see also Merten, v. Nathan, 321 N.W.2d 173, 177 (Wis. 1982).
ment of contractual principles\textsuperscript{111} enables the parties to adjust the common law tort allocations of risks associated with their proposed transaction.

Parties allegedly gain security through compliance with these principles by mandating that breach of their modified agreement will result in compensatory damages.\textsuperscript{112} In his article regarding the enforceability of bargain promises, Professor Melvin Aron Eisenberg stresses that modern contract law focuses on which promises are enforceable, and to what extent such promises should be enforced.\textsuperscript{113} The paradigmatic bargain principle,\textsuperscript{114} which espouses the premise “that damages for the unexcused breach of a bargain [or] promise should invariably be measured by the value that the promised performance would have had to the plaintiff, regardless of the value for which the defendant’s promise was exchanged[,]”\textsuperscript{115} attempts to address these omnipresent questions of enforceability.

Efficiency and fairness are imbued in this concept. Emphasis is

\textsuperscript{111} The Restatement (Second) of Contracts (1979) defines a “contract” as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement (Second) of Contracts § 1 (1979). The fundamental purpose of a contract is to preserve a party’s bargain and to serve as a tangible embodiment of the party’s voluntary assent to the contract’s terms. See Hillman, supra note 87, at 653 (stating that “the very purpose of a contract is to ensure performance”); Salbu & Brahm, supra note 87, at 305 (noting that contracts “perform the traditional legal role of enunciating the terms . . . and helping to ensure performance or to fashion a remedy in the absence of performance”).

\textsuperscript{112} See Melvin Aron Eisenberg, Expression Rules in Contract Law and Problems of Offer and Acceptance, 82 Cal. L. Rev. 1127, 1178 (1994) (“Under the principles of contract law, the moment a contract is formed each party is subject to liability for expectation damages for breach, even if the breach consists of repenting or recanting only hours or even minutes after the contract was formed.”); Howard Gensler, The Competitive Market Model of Contracts, 99 Com. L.J. 384, 391 (1994) (“In contract law, damages are awarded for breach where performance of the contract is materially substandard, incomplete or absent.”); see also Howard O. Hunter, Modern Law of Contracts ¶ 1.03, 7.02 (1986); Miguel Deutch, Reliance Damages Stemming from Breach of Contract: Further Reflections and the Israeli Experience, 99 Com. L.J. 446, 451 (1994) (“The law of Contract compensates a plaintiff for damages resulting from the defendant’s breach. It does not compensate a plaintiff for damages resulting from his making a bad bargain.”) (quoting Bowlay Logging Ltd. v. Domtar Ltd., [1978] 4 W.W.R. 105, 117).

\textsuperscript{113} See Eisenberg, The Bargain Principle, supra note 12, at 741; see also Goetz & Scott, supra note 9, at 1261.

\textsuperscript{114} See supra note 60 and accompanying text.

\textsuperscript{115} Eisenberg, The Bargain Principle, supra note 12, at 798-99.
placed upon the enforcement of agreements if objective assent is manifested.\textsuperscript{116} It must be understood, however, that the bargain principle\textsuperscript{117} is difficult to effectuate in "real world" contexts. Often transactions that satisfy its constraints must be policed by such mechanisms as unconscionability.\textsuperscript{118} Implementation of contract principles can affect either the entire bargain or particular provisions therein.\textsuperscript{119} In keeping with the realism imbued in neoclassicism,\textsuperscript{120} agreements, albeit seemingly voluntary in the objective sense, can be subject to restriction if, for example, they abridge some regulatory requirement such as unconscionability.\textsuperscript{121}

One factor the classicists fail to appreciate, however, is that consent is not formed in a sterile environment, protected from pejorative external influences. Human frailties such as prejudice,\textsuperscript{122} negative opportunism,\textsuperscript{123} avarice, and bias may work to skew the assent of either the offeror or offeree. Such influences may impact the reality of assent, thereby bringing into question the propriety of enforcement. Appreciation of this reality reflects the more modern neoclassical theory of contract law,\textsuperscript{124} which advocates adherence to traditional notions of contractual requirements, yet acknowledges the need for flexibility to accommodate impediments within the bargain process, such as incapac-

\textsuperscript{116} See id. at 798-801.
\textsuperscript{117} See supra notes 71-78 and accompanying text.
\textsuperscript{118} See Eisenberg, supra note 12, at 798-801; see also infra text accompanying notes 191-205 for a discussion of unconscionability as it relates to the enforcement of the parties’ bargain.
\textsuperscript{119} See Morant, Contractual Rules and Terms, supra note 1, at 477-78 for an example of the effect of contract principles upon contractual terms.
\textsuperscript{120} A significant amount of scholarship has been dedicated to the neoclassical theory of contract law as it relates to the traditional, contractual paradigm. See Eisenberg, The Responsive Model, supra note 12, at 1111 (indicating that the neoclassical contract theory should be elaborated on in order to ensure that the theory encompasses principles which are "intellectually coherent and sufficiently open-textured to encompass the complex and evolving realities of contract as a social institution"). See generally Eisenberg, The Bargain Principle, supra note 12, at 741; Eisenberg, Donative Promises, supra note 12, at 1; Eisenberg, The Principles of Consideration, supra note 12, at 640.
\textsuperscript{121} See infra notes 191-205 and accompanying text; see also infra notes 141-61 and accompanying text for other phenomena, such as duress, capacity, undue influence, fraud, etc., that regulate the bargain.
\textsuperscript{122} See infra note 240 and accompanying text.
\textsuperscript{123} See infra notes 183-85 and accompanying text.
\textsuperscript{124} See supra notes 12, 79-83 and accompanying text.
ty, or unconscionability. The neoclassical theory facilitates truly voluntary exchanges through evaluation of the parties’ manifestation to bargain. Consequently, true and valid consent must be considered in conjunction with the motivation of the parties, and the possible need for paternalistic intervention to assist those parties whose voluntariness was tainted by pejorative influences.

III. INTERSECTION OF MOTIVATION AND CONSENT WITHIN THE PARADIGM

As discussed in Part II, the present contractual paradigm places emphasis on the validity of assent. This is not untenable given the logical premise that bargains should not be enforced unless parties voluntarily consented to their terms. As generally premised in the classi-

125. See infra note 142 and accompanying text.
126. See infra notes 188-200 and accompanying text.
127. See Feinman, supra note 12, at 1285-89 (providing a detailed explanation of the neoclassical theory of contract law); see also Farber, supra note 12, at 319-22 (providing a cogent explanation of the “neoclassical” model of contract theory, which, inter alia, supports the enforcement of bargained promises); Williamson, supra note 12, at 235-38 (noting not only the characteristics of neoclassical theory, but also delineating the distinctions between neoclassical theory of contract law, classical theory of contract law and relational contracting). Until recently, it was thought that neoclassical theory had supplanted the classical theory as an interpretative approach to contract law, however, the City of Richmond v. J. A. Croson Co. and Adarand Constructors, Inc. v. Pena opinions give rise to the notion that the rigid formalism championed by the classicists has reemerged. See supra Part I.

Although not discussed fully in this Article, other theories, such as critical analysis and economic analysis, may also be probative of the operation of contract law. See generally, Farber, supra note 12, at 303; Jay M. Feinman, Critical Approaches to Contract Law, 30 UCLA L. REV. 829 (1983); Goetz & Scott, supra note 9, at 1261; Robert A. Hillman, The Crisis in Modern Contract Theory, 67 TEX. L. REV. 103 (1988); Meurer, supra note 9, at 1.

128. Consequently, the neoclassical theory of contract law provides an operational framework in which economic transactions may be fully facilitated in the marketplace. See Feinman, The Significance of Contract Theory, supra note 12, at 1288. See infra notes 162-85 and accompanying text (noting that the concept of paternalism, at least in theory, functions to ensure that the transaction entered into by the parties was voluntary and, therefore, that the consent was authentic).

129. Given the “moralistic” component of assent as delineated by Professor Barnett, see supra notes 96-101 and accompanying text, ensuring its reality through the consideration of negative influences such as bias, prejudice, and disparity, seem appropriate if not compulsory. Therefore, consideration of consent in conjunction with motivation and paternalism becomes de riguer.

130. See supra notes 66-70 and accompanying text.
131. See Mooney, supra note 83, at 1136-37 (depicting the American contract
tical theory of contract,\textsuperscript{132} strict adherence to the formalism of consent yields a rigid evaluative mechanism; but this very notion eschews consideration of impediments related to race and disparity.\textsuperscript{133}

Voluntariness is often equated with the ideal of contractual freedom which may be a spurious concept at best.\textsuperscript{134} Consequently, one may argue that bargainers should be free to contract with whomever they please. This inalienable right should arguably allow an individual to summarily or deductively reject offers without cause. Correlatively, such freedom supports the voluntariness of assent to the agreement with the "preferred" bargainer.

Motivation, which is operative in the preformative stages of contract, has a similar impact. Bargains born through, or resulting from, the ambit of diminished bargaining power, negative stereotype\textsuperscript{135} and prejudice\textsuperscript{136} have as their genesis a somewhat tainted and untrue assent (the disadvantaged party's), which was not derived from a freely objective milieu. Particularly with stereotype\textsuperscript{137} and prejudice,\textsuperscript{138} the advantaged party's assent may appear true, yet must be viewed skeptically given the influence of negative factors upon the bargain as a whole. In other words conscious assent born of negative stereotype\textsuperscript{139} is tantamount to dubious assent which, at a minimum, should be subject to check.\textsuperscript{140}

The overall quality of assent can be impacted by a variety of phenomena, such as duress,\textsuperscript{141} incapacity,\textsuperscript{142} undue influence,\textsuperscript{143}

\textsuperscript{132} See supra notes 60-70 and accompanying text.

\textsuperscript{133} This premise reflects the classical view of contractual validity. The rigid adherence to the bargain principle emphasizes the "manifestation intent" regardless of possible negative influences which led thereto. Myopic focus upon consent, and the companion doctrine of contractual freedom, likely prompts decisionmakers to resist remedial efforts designed to ameliorate the adverse effects of racism within the bargaining sphere. See Mooney, supra note 83, at 1206-07. This phenomenon also serves to subvert issues of race within the pedagogy of contracts, since the operation of disparity is recognized as a tangential influence upon consent. See supra notes 60-70 and accompanying text.

\textsuperscript{134} See infra notes 81, 88-103 and accompanying text.
\textsuperscript{135} See infra note 231 and accompanying text.
\textsuperscript{136} See infra note 232 and accompanying text.
\textsuperscript{137} See infra note 231 and accompanying text.
\textsuperscript{138} See infra note 232 and accompanying text.
\textsuperscript{139} See infra note 231 and accompanying text.
\textsuperscript{140} This realization also prompted me to include discussions of race and disparity when relevant to contract formation or adjudication.
\textsuperscript{141} Duress constitutes an "unlawful threat or coercion used by a person to induce
fraud, \(^{144}\) and other impediments to voluntariness. These “preformation” issues, \(^{145}\) which have their genesis in motivational elements such as negative opportunism \(^{146}\) and prejudice, \(^{147}\) tend to influence, if not tinge assent, thereby casting the parties’ voluntariness in a dubious light. As a result, validity of assent must be verified through a broad-

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

142. A person is incapacitated when she is unable to exercise the legal power a normal person would under the same circumstance. See RESTATEMENT (SECOND) OF CONTRACTS § 12, cmt. a (1981). For a contract to be void on the ground of mental incapacity, the person, at the time the contract was entered into, “had no reasonable perception or understanding of the nature and terms of the contract.” Lloyd v. Jordan, 544 So. 2d 957, 959 (Ala. 1989) (quoting Williamson v. Matthews, 379 So. 2d 1245, 1247 (Ala. 1980)).

143. Undue influence is “[p]ersuasion, pressure, or influence short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.” BLACK’S LAW DICTIONARY 1528 (6th ed. 1990). However, the mere existence of a confidential relationship does not create a presumption that undue influence was exercised. See Bradbury v. Rasmussen, 401 P.2d 710, 715 (Utah 1965). The party alleging undue influence must prove it by clear and convincing evidence. See id.; see also Armstrong v. Anderson, 417 P.2d 326, 328-29 (Okl. 1966).

144. Fraud is “[a]n intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing . . . or to surrender a legal right.” BLACK’S LAW DICTIONARY 660 (6th ed. 1990). A statement is fraudulent if the maker intends the statement to induce manifestation of assent and the maker knows that the statement is not in accord with the facts, implies the truth of the statement, and knows that he does not have a basis for the assertion. See RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981). Like undue influence, the person alleging fraud must show it by clear and convincing evidence. See Armstrong, 417 P.2d at 328-29.

145. Issues of “preformation” include those questions occurring before, or at the time of, the bargain’s consummation.

146. See infra note 183 and accompanying text.

147. See infra note 232 and accompanying text.
ened review of preformation regulatory phenomena to include those motivational elements which potentially impact assent.

Of course, bargains may involve a variety of motivating factors, not all of which are negative. Many parties to potential agreements often pursue bargains in an effort to maximize personal gain.\textsuperscript{148} At some level of consciousness, some bargainers may also pursue these transactions in order to realize other indirect or intangible benefits to society as a whole. These "intangibles," or in some instances by-products, spur the parties to entice other potential bargainers to enter an agreement that will fulfill their mutual expectations and goals.\textsuperscript{149} Regardless of


This is not to suggest, however, that gain (similar to wealth) maximization comprises the sole rationale for the consummation of bargains. Indeed, other factors, such as utility, may also encourage individuals to bargain. For criticisms of wealth maximization, see Jules L. Coleman, Efficiency, Utility and Wealth Maximization, 8 Hofstra L. Rev. 509, 526 (1980) ("Unfortunately, the system of wealth maximization has its fair share of drawbacks—many of which arise because of the conceptual or logical connection of wealth maximization to the existence of prices."); Whitney Cunningham, Testing Posner's Strong Theory of Wealth Maximization, 81 Geor. L.J. 141, 142 (1992) (observing wealth maximization's failure as a "public decisionmaking criterion" and noting "the limits of economics as a theoretical discipline"); Herbert Hovenkamp, Positivism in Law & Economics, 78 Cal. L. Rev. 815, 826 (1990), who notes that:

One can criticize the argument for wealth maximization as a foundation for legal policy in two different ways. First, one can dispute the proposition that identifying the state of affairs that maximizes wealth is a purely positive endeavor. Second, one can argue that neither wealth maximization nor any other version of allocative efficiency captures all that the legislative policymaker has in mind when he speaks of the welfare, or 'well-being,' of individuals in the legal community.


\textsuperscript{149} See Morant, Contractual Rules and Terms, supra note 1, at 467 (delineating
its goal, motivation\textsuperscript{150} propels the parties toward a prospective bargain and ultimately contributes to the realization of their goals.

Consummation of a conceivable agreement requires potential bargainers who are motivated to enter into such a relationship. Few acknowledge motivation as a significant force in the formation of resultant bargains.\textsuperscript{151} It has been obliquely referenced as a factor in the possible tortious liability for breach of the duty of good faith and fair dealing in employment contracts.\textsuperscript{152} Most notably, motivation has a pejorative connotation when the bargain was formulated under the veil of unconscionability or some other cloud upon the consent of the disadvantaged party.\textsuperscript{153} Yet motivation has broader implications in the

\textsuperscript{150} In the interest of clarity, the term “motivation” generally refers to the incentive or motive to contract. WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 772 (1984). I adopt the term motivation as a concept in the bargaining process to denote the driving force that compels the parties to seek out and ultimately consummate a bargain or bargains with other parties.

\textsuperscript{151} See Ronald K. Chen, Once More Into the Breach: Fact Versus Opinion Revisited After Milkovich v. Lorain Journal Co., 1 SETON HALL CONST. L.J. 331, 361-62 (1991) (“[T]he law generally does not deem itself competent to judge motivation, the ultimate extension of state of mind, and thus avoids its definition altogether. . . . Contract law of course purports to avoid subjective state of mind altogether in determining contract formation, and particularly eschews motivation.”). See generally Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814-15 (7th Cir. 1987) (stating that with regard to contract formation, the “[s]ecret hopes and wishes [of the parties] count for nothing,” because “[t]he status of a document as a contract depends on what the parties express to each other and to the world, not on what they keep to themselves”); B. Morris Martin, Contracts, 45 MERCER L. REV. 109, 117 (1993) (indicating that there is a “familiar principle of law that one’s motive,” to enter into a contract, “is irrelevant as long as his actions are legal”).

\textsuperscript{152} See Wallis v. Superior Court, 207 Cal. Rptr. 123, 129 (Cal. Ct. App. 1984); see also Miller v. Fairchild Indus., Inc., 797 F.2d 727, 735 (9th Cir. 1986); Freeman & Mills, Inc. v. Belcher Oil Co., 33 Cal. Rptr. 2d 585, 594 (Cal. Ct. App. 1994) (stating that an action in tort will not lie for bad faith denial of an employment contract unless the party bringing the action can prove, inter alia, that “the motivation for entering the contract must be a nonprofit motivation, i.e., to secure peace of mind, security, [and] future protection”); Okun v. Morton, 250 Cal. Rptr. 220, 233 (Cal. Ct. App. 1988) (agreeing with the court’s holding in Wallis that in order for one of the parties to state a cause of action for tortious breach of the implied covenant of good faith and fair dealing, one characteristic that must be present in a contract is that “the motivation for entering the contract must be a nonprofit motivation, i.e., to secure peace of mind, security, [and] future protection”).

\textsuperscript{153} See generally Frank J. Cavico, Jr., Punitive Damages for Breach of Contract—A Principled Approach, 22 ST. MARY’S L.J. 357 (1990); see also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (indicating that the private beliefs and
transactional process. It comprises a powerful, cognitive starting point for parties who contemplate the need for an agreement and seek out others who desire bargains that foster their mutual goals. As a result, motivation crystallizes the parties’ goals that are ultimately converted into expectations once assent to a bargain occurs.

In cases where issues of disparity become critical, the advantaged party to a potential bargain may modify his customary contractual terms due to his perception of the disadvantaged party’s limited ability to perform the ultimate agreement.\(^\text{154}\) Regardless of the merit of this assumption, the party formulates his assent based upon his subjective or objective assessment of the disadvantaged party. Of course, the magnitude and cognitive acceptance of any negative perception\(^\text{155}\) may cause the advantaged party to reject the bargain altogether.

One may find the advantaged party’s modification of customary bargaining terms or the refusal to bargain with the disadvantaged party as manifestations of risk aversion.\(^\text{156}\) This prompts the advantaged par-

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\(^{155}\) “Negative perception” may also constitute stereotype, a learned or otherwise acquired group association, or prejudice, a cognitive acceptance, and actions upon, negative perception. See infra notes 231-32 and accompanying text.

ty to demand more when faced with the enhanced probability of losing some or all of his investment in the event of nonperformance by the disadvantaged party. Yet the advantaged party’s primary rationale for negotiating more stringent terms may likely relate to his pejorative perception\textsuperscript{157} of the disadvantaged party and adherence to negative beliefs which may be substantiated by that perception.\textsuperscript{158} Herein lies justification for policing the ultimate bargain—assent to a bargain, formed within the auspices of negative and erroneous perceptions, may likely constitute disingenuous assent which should therefore prompt review of any resultant contract.\textsuperscript{159}

Nonetheless the advantaged party may believe that his and the disadvantaged party’s consent is genuine; however, the possible erroneous cognitive premises he used to fashion the bargain obfuscate authentic consent. Consequently, the bargain should be scrutinized to police not only the disadvantaged party’s lack of choice that casts doubt upon her assent, but also the advantaged party’s motivations influenced by accepted negative perceptions.\textsuperscript{160}

Motivation, as a possible, pivotal element of the contractual paradigm, embodies an academically ignored, yet omnipresent phenomenon. Not only can it greatly influence ultimate bargains, but it also delimits the parties’ goals, which ultimately project their expectations. Motivation comprises a precursory element of the ultimate parties’ bargain. It may further provide the justification and necessity to analyze the legitimacy of transactions impacted by issues of race and disparity.\textsuperscript{161}

\textsuperscript{157} See supra note 155 and accompanying text; see also infra notes 231-62 and accompanying text.

\textsuperscript{158} See infra notes 231-32 and accompanying text.

\textsuperscript{159} See infra notes 236-40 and accompanying text. Lack of choice on the weaker party’s part is commonly associated with unconscionability. See infra notes 180-200 and accompanying text. Yet that doctrine deals ostensibly with the issue of fairness during the formation stage of the transaction. It fails to take into account cognition and perceptual factors that may prompt the more powerful party to formulate a more onerous bargain in the first place. Consequently, a discussion of disparity, if confined to unconscionability’s conventional definition and parameters, would not guarantee that relevant issues associated with race would be included.

\textsuperscript{160} See infra notes 231-62 and accompanying text.

\textsuperscript{161} See infra notes 197-205, 219-35, 253-62 and accompanying text.
IV. *Operation of Paternalism Within the Paradigm*

A. Paternalism as a Check on Motivation and a Verifier of Consent

Demonstrative unfairness within the bargain or its formation may prompt intervention to protect, secure, or relieve the disadvantaged party, or protect third parties adversely impacted by its implementation. Such intervention reflects paternalism, which encompasses formalistic measures designed to temper such adverse behavior.162 Given its ubiquity within the bargain and its application by an authority (the decisionmaker) who was external to the transaction, paternalism comprises a unique force within the transactional process. It is often characterized by a legal rule or action which has a protectionist goal.

Paternalistic intervention monitors enforcement of seemingly valid bargains that offend sensibilities rooted in justice and equity. Two concepts within the contractual paradigm justify paternalistic adjustment of bargains: authenticity of consent and the pejorative impact of negative motivational forces. An omnipresent consideration in the application of paternalistic principles is the harsh impact of the agreement on the disadvantaged bargainers or third parties. This protectionism justifies the use of paternalism, but can exacerbate confusion and unevenness associated with its application.163

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162. See Hugh Collins, *The Law of Contract* 116 (1986) (adopting a rather narrow definition of paternalism in contract law and stating that paternalism appears in modern contract law as a means of preventing strong parties from dominating weaker parties); Donald VanDeVeer, *Paternalistic Intervention: The Moral Bounds on Benevolence* 12 (1986) ("A paternalistic act is one in which one person A, interferes with another person, S, in order to promote S's own good."); Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 712, n.9 (1992) (providing sources that attempt to define paternalism); Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1372 (1995) ("Paternalism is often defined as an exercise of control over an individual that purports to be implemented in the interests of that individual, either overriding or filling in for unreliable or nonexistent individual choices.") (footnote omitted). Kennedy, *supra* note 81, at 572 (defining paternalism to include all government intervention that purports to replace the will of a party with what the decisionmaker thinks is better for the party); see also *infra* notes 169-73, 184 and accompanying text.

163. Legal scholar Duncan Kennedy provides a comprehensive examination of "paternalism" as it relates to the regulation of the bargaining process. Paternalism, which manifests "empathy" or "love," "involves compelling a decision [which generally is not in accord with the original bargain] on the ground that it is in the beneficiary's best interest." Kennedy, *supra* note 81, at 624-25. Consequently, the decision maker alters the original bargain entered into when paternalistic concerns dictate that the bargain is somewhat flawed. See *id.*
Paternalism operates externally; that is, its invocation by decisionmakers who are not parties to the agreement generally occurs subsequent to contract formation. As a result, any "adjustment" to the bargain may alter the original substance of the transaction. 164 The operation of paternalism becomes pronounced when the parties’ agreement contains terms that may impinge upon the rights of either party, or contravene some matter of public policy. 165 Although not an overt element or term of the bargainers’ agreement, paternalism serves as a remedial mechanism that authenticates consent and protects bargainers and third parties from improvident decisions. 166 The operation of this device is generally affected by the parties’ motivations 167 and consent 168 to the transaction. Paternalism’s ultimate impact, intended or not, may transform the parties’ agreement as a whole, or specific terms therein.

Although paternalism may seemingly operate simplistically to restrict the parties’ bargain, construction of a model which explains its application remains a difficult task. The common objective may be to protect a bargainer (or other third parties) from the adverse consequences of the bargain; however, the tools for doing so may vary. Professor Anthony T. Kronman proffers a cogent explanation of the basis for paternalistic restrictions. 169 Economic efficiency and distributive fairness reflect the decisionmaker’s attempt to redistribute wealth in society. 170 Personal integrity encompasses the goal to protect a party’s self-respect or confidence. 171 Judgment and moral imagination implore the unwillingness

164. Because intervention due to paternalism generally involves the protection of one of the parties to the bargain or third parties in general, any “distributive effects” of paternalistic intervention tend to operate as side effects rather than as reflections of the party’s bargain. See id.
165. See infra notes 169-85 and accompanying text.
166. Paternalism also relates to the motivation of the parties, particularly in a case in which one of the parties seeks to take advantage of the other due to some superior knowledge or bargaining position. See supra notes 162-64 and accompanying text.
167. See supra notes 148-61 and accompanying text.
168. See supra notes 85-107 and accompanying text.
170. See id. at 766-74 (providing Kronman’s example of distributive justice as the decision maker’s refusal to allow disclaimers of the warranty of habitability in landlord-tenant relationships); see also Anthony T. Kronman, Contract Law and Distributive Justice, 89 YALE L.J. 472, 495-98 (1980) (explaining that the concept of unconscionability would also fit within the rubric of this justification).
171. See Kronman, supra note 169, at 774-86. Professor Kronman notes that this rationale seeks to preserve individual liberty and, therefore, prevent self enslavement.
to enforce bargains against those individuals who suffer some impairment of judgment.\textsuperscript{172} While these rationales are not mutually exclusive, they comprise a multifaceted model which substantiates the need for paternalism.\textsuperscript{173}

Paternalism is loosely associated with equity or justice which have their roots in public policy.\textsuperscript{174} In other words, regardless of the appearance of validity, it may be deleterious to enforce certain agreements given the implications that enforcement will have on unsuspecting third parties, or the influence it may have on future bargainers.\textsuperscript{175} This noble goal may nonetheless be undermined by its roots in "public policy," a somewhat vague notion that defies cogent characterization.\textsuperscript{176} As

\textit{See id.} He provides as examples antenuptial agreements that prohibit divorce and waivers of discharge in bankruptcy. \textit{See id.} at 776-85.

\textsuperscript{172} \textit{See id.} at 786-97. This rationale relates to perceived defects in the bargainer’s reasoning and Professor Kronman specifically notes the contracts of minors as an example of the applicability of this rationale. \textit{See id.} The contractual restrictions based upon incapacity not only invoke notions of paternalism, but also relate to the absence or authenticity of consent because the incapacitated bargainer did not possess the requisite faculties for true consent. \textit{See id.}


\textsuperscript{174} \textit{See} Kennedy, \textit{supra} note 81, at 570 (arguing that contractual rules should be governed by distributive justice, paternalism and efficiency, in lieu of freedom of contract).

\textsuperscript{175} \textit{See id.}

\textsuperscript{176} \textit{See} W.R. Grace & Co. v. Local Int’l Union of United Rubber Workers, 461 U.S. 757, 766 (1983) (noting that public policy must be ascertained "by reference to the laws and legal precedents") (quoting Muschany v. United States, 324 U.S. 49, 66 (1945))); Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233 (1892) (stating that the standard of such policy is not absolutely invariable, since contracts which at one stage of our civilization may seem to conflict with public interest, at more advanced stages are treated as legal and binding); Pittsburgh, C. C. & St. L. Ry. Co. v. Kinney, 115
such, there can be considerable confusion regarding the precise situations in which it should be invoked. Paternalism, therefore, has been seen more as an ill than as a cure.177

Notwithstanding its shortcomings,178 paternalism appears alive and well given the inherent unfairness of some agreements, and the need to protect paramount interests which may be superior to that of the bargainers.179 From a pedagogical standpoint, it comprises a fortuitous segue to discussions of race and disparity in cases when such factors of inequity are operative.

Perhaps the most significant paternalistic device relevant to bargains tainted by issues of disparity must be unconscionability.180 Commonly invoked to protect the disadvantaged bargaining party who suffered from a lack of free choice, this concept represents a form of distributive justice depicted by Professor Kronman.181 Negative opportunistic conduct of the advantaged party remains central to paternalistic concerns. The enforcement of certain bargains, or specific terms thereof, may be jeopardized by the assumption or reality that the advantaged party will exploit his superior bargaining position in both the negotiation and performance of the agreement.182 Such negative oppor-

N.E. 505, 507 (Ohio 1916) (observing that a correct definition, both concise and comprehensive, of the words “public policy” has not yet been formulated by the courts); see also Morant, Contractual Rules and Terms, supra note 1, at 478-86.

It has been viewed as “the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man’s plain, palpable duty to his fellow men . . . .”

Id. (quoting Kinney, 115 N.E. at 507).


178. See id.

179. See Morant, Contractual Rules and Terms, supra note 1, at 507 n.114 (stating that “[p]ublic policy encompasses a plethora of concerns including unconscionability, breach of public duty (which includes the protection of third parties) and illegality (violation of statutes)”).

180. See infra notes 188-90 and accompanying text for a “definition” of unconscionability.

181. See generally Kronman, supra note 170, at 472; see also Kronman, supra note 169, at 766-74.

182. Eisenberg indicates that the concept of unconscionability justifies limitations
tunism\textsuperscript{183} by the advantaged party may not only result in onerous consequences for the disadvantaged party,\textsuperscript{184} but also cast a dubious shadow over the reality of consent of both parties.\textsuperscript{185}

Where great disparity in bargaining power arises, public policy\textsuperscript{186} placed upon the bargain principle given the need to ensure “the quality of the bargain.” Eisenberg, The Bargain Principle, supra note 12, at 798-801. Consequently, the bargain principle, which on its face appears to be relatively simplistic in design, becomes exceedingly complex and difficult to implement in reality. Limitations placed upon the bargain principle by way of such mechanisms as unconscionability not only complicate the decisions as to which bargains the decision maker will enforce, but also heightens the administrative costs of enforcing such agreements. See id.

183. The author’s use of the phrase, “negative opportunism,” connotes that opportunism remains a bifurcated concept. In purely economic terms, opportunism is not always necessarily malevolent. According to Professor Gergen, opportunistic behavior is condemned if the victim’s loss is greater than the actor’s gain. See Mark P. Gergen, The Use of Open Terms in Contract, 92 COLUM. L. REV. 997, 1002 (1992). Thus, opportunism would be good if the actor’s gain was greater than the victim’s loss. See id. One could conceive of many instances where an opportunistic party gains more by breaching a contract, even after paying damages to the victim, than by honoring it. See id. at 1002-03.

184. This bargaining situation comports with Professor Richard Delgado’s view regarding the appropriate timing for paternalistic intervention. Delgado defines paternalism as “a justification for curtailing someone’s liberty that invokes the well-being of the person concerned, that is, that requires him or her to do or refrain from doing something for his or her own good.” Richard Delgado & David H. Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation, 82 CAL. L. REV. 871, 871 n.1 (1994); see also supra notes 162-85 and accompanying text.

185. Opportunism may be defined in either economic or moral terms. In an economic sense, opportunism occurs when “a performing party ‘behaves contrary to the other party’s understanding of their contract, but not necessarily contrary to the agreement’s explicit terms, leading to a transfer of wealth from the other party to the performer.’” G. Richard Shell, Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action, 44 VAND. L. REV. 221, 228 (1991) (quoting Timothy Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521, 521 (1981)). In a moral sense, opportunism is “self-interest seeking with guile.” Id. (quoting OLIVER WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 26 (1975)). See generally Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521 (1981) (denoting the problem of one party’s conduct that is contrary to the other party’s understanding of the agreement, notwithstanding that such conduct is not violative of the explicit terms of that agreement). See Richard E. Speidel, Article 2 and the Relational Sales Contracts, 26 LOY. L.A. L. REV. 789 (1993); George M. Cohen, The Negligence-Opportunism Tradeoff in Contract Law, 20 HOFSTRA L. REV. 941 (1992) for a more exhaustive discussion of opportunism within the bargaining context; see also supra note 185 and accompanying text.

186. As I explain in more depth in Part III, negative motivational factors cast a
may compel relief for the disadvantaged party in the transaction.187 This situation gives rise to the concept of unconscionability.188 Although seemingly simplistic, unconscionability constitutes an elusive phenomenon characterized by such elements as "oppression"189 and "unfair surprise."190

dubious shadow over the ambiance of assent; therefore the consent of the advantaged party may be suspect. See generally supra notes 134-60 and accompanying text. [public policy].

187. See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981). The RESTATEMENT notes that an agreement is not void merely . . . 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 choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

Id.; see also Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 446 (Cal. 1963) (noting that public policy may invalidate a negligence disclaimer when "the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services." (footnote omitted)).

188. "Unconscionability" has been defined as 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." Leasefirst v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 587 (Wis. Ct. App. 1992) (citation omitted). Similarly, the West Virginia Supreme Court describes unconscionability as an "overall and gross imbalance, one-sidedness or lop-sidedness that justifies a court's refusal to enforce a contract as written." McGinnis v. Cayton, 312 S.E.2d 765, 776 (W. Va. 1984) (citation omitted); see also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (indicating that unconscionability is recognized 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" (footnote omitted)). Furthermore, the doctrine is broken down into two components: substantive and procedural. The McGinnis court identified substantive unconscionability as "unfairness in the contract itself—overall imbalance, one-sidedness, laesio enormis, and "the evils of the resulting contract."

McGinnis, 312 S.E.2d at 777 (footnote omitted). "Procedural unconscionability [the court explained] involves inequities and unfairness in the bargaining process." Id.


The RESTATEMENT recognizes the concept of unconscionability, notwithstanding the RESTATEMENT's basis in the neoclassical theory of contract law. See E. ALLAN FARNsworth, supra note 72, §§ 1.8-1.11; MURRAY, supra note 88, § 9; Symposium, The Restatement (Second) of Contracts, 67 CORNELL L. REV. 631 (1982).

190. See U.C.C. § 2-302 (1977), which states that:

The basic test is whether . . . the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . [t]he principle is one of the prevention of oppression and
Professor Melvin Eisenberg provides an excellent explanation of the unconscionability. He first notes that the doctrine is a two-tiered notion that includes "procedural" and "substantive" unconscionability. Procedural unconscionability represents basic unfairness in the bargaining process itself. Substantive unconscionability consists of unfairness in the bargaining "outcome"—that is, the actual terms of the agreement. Their collective consideration leads to the policing of "unfair surprise" which has become a linchpin notion within the doctrine. Although unconscionability focuses on fundamental fairness within the bargain, an interstice remains in the doctrine's lexicon, particularly as it relates to preformation and post-formation issues in contract.

Conspicuously absent from cited considerations within the unconscionability doctrine is the concept of race. Issues of procedural unconscionability are confined to unfairness in the transactional process.

unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

Id.; see also SCOTT & LESLIE, supra note 82, 514-16 (providing a comprehensive bibliography of materials related to the concept of unconscionability and other factors used to regulate the bargaining process).

192. See id. at 752-53; see also Arthur Allen Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485, 488 (1967).
194. See supra note 190 and accompanying text.
195. See Eisenberg, The Bargain Principle, supra note 12, at 753 n.39; see also U.C.C. § 2-302 (1977); Leff, supra note 192, at 486-94.
196. Scholars have noted the advantages and disadvantages of the unconscionability doctrine. See Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 HASTINGS L.J. 459, 482-86 (1995) (stating that unconscionability, as generally applied in all jurisdictions that recognize the doctrine, is limited to application "at the [t]ime [the] [e]ntract [w]as [m]ade" and delineating the doctrine’s general use). See generally Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & ECON. 293 (1975) (noting that the doctrine’s generality could prompt its abuse); M. P. Ellinghaus, In Defense of Unconscionability, 78 YALE L.J. 757 (1969) (supporting the need for unconscionability in modern contract law); John A. Spanogle, Jr., Analyzing Unconscionability Problems, 117 U. PA. L. REV. 931 (1969) (noting that the doctrine suffers from vagueness and should be applied only when both procedural and substantive conditions are met); Leff, supra note 192, at 486-94 (noting the vagueness of U.C.C. § 2-302).
197. See generally Jeffrey L. Harrison, Class, Personality, Contract, and Unconscionability, 35 WM. & MARY L. REV. 445 (1994) (discussing the applicability of unconscionability to issues of fairness in light of socioeconomic differences related to class).
often associated with the parties’ disparate bargaining positions attributable to wealth or comprehension. The doctrine fails to include the operation of advantaged parties’ pre-bargain, which may include perceptual modalities that may influence the resultant unfair terms (substantive unconscionability). Perhaps the development of unconscionability presupposes the issue of race, particularly when unconscionability is compatible with evidence of transactional unfairness. If this is so, it must be tacit. The focus tends to be upon the disadvantaged party, not the motivations of the advantaged, as a catalyst for intervention. Perhaps this is a function of the “colorblind” thesis that has been resoundingly criticized.

The generic definition of unconscionability nonetheless comfortably accommodates perceptual modalities given the latter’s potentially negative effect on the terms of the resultant agreement (substantive unconscionability). The doctrine therefore comprises a convenient vehicle for the discussion of the impact of race upon the bargain. This dialogue is specious at best, however, unless the present understanding of unconscionability is expanded to include an examination of the advantaged party’s actions resulting from negative perceptions based upon stereotypes and beliefs.

B. Williams v. Walker-Thomas Furniture Co.: The Conspicuous Absence of Race, and the Broadening of Unconscionability’s Components

The famous case of Williams v. Walker-Thomas Furniture Co. is a fascinating paradox in this discussion. It illustrates the convenient exclusion of race from unconscionability analyses, while simultaneously presenting an opportunity to inject the operation of race into the fairness debate. The facts of the case are fairly renowned, they require closer study.

198. See supra note 192 and accompanying text.
199. See supra note 193 and accompanying text. The fact that the advantaged party authors the terms of the ultimate contract buttresses this point. If the advantaged party’s beliefs are influenced by negative perceptions, the resultant contractual terms will reflect that influence.
200. See supra notes 188-90 and accompanying text.
201. See supra notes 19-20 and accompanying text.
202. See supra note 193 and accompanying text.
203. See infra notes 230-35 and accompanying text.
204. See infra note 232 and accompanying text.
205. See infra notes 231-32 and accompanying text.
206. 350 F.2d 445 (D.C. Cir. 1965).
Ms. Williams, an unemployed mother receiving government assistance, executed a standard-form installment contract to purchase a stereo unit.\textsuperscript{207} What the reported case failed to mention was that Ms. Williams was African American.\textsuperscript{208} The installment contract, which was a "pre-formed" agreement, contained many provisions, one of which provided the company with the right to prorate her payments against the cost of any other merchandise she ever bought on credit.\textsuperscript{209} As a result, when she failed to make timely payments, the company repossessed the stereo and all other items purchased on credit from the company.\textsuperscript{210}

The appellate court found Ms. Williams' contract with the company substantively unfair; that is, the terms were unduly one-sided and oppressive.\textsuperscript{211} She could owe very little on other items she purchased from the company, yet, under the terms of the installment agreement, she would lose everything if she were to default on her credit obliga-

\textsuperscript{207} See id. at 447.

\textsuperscript{208} See id. (failing to recognize that Ms. Williams was African American). Other scholars have noted Ms. Williams' ethnic background. See, e.g., Chase, supra note 19, at 39; Russell, supra note 19, at 803. While it is unclear as to how other scholars have discovered this fact, I received verification through more familiar, yet personal means. Professor Rhoda Berkowitz, a colleague, worked in the Legal Services Office of Washington, D.C., during the middle to late 1960s. She was exceedingly familiar with the case, including the characteristics of both litigants. She confirmed the fact that Ms. Williams was African American, and that Walker-Thomas Furniture Company comprised a large and, at that time, successful furniture merchant in the Washington area. Curiously, none of the prominent casebooks and treatises that report the Williams case mention Ms. Williams' race.

The District of Columbia court's failure to mention Ms. Williams' race, together with the unconscionability analysis, delivers a powerful, albeit tacit, message. Perhaps the decisionmaker believed that race was irrelevant to any considerations of fairness, thereby implicitly endorsing the "color blindness" rationale. See supra notes 19-20 and accompanying text. Rejection of race as a factor may also signal resistance to a cognitive reliance on negative stereotype—that an African American may not fully comprehend a complex agreement. Both of these rationales make short shrift of the importance of race. Arguments against color blindness include the omnipresent reality that people still see race, and act upon preconceived notions based on race. See id. This realization requires the focus of the effect of race, not upon the perceived weaker party, but rather upon the more sophisticated party who authors the bargain. Also, the failure to mention Ms. Williams' race in texts that report the case can exacerbate problems for teachers who take it upon themselves to raise the issue. See infra note 219 and accompanying text.

\textsuperscript{209} See Williams, 350 F.2d at 445-47.

\textsuperscript{210} See id. at 447.

\textsuperscript{211} See id. at 449.
tions. The court specifically noted that Ms. Walker was on government assistance, and perhaps correlative, she likely failed to understand the magnitude of the transaction.

Several factors weighed in Ms. Williams’ favor. The agreement with Walker-Thomas Furniture was a standard form. Commonly referred to as “adhesion contracts,” these form agreements required one party to acquiesce to pre-drafted terms, typically printed in small type, on a document supplied by an advantaged business entity. Under these circumstances, decisionmakers were likely to invoke public policy and, due to paternalistic considerations, shield the disadvantaged party from the consequences of her bargain.

Moreover, Ms. Williams was a less powerful, less knowledgeable bargainer who negotiated with a more sophisticated party; this scenario heightened the unfairness quotient. Consequently, the appellate court remanded the case with instructions that the trial court consider the merits of an unconscionability defense.

If it can be said that Williams implicates race, it does so obliquely. While the court assumes that Ms. Williams’ socioeconomic sta-

212. See id. at 448.
213. See id. at 449.
214. See id. at 447.
215. See generally Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173 (1983); see also Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 631-33 (1943). Professor Kessler defines an adhesion contract, quite simply, as a “standardized mass contract.” Id. at 631. These contracts are highly practical from a business perspective. See id. He notes, however, that:

Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

Id. at 632.
216. See 6A Arthur L. Corbin, Corbin on Contracts § 1472, at 599 (1962); see also Kronman, Paternalism, supra note 169, at 770-72 (recognizing that bargains which result from the execution of an adhesion contract can fuel the decisionmaker’s intervention to accomplish distributive justice).
217. See Williams, 350 F.2d at 447-50.
218. See id. at 450.
219. While many individuals who teach contracts know that the disadvantaged bargainer in the Williams case is an African-American woman, resource materials fail to elucidate that fact. See supra notes 16-19 and accompanying text. This places the
tus might equate to her lack of understanding of the contract with Walker-Thomas Furniture Co., it would not, and should not, intimate that her status as an African American would lead to a similar finding. Yet ignoring her race in the reasoning, or even in the facts, implies that it has no relevance to discussions of fairness or burden within the bargaining transaction. Of course, this would be defensible if the sole focus in the evaluation was the characteristic and abilities of the perceived, disadvantaged party. Questions of fairness extend beyond the bounds of the “disadvantaged” party’s capacity; a truly comprehensive evaluation of equity must also consider the “advantaged” party’s perception of the “disadvantaged” party, and the influence of that perception upon the transactional decisions of the “advantaged” party.

Some believe that Williams v. Walker-Thomas Furniture represents an opportunity to discuss race, however, in strict academic terms it does not. Unconscionability focuses upon diminished or disparate bargaining position, not race. Under the court’s “tacit” rationale, Williams’ relief under the doctrine can be justified due to her socio-economic status and, possibly, gender (welfare, single mother). These factors relate more to her lack of bargaining prowess and not to any perceptual influences upon Walker-Thomas Furniture Co. Race,

 burden squarely on the shoulders of the professor to introduce this subject. Failing to mention Ms. Williams’ race in the texts not only subverts the issue of race as a factor in the decisionmaker’s opinion but also unnecessarily burdens the contracts professor. When the teacher sui sponte raises the issue of race (when it is not clearly delineated in the reported case), students may surmise that the professor, particularly if he or she is a person of color, detects race in most problems or over-emphasizes its relevance. This could cause students to ultimately dismiss consideration of that fact as being part of the personal agenda of the professor.

220. See supra note 209 and accompanying text; see also Chase, supra note 19, at 39-40.

221. This further manifests the “colorblind” theory, implying through deliberate or tacit omission that, without clear proof, race has little relevance. See supra notes 19-20 and accompanying text.

222. See infra notes 231-235 and accompanying text.

223. See infra notes 231-35 and accompanying text.

224. See supra notes 206-23 and accompanying text.

225. See supra notes 188-90 and accompanying text.

226. By “tacit” rationale, I mean the court’s reasoning may implicate race, yet does not include that factor in its analysis.

227. The court’s explicit rationale to assist Ms. Williams relates to her apparent lack of comprehension of the agreement and the latter’s burdensome terms. See supra notes 217-23 and accompanying text.
while impliedly considered,\footnote{228} does not appear to be a factor.\footnote{229}

But if the objects of unconscionability are to root out the causes for and rectify inequity,\footnote{230} decisionmakers must broaden their focus to include those factors that may have prompted the “advantaged” party to author burdensome terms in the first place. In Williams, it is reasonable to assume that knowledge of Ms. Williams’ socioeconomic status likely induced the company to author and offer the one-sided agreement. If this premise has any validity, it should be conceivable that Ms. Williams’ ethnicity, and any negative stereotypes\footnote{231} and prejudices\footnote{232} associated thereto, also may have contributed to the company’s decision to tender the burdensome installment contract.\footnote{233} This observation bears no relation to her cognitive skills as an African American;\footnote{234} it relates completely to the assumptions and beliefs of the company’s agents and decisionmakers, the cognitive acceptance of beliefs based upon negative, racial preconceptions, and the effect of these factors

\footnote{228} See supra notes 219-25 and accompanying text; see also infra Part VII, in which a student noted the implications of race in the Williams case.

\footnote{229} See supra notes 142, 188-200 and accompanying text.

\footnote{230} See supra notes 192-96 and accompanying text.

\footnote{231} Stereotyping consists of placing people into groups and then assigning certain attributes to that group. See Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 Hastings L.J. 471, 489 (1990). To Duncan Kennedy, stereotyping is the ill-formed belief that “race in any of its various socially constructed meanings is an attribute biologically linked to any particular meritorious or credible intellectual, psychological or social traits of any kind.” Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 Duke L.J. 705, 710 (1990). A stereotype is also a “false generalization[] about groups of people that [is] used to justify negative actions about individuals within the group or about the group as a whole.” Ann E. Freedman, Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School, 24 Ga. L. Rev. 849, 878 (1990). For additional sources that address the issue of stereotype in a variety of circumstances, see Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 Calif. L. Rev. 733, 740-44 (1995); Steven H. Hobbs, Gender and Racial Stereotypes, Family Law, and the Black Family: Harpo’s Blues, 4 Int’l Rev. of Comp. Pub. Pol. 35 (1992).

\footnote{232} According to Professor Armour, prejudice is the acceptance and adoption of a negative cultural stereotype. See Armour, supra note 231, at 742.

\footnote{233} This assumes of course that the responsible authority of Walker Furniture possessed such stereotypes and processed them into the decision to contract with Ms. Williams. See supra notes 231-32 and accompanying text. The company’s agent may be cognizant of stereotypes and consciously avoid their implication. Nonetheless, the possible operation of these negative perceptions should be investigated to authenticate the need for paternalistic intervention.

\footnote{234} See infra notes 231-33 and accompanying text.
upon the resulting contract.\textsuperscript{235}

Anecdotal evidence provides vivid illustration of the operation of perception within isolated situations, and thereby buttresses the need to consider perceptual modalities in transactional processes.\textsuperscript{236} As a preliminary axiom, perceptual reactions are not confined to any particular characteristic or class; therefore, its comprehension and cognitive employment can occur in a variety of situations. They also apply to different individuals regardless of race. The following narratives illustrate these postulates.

A United Methodist minister who pastors a traditional, established church in Toledo, Ohio, led a motorcycle tour through the Blue Ridge and Allegheny Mountains, with the trip culminating in South Carolina. Given the nature of the journey, he, his wife, and other members of his entourage donned appropriate attire—helmets, dark-tinted goggles, black-leather jackets, pants, and, at various stages of the trip, black, full-length leather jumpsuits.

When the minister and his party stopped for lodging or provisions, they were often greeted with “sinister” stares and curt responses. Vendors demanded identification when he tendered payment with traveler’s checks; he was unsure as to whether other customers were subject to a similar burden of proof. Once he presented his ministerial identification however, proprietors became more conciliatory. When he appeared in establishments wearing his ministerial collar (without the leather outfit), he seldom encountered hostility or discourtesy. From his experiences, he was convinced that his maltreatment was due in large measure to his appearance as a “biker.” The only substantiation of his conclusion was his (and his party’s) own experiences and impressions. Those who initially perceived him and his group negatively altered their disposition once they discovered that he was a cleric.\textsuperscript{237}

\textsuperscript{235} The analysis’ focus upon African Americans is not meant to connote that its premises are applicable only to that group. Given the use of the Williams case as a prototype for this premise prompts the use of the African Americans as illustrative of the argument. Any disadvantaged group subject to negative stereotype and prejudice within the bargaining context could also invoke this argument. The key is that fairness and equity, which are bulwark concepts of the unconscionability doctrine, require consideration of the possible impact of negative stereotype and prejudice upon the decisionmaking processes of the bargain’s more sophisticated party who controls the terms of the resultant agreement.

\textsuperscript{236} I intentionally selected nonracial, perceptual accounts here to demonstrate that the effect and acceptance of perceptions transcend traditional, individual categories. Of course, Narratives that demonstrate the operation of racial perceptions can also prove to be quite compelling. See infra note 240 and accompanying text.

\textsuperscript{237} Interview with the Reverend Thomas Sagendorf, former senior pastor, Monroe
In an analogous situation, an attorney, during his "off-duty" time (dressed casually in a short-sleeved shirt), dined in a local, middle-scale restaurant for lunch. Seated at a small table, an ostentatious, yet nonoffensive tattoo was visible on his forearm. He appeared in the restaurant on his off-duty day for three consecutive weeks; during each visit, he was dressed informally with the tattoo exposed. On every occasion, he observed that the server was somewhat abrupt and malevolent.

It was difficult to pinpoint the exact cause of the server's demeanor given other circumstances that could have triggered this response; however, the attorney suspected that his tattoo may have contributed to the problem. In subsequent encounters in which he was dressed in a conventional coat and tie with the tattoo covered, the server was demonstratively more pleasant. Moreover, he later learned through other workers at the restaurant that the server disliked tattoos and thought that individuals who bore them were base.238

Of course, perceptions may also lead to favorable treatment. An acquaintance who processes applications at a local state licensing agency espoused that "individuals who were well dressed and groomed and wore glasses were intelligent and [presumptively garnered] more deference."239

Additionally, perceptions may defy predictability due to various characteristics that define a person's perception of others. For example, an African-American male, despite wearing a coat and tie, may nonetheless be perceived as menacing (for example, individuals may distance themselves from him in elevators) or confined to lower profile, professional duties, such as a messenger, paralegal, or apprentice.240

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238. Interview with an anonymous (by choice) attorney, in District of Columbia (Nov. 20, 1995).
239. The acquaintance who proffered this belief requested anonymity. See supra note 235 for a discussion of negative stereotypes and prejudice.
Although these assumptions based upon stereotype may be erroneous, their genesis is understood given societal norms, circumstances, and acquired associations. If one accepts the proposition that such cognition is a natural or common phenomenon, it logically follows that individuals may act upon or employ the information gleaned therefrom in the formulation of their bargains.

While persuasive of the influence of perception, anecdotal evidence alone may not substantiate the need for legal intervention. Indeed, judicial decisionmakers have confined its probative relevance to proof of individual bias, not systemic or group discrimination.Govern-

241. See supra notes 231 and accompanying text.
242. See generally Armour, supra notes 231-32.
243. Note that I do not assert that all individuals naturally or impulsively act upon this perceptual cognition. To process such perceptions does not necessarily connote that the information gleaned therefrom will necessarily govern the processors' conduct. See Armour, supra note 231, at 740-45 (espousing the view that individuals do not necessarily act upon negative stereotypes even though they are aware of their existence).
244. See Contractors Assoc. of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 597 (3d Cir. 1996) (noting that proponents of race-based affirmative action programs bear the burden of proof of coming forward with evidence proving that "discrimination in fact exists or existed and that race-based classifications are necessary to remedy the effects of . . . discrimination"); Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363, 1426-28 (S.D. Ohio 1996) (noting possible "flaws" in anecdotal evidence); Associated Gen. Contractors of Conn. v. City of New Haven, 791 F. Supp. 941, 947 (D. Conn. 1992) (stating that anecdotal evidence offered by the city did not establish an "adequate factual predicate" to justify enactment of set-aside ordinance); Concrete Gen., Inc. v. Washington Suburban Sanitary Comm., 779 F. Supp. 370, 378 (D. Md. 1991) (noting that the statistical and anecdotal evidence offered by defendant did not sufficiently "substantiate the need" for an agency's contract set aside program). But see Contractors Assoc. of E. Pa., Inc., 91 F.3d at 598 (stating that anecdotal evidence, when proffered with expert testimony, "could provide a firm basis for the inference that there had been discrimination against blacks . . . and that the program was narrowly tailored to remedy the effects of such discrimination"). Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1520-21 (10th Cir. 1994) (confirming that anecdotal evidence can "complement empirical evidence").
245. See generally Middleton v. The City of Flint, 1996 WL 438655 (6th Cir. 1996); Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1990). The Court of Appeals of the Ninth Circuit stated that:

statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. . . . However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. . . . While anecdotal evidence may suffice to prove individual claims of discrimination however, rarely, if ever, can such evidence show a systematic pattern of discrimination necessary for the adoption of an affirmative action plan.
mental remedy of alleged discrimination requires additional evidence of disparate treatment.\textsuperscript{246}

Anecdotal evidence is strikingly similar to Narrative\textsuperscript{247} which comprises a significant methodological tool of Critical Race and Critical Feminist theorists who respectively examine the extent to which the legal system accounts for race or gender.\textsuperscript{248} Like anecdotal evidence, Narrative has been challenged as a legitimate arbiter of legal issues and problems.\textsuperscript{249} Given the distinct yet amorphous operation of


\textsuperscript{246} See \textit{Contractors Assoc. of E. Pa., Inc.}, 91 F.3d at 598 (noting that anecdotal evidence alone was insufficient to substantiate a set-aside program for Hispanics, Asian Americans, Native Americans and women; yet such evidence, when proffered with expert testimony, “could provide a firm basis for the inference that there had been discrimination against blacks . . . and that the program was narrowly tailored to remedy the effects of such discrimination”); \textit{Concrete Works of Colo., Inc.}, 36 F.3d at 1520 (finding that “selective anecdotal evidence” relevant to the various experiences of minority contractors fails to “provide a strong basis” to support the need for a race-based set-aside program); see also \textit{Coral Construction Co.}, 941 F.2d at 919 (stating that “the combination of convincing anecdotal and statistical evidence is potent”).


\textsuperscript{248} See supra note 20 and accompanying text; see also Johnson, supra note 247, at 813 (providing an excellent explanation of critical race theory and the operation of Narrative within that body of scholarship).

\textsuperscript{249} For more pointed criticisms of Narrative, see Daniel A. Farber & Suzanna Sherry, \textit{Telling Stories Out of School: An Essay on Legal Narratives}, 45 STAN. L. REV. 807, 854 (1993) (conceding to a limited extent the value of Narrative in scholarship, yet stressing the need for truthfulness and typicality which, therefore, requires that an analysis that employs Narrative include more traditional mechanisms of reason); Toni M. Massaro, \textit{Empathy, Legal Storytelling, and The Rule of Law: New Words, Old Wounds?}, 87 MICH. L. REV. 2099, 2126 (1989) (recommending a restraint in the reliance on empathetic colloquy in legal analyses and expressing the
perceptual realities within transactional situations, and the awkward if not limiting applicability of traditional proof standards in such circumstances, anecdotal evidence, and Narrative, should be accorded deference as a syllogistic mechanism of proof.

In Williams, the agents of Walker-Thomas Furniture Co. may not have acted upon preconceptions based upon Ms. Williams’ ethnicity or gender. Nonetheless, the possibility that preconceptions based on stereotypes or prejudices influenced the company’s bargaining decision, requires that this externality be explored as a factor justifying paternalistic intervention. To neglect this consideration relegates race and gender as irrelevant, misplaced, or possibly incongruous factors in the unconscionability analysis.

The failure to consider the possible effect of negative stereotypes and prejudices upon the advantaged party underscores the deficiencies of the unconscionability doctrine. Others, particularly the classicists, have criticized the doctrine on different grounds. Classicists believe that unconscionability assaults the bargain principle. Under this rationale, “justice” relates solely to the bargaining sphere itself wherein autonomous, competent individuals have the will to negotiate freely. In other words, the process dictates the fairness of the resultant agreement. Unconscionability shatters this presumption by injecting the influence of context and human frailty into the evaluation of bargains struck in the real world.

need for “other guides to reasoned judgment”). But see Johnson, supra note 247, at 807 (delineating the problems associated with Professors Farber and Sherry’s critique of Narrative and critical race theory in terms of traditional mechanisms of evaluation).

250. This is particularly applicable to perceptual modalities peculiar to issues of race and disparity. See supra notes 231-35 and accompanying text.


252. See supra note 231 and accompanying text.

253. See supra note 232 and accompanying text.

254. See supra notes 71-84 and accompanying text.

255. See supra notes 82, 85 and accompanying text.

256. See SANDEL, supra note 71, at 106; Rosenfeld, supra note 71, at 777-84.

The "classicists" difficulties with unconscionability appear largely doctrinal, bolstered by strict adherence to the bargain principle. The problem with the doctrine lies in its narrow delineation of contextual factors which are applicable to its operative framework. Refusal to acknowledge or consider race as a possible function within the cognitive processes of the advantaged party to the agreement leaves the analysis incomplete and vulnerable to questions of relevancy.

The advantaged party's motivations, if driven by race as well as other factors, may ultimately justify implementation of the doctrine, as well as explicate the validity of the "substantively" unconscionable terms of the resultant agreement. Recognition of the disadvantaged party's handicap within the bargaining process can be insufficient to warrant paternalistic intrusion, particularly if the disadvantaged party could have either remedied the handicap or taken precautionary measures to guard against adverse consequences. Paternalistic intervention in such cases to "correct" a resultant bargain may be questionable at best. Consideration of the cognitive motivations of the advantaged

258. See supra note 196 and accompanying text for sources detailing the problems associated with the unconscionability doctrine.

259. Of course, the use of motivation as an operation factor raises difficulties associated with proof. Because my proposal here shifts some of the unconscionability analysis to the advantaged party, one might argue that objective proof of motivation, that is, "intent" is required. See Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1054 (1978) (noting the "perpetrator" model of discrimination, whereby proof of discriminatory intent is mandated for relief). This point, while probative, is not dispositive. Motivation of the advantaged party operates more as a cognitive function of basic beliefs. See supra notes 231-36 and accompanying text. Consequently, objective proof of motivation may be difficult to delineate, yet recognizable due to natural cognitive function.

260. Like opportunism, strategic bargaining, which can consist of making the most of transactional opportunities, is not necessarily wicked. See, e.g., Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 91 MICH. L. REV. 319, 391 (1991) (indicating that contingent fee contracts provide the plaintiff with a "strategic bargaining advantage"); see also supra note 185 and accompanying text. In some instances, it may be desirable for individuals to utilize their superior skills in the marketplace, however, exploitation of advantage in other instances may lead to deleterious effects which require paternalistic intervention. Determination of the appropriate triggering point for intervention remains the ubiquitous problem. See generally Jason S. Johnston, Strategic Bargaining and the Economic Theory of Contract Rules, 100 YALE L.J. 615 (1990) for additional thoughts regarding strategic bargaining as a pejorative consequence; Glen O. Robinson, Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants, 91 COLUM. L. REV. 546 (1991).
party supports the need for such intervention, particularly if the motivations were elicited from negative stereotype and prejudice. This latter point provides the impetus for discussion of race in such bargaining situations. It may also prove to transform discussions of race and other matters of disparity from irrelevance to legitimacy.

C. Ubiquity of Perceptual Analysis

My employment of Williams as a prototypical case of the implication of disparity is not meant to intimate that the resultant analysis has limited applicability. The fact that the disadvantaged party in Williams was an African-American woman illustrates one possible circumstance in which perceptual modalities may modify transactional behavior. While the plight of African Americans within the bargaining sphere may be distinctive, it is certainly not solitary. Discussions of disparity may include a plethora of individuals who, from a variety of perspectives, battle stereotype and prejudice to gain equal opportunities in many venues.

While the travails of other traditionally disadvantaged groups have their distinctions from those of African Americans, their particular

261. See supra note 231 and accompanying text.
262. See supra note 232 and accompanying text.
263. See supra note 207 and accompanying text.
264. All too often, debate regarding issues of race, ethnicity and discrimination focus on interactions among African Americans and Whites. This dilemma has been referred to as the “black/white paradigm.” See Robert S. Chang, Essays, The End of Innocence or Politics After the Fall of the Essential Subject, 45 AM. U. L. REV. 687, 688 (1996) (urging that we must “move . . . beyond . . . [the] black/white racial paradigm”); Adrienne D. Davis, Identity Notes Part One: Playing in the Light, 45 AM. U. L. REV. 595, 696 (1996) (arguing that the “black/white paradigm . . . [is] debilitating for legal analysis”); John A. Powell, Living and Learning: Linking Housing and Education, 80 MINN. L. REV. 749, 793 n.152 (1996) (stating that “[h]e is aware that America is and always has been more than black and white. . . . While a redefined racial paradigm may be in order, the black-white paradigm persists”). In fact, the black/white paradigm is spurious when viewed in contemporary society. See Davis, supra, at 719.

265. As many scholars note, the colloquy concerning race in this country must expand beyond the boundaries of black and white. See Nancy Cervantes et al., Hate Unleashed: Los Angeles in the Aftermath of Proposition 187, 17 CHICANO LATINO L. REV. 1, 22 (1995); Robert S. Chang, Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 CAL. L. REV. 1241, 1267 (1993) (noting that critical race theory scholarship tends to focus on the black/white paradigm, excluding Asian Americans and other minorities); Frank Wu, Neither Black Nor White: Asian Americans and Affirmative Action, 15 B.C. THIRD WORLD L.J. 225, 250 (1995); see also note 260 and accompanying text.
plights serve to underscore the need to explore the depth of possible discrimination within a variety of commercial contexts. Consequentially, transactional difficulties suffered by other groups such as women and individuals of the Jewish faith reinforce the existence of dispa-


267. See In re Greene, 45 F.2d 428, 429-30 (S.D.N.Y. 1930) (opining that a formal, written contract between a woman and a married man with whom she had previously maintained an adulterous relationship, could not be enforced due to policy concerns imbued in marriage, notwithstanding the contract’s formal recitation of consideration); Kirksey v. Kirksey, 8 Ala. 131, 131-32 (Ala. 1845) (finding that brother-in-law’s promise to provide sister-in-law a suitable home on his property if she would “quit the country” and move did not constitute a binding promise, even though, in reliance on that promise, she moved to his property and was subsequently evicted without apparent cause); Hewitt v. Hewitt, 394 N.E.2d 1204, 1205, 1211 (Ill. 1979) (finding that an unmarried woman in a “family-like” relationship complete with children and other “respectable appearances” could not sustain a promissory estoppel claim for spousal-like support against her presumed husband, notwithstanding his promises to sustain her because of her continued support and personal sacrifice to ensure his professional education and subsequent pedodontia practice); Feinberg v. Pfeiffer, 322 S.W.2d 163, 168-69 (Mo. Ct. App. 1959) (sustaining a promissory estoppel claim against a former employer who promised Ms. Feinberg a monthly pension for her many years of superior and loyal service, noting the extent of reliance on her part, and tacitly observing that a woman of advanced age, suffering with cancer would experience difficulty in acquiring gainful employment); In re Baby M, 537 A.2d 1227, 1240, 1249-50 (N.J. 1988) (stating emphatically that a surrogate contract between Mary Beth Whitehead, a woman of modest financial means and educational background, and William Stern, who, with his wife, was highly educated and economically secure, was invalid in light of public policy concerns); Wood v. Lucy Duff Gordon, 118 N.E. 214, 215 (N.Y. 1917) (maintaining the validity of an exclusive dealings contract between an agent and Lady Lucy Duff Gordon, irrespective of arguments of a possible lack of mutuality on the agent’s part, and further noting that such agreements contain an implied, good-faith term for the parties to utilize “reasonable efforts” in the fulfillment of their duties); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1217 (Ohio 1989) (allowing a meritorious claim of detrimental reliance to enforce a specific promise of job security as an exception to the at-will doctrine, notwithstanding a vigorous dissent).


rate treatment within the bargaining process.\textsuperscript{269} They also comprise interactive circumstances which color the formation and ultimate adjudication of bargains. If the foregoing analysis is to have any legitimacy, “disparity” must be viewed expansively to include any group whose bargaining options are stymied by perceptions mired in negative stereotype and prejudice.\textsuperscript{270}

VII. CONCLUSION

A post-class discussion with a student concerning the Williams case evoked a profound revelation. Noticing the conspicuous omission of Ms. Williams’ race from the exchange, the student commented, “I read somewhere that the plaintiff in that case was a Black woman. Wouldn’t that fact possibly affect the furniture company’s [sic] and the court’s treatment of her?”

As I guardedly addressed the student’s question in the affirmative, I suddenly became cognizant of the shortcomings in my pedagogy. Not only had I omitted or avoided racial issues in my class, but in so doing, I also restricted the depth of transactional analysis I so doggedly sought to encourage.

Despite the rigidity of the reborn classical theory of contract and my previously miscued presumptions, issues of race and disparity should be incorporated in discussions of contractual problems. While those factors are not necessarily important in all contexts, they should be explored whenever they conspicuously or tacitly impact either the bargainers’ actions prior to formation, or the decisionmaker’s adjudication of the formed bargain. This latter caveat may appear to perpetuate “avoidance” and further reflect the perceptional fears I maintained when I first taught the subject; but its true impact serves to treat issue of disparity as any other which negatively influences the bargain. To inject issues of race and disparity when they bear no relation to a controversy may be

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\textsuperscript{269} Jewish charity, citing the need for proof of reliance, and the requirement to preserve the ambits of contract law by enforcing only those promises that are supported by consideration or, at a minimum, reliance); Congregation Kadimah Toras-Moshe v. DeLeo, 540 N.E.2d 691 (Mass. 1989) (refusing to enforce decedent’s oral promise of $25,000 to an orthodox Jewish synagogue as a charitable subscription, notwithstanding policy generally favoring the enforcement of such promises).

\textsuperscript{270} As they surface factually in cases used to illustrate various contractual concepts, I encourage students to discuss the possible operation of biases related to gender, religious ethnicity, or disability as influences upon bargainers and decisionmakers in the adjudication of those bargains. See supra note 267 for an example of cases that implicate these biases.

\textsuperscript{270} Davis, supra note 264, at 595, 719.
deleteriously inflammatory; yet to ignore them when they may be pivotal would be intellectually and academically indecorous.