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Nancy S. Kim*

Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes

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I. INTRODUCTION

A consumer living in Ohio, using a credit card, purchases an expensive leather purse from a company based in Milan, Italy. In order to access the website, she must click on the electronic agreement, which she does without reading the terms. The purse that is delivered is of inferior quality to that which was described on the website. When the consumer contacts the Italian company, she is informed that the click agreement requires that all disputes be handled by arbitration in Milan.

A stay-at-home mom decides to open a business selling handmade soaps over the Internet. Her lawyer advises her that she should incorporate her business in order to protect her personal assets. She contacts a bank about setting up a merchant account in order to process credit cards electronically. The representative for the bank informs her that the fee for credit card purchases will be 3.5% of the total monthly charges and faxes an application to her. The mom/entrepreneur glances at the application, notes that the commission amount is accurate, and signs where indicated. She does not have the money to have a lawyer review the agreement. Unknowingly, she has executed a guaranty that makes her personally liable for her company's obligations.

A Korean-born business owner discusses renting retail space for a video rental store from a Russian-born property owner. Due to a miscommunication, the business owner believes that maintenance costs will be included in the monthly rental. The agreement is delivered by the property owner and the business owner signs it, anxious to start construction on the space. Six months after the agreement is executed, the business owner receives a bill for maintenance costs in the amount of $5,000.

This Article argues that rapid societal changes require a theory of contract that is capable of evolving with them and urges adoption of a "dynamic" approach to contract disputes.[1] In his essay, *The Emergence of Dynamic Contract Law*, Melvin Eisenberg states that princi-

1. The evolving nature of science and human relationships also underscores the need for dynamic contract law as evidenced by the state of judicial decisions governing reproductive technology and surrogate parenthood. These issues raise a host of relevant and interesting issues that may be informed by this Article but are not the subject of it.

ples of dynamic contract law do not depend "solely on what occurred at the moment in time when a contract was formed, but instead turn on the moving stream of events that precedes, follows, or constitutes the formation of a contract."[2] By contrast, contract law principles are "static" if their "application turns entirely on what occurred at the moment in time when a contract was formed."[3] Although Eisenberg defines "dynamic" in relation to the time of contract formation, I use the term here to reflect his larger thesis that contract law should, where appropriate, be "individualized rather than standardized, subjective rather than objective, complex rather than binary, and dynamic rather than static."[4] In other words, dynamic contract law strives to establish the "best possible rules"[5] rather than hewing to formalistic principles. It views the contract not as a written text frozen in time with two purely rational actors as parties, but as an exchange of words and acts between two individuals with varying experiences, against a backdrop of changing circumstances.

Unfortunately, while many modern contractual disputes develop from a myriad of factors, contract law, which focuses on interpretation,[6] adopts a unitary approach to addressing such disputes. This emphasis on contract interpretation is likely derived from classical contract law, which adopted an objective theory of contract interpretation despite its proclamation that contract formation required a meeting of the minds.[7] Thus, the issue of what the parties subjectively intended was subordinate to the issue of what was reasonable to presume based upon their overt acts.[8]

While modern contract law strives to effectuate the understanding of the parties, the focal point of judicial inquiry continues to be the interpretation of the contract's written words, rather than the parties' subjective state of mind. The interpretation of the writing, word(s), or clause(s) usually proves determinative in the enforceability of the con-

2. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1762 (2000).
3. *Id.* at 1748.
4. *Id.* at 1745. Similarly, the term "static" is used in a broader sense, to refer to a formalistic, standardized application of a rule which focuses solely on the time of contract formation.
5. *Id.*
6. Avery Weiner Katz, Essay, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496 (2004) ("Under the modern American law of contracts, almost all applications of legal doctrine turn on questions of interpretation. . . ." (quoting Woburn Nat'l Bank v. Woods, 89 A. 491, 492 (N.H. 1914))).
7. Eisenberg, *supra* note 2, at 1756 ("A contract involved what is called a meeting of the minds of the parties. But this does not mean that they must have arrived at a common mental state touching the matter in hand. The standard by which their conduct is judged and their rights are limited is not internal, but external.").
8. *Id.*

tract, the obligation of the parties, and the amount and type of damages available. Contract law sets forth many rules of contract interpretation or "default" rules to address contractual disputes. For example, the plain meaning rule requires that if the disputed writing or word "appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature."[9] Yet, where a party is unaware of this interpretation or default rule, the use of the rule may defeat or contradict that party's contractual intent. This Article further argues that, in many cases, these numerous rules of interpretation work to the disadvantage of the party with fewer resources, particularly when that party is a member of a cultural or language minority.[10] Traditionally, contract doctrine assumes that contracting parties are equals—that they are equally situated economically, experientially, and ethically—when entering into a contract. In reality, individuals entering into a contract have varying degrees of experience and bargaining power that affects their understandings of the nature of their contractual relationship. Cultural and linguistic factors may also play a role in each party's interpretation of the contract.

The interplay of interpretation rules with standard forms raises additional issues of fairness that may disproportionately affect already disadvantaged parties. Strict adherence to interpretation rules where the agreement is a form with standardized terms also undermines the three oft-cited objectives of contract law—autonomy, economic efficiency, and fairness. All three of these objectives involve both individual and societal interests. While the parties to a contract may be furthering their individual desires, they are also engaging in an act that has repercussions for third parties and the larger society. In particular, where the contracting parties are commercial entities and not individuals, there may be very little self-actualization at stake but significant economic implications affecting nonparties to the transaction. For example, a contract for the sale of software between two commercial entities should be enforced not because it enhances the will of living, breathing parties (as the entities are legal fictions), but because it affects the economic interests of living, breathing nonparties (such as the salesperson expecting a commission and the technology officer responsible for ordering the software) and stimulates commerce.

Melvin Eisenberg notes that the twentieth century has already witnessed the emergence of dynamic contract law although, as discussed in this Article, the adoption and advocacy of dynamic contract

9. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3-10, at 166–67 (3d ed. 1987).

10. This Article uses the term "cultural" broadly to include commercial, social, ethnic, and racial contexts.

principles by courts and scholars is neither uniform nor widespread. This Article proposes that adoption of dynamic principles furthers the primary objectives of contract law and is best suited to address evolving social norms and needs. By setting as the primary objective ascertainment of the parties' intent rather than review of words on a page, a dynamic approach better captures the context and the spirit in which the contract was made. Part II briefly summarizes the most commonly cited objectives of contract law and discusses why a dynamic approach to contract law is preferable to strict adherence to any one theory. Part III examines why and how contract rules of interpretation may undermine the objectives of contract law discussed in Part II and discusses why a dynamic application of contract rules of interpretation best accommodates evolving business and societal needs and the traditional objectives of contract law. Part IV examines three cases and proposes how the analysis might differ using a dynamic approach. This Part concludes that the threshold question of whether to apply a particular interpretation rule should depend upon whether it is helpful in determining the intent of the parties or in promoting a policy or legislative objective. This Part also provides guidelines regarding how and when to apply contract interpretation rules using a dynamic approach.

II. A BRIEF SUMMARY OF CONTRACT LAW THEORIES

Although there are various articulated objectives of contract law, this Part considers the three most acknowledged and often-cited:[11] furtherance of individual autonomy; encouraging promissory exchanges; and promoting fairness or redistributive justice.[12] This Part then discusses a dynamic theory of contracts and its broader capacity for accommodating the various goals of contract law.

A. The Individual Autonomy Theory or "Furthering the Will of the Parties"

Many theories of contract law arise from the belief that humans are free and rational beings[13] and that contracting should facilitate

11. In this Part, I am performing the purely descriptive function of summarizing and distilling the most oft-cited reasons for enforcing contracts, not advocating any one policy or objective.
12. *See* William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wis. L. Rev. 931, 947 (2001); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 Md. L. Rev. 253, 272–73 (1991); Richard E. Speidel, Book Review, 31 Loy. U. Chi. L.J. 255, 257 (2000) (reviewing E. Allen Farnsworth, Changing Your Mind: The Law of Regretted Decisions (1998)).
13. *See generally* Roscoe Pound, An Introduction to the Philosophy of Law 143–49 (1954) ("The decisive element in seventeenth-century thought as to contract was the idea of natural law; the idea of deduction from the nature of man as

the power of self-governing parties.[14] Derived from classic liberalism, individual autonomy or "will theorists" emphasize self-determination and freedom of contract.[15] Thus, individuals should be free to engage in promissory exchanges with minimal government interference. Promises are expressions of individual will and, as such, are the source of the parties' obligations.[16] Parties may promise anything that is not illegal and are obligated only to perform what they have promised.[17] Even among will theorists, there are differences. Charles Fried, for example, states that a contract is a moral obligation and should be legally enforceable in order to foster mutual trust and cooperation to facilitate individual pursuits.[18] Randy Barnett, on the other hand, has promoted the view that contracts should be enforced

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a moral creature and of legal rules and legal institutions which expressed this ideal of human nature . . . . Later metaphysical jurists rely upon the idea of personality. The Romanist thinks of a legal transaction as a willing of some change in a person's sphere of rights to which the law, carrying out his will, gives the intended effect . . . . Later in the nineteenth century men came to think more about freedom of contract than about enforcement of promises when made. To Spencer and the mechanical positivists conceiving of law negatively as a system of hands off while men do things, rather than as a system of ordering to prevent friction and waste so that they may do things, the important institution was a right of free exchange and free contract, deduced from the law of equal freedom as a sort of freedom of economic motion and locomotion. Justice required that each individual be at liberty to make free use of his natural powers in bargains and exchanges and promises except as he interfered with like action on the part of his fellow men, or with some other of their natural rights.").

14. Friedrich Kessler, *Introduction: Contract as a Principle of Order*, *in* FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY M. KRONMAN, CONTRACTS (3d ed. 1986), *reprinted in* A CONTRACTS ANTHOLOGY 4–12 (Peter Linzer ed., 4th ed. 1992); POUND, *supra* note 13, at 149.

15. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 5–6 (1981) ("I begin with a statement of the central conception of contract as promise. This is my version of the classical view of contract proposed by the will theory and implicit in the assertion that contract offers a distinct and compelling ground of obligation . . . . I propose to perennial conundrums solutions that accord with the idea of contract as promise and with decency and common sense as well."). *But cf.* P. S. ATIYAH, ESSAYS ON CONTRACT 3–4 (1986) ("[M]y view is that the great storehouse of legal decisions concerning contractual obligations . . . . illustrates that at no time in our legal history has a bare promise been regarded, without more, as sufficient to create a legal obligation; and furthermore, this limitation on legal effectiveness is itself largely based on moral considerations . . . . [I]t is quite impossible to affirm that all promises *ought* to create moral or social obligations, without any regard to the reasons for the making of the promise, or the consequences which have ensued from its being made.").

16. James Gordley, *Contract Law in the Aristotelian Tradition*, *in* THE THEORY OF CONTRACT LAW 265, 267 (Peter Benson ed., 2001).

17. *Id.*

18. FRIED, *supra* note 15, at 57 ("The moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be.").

because the parties have consented to be legally bound.[19] These subsets or offshoots of the "individual autonomy" or "furthering the individual will of the parties" theory of contract law[20] believe that a promisor is bound because the promisor willed to be bound.[21]

Under autonomy theories, a defendant in a breach of contract case may raise a defense if she did not voluntarily assent to the agreement.[22] This is because promises induced by fraud or mistake are not expressions of will and therefore lack moral foundation.[23] Cognitive and informational gaps may also affect autonomous decision-making[24] and provide a basis for rescission.[25] In general, however, such gaps must result from some sort of deception on the part of the plaintiff[26] or a legal condition (such as mental incapacity or minor status) that justifies intervention by the courts. Generally, lack of sophistication or bad judgment provides no defense to otherwise valid contracts.[27]

19. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 634–35 (2002) [hereinafter Barnett, *Consenting to Form Contracts*] ("Suppose that the enforcement of private agreements is not about promising, but about manifesting consent to be legally bound. Suppose the reason why we enforce certain commitments, whether or not in the form of a promise, is because one party has manifested its consent to be legally bound to perform that commitment. According to this theory, the assent that is critical *to the issue of formation or enforceability* is not the assent to perform or refrain from performing a certain act—the promise—but the manifested assent to be legally bound to do so."); *see also* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992).
20. Anthony R. Chase notes, however, that the notion of free will and individual autonomy on the part of contracting parties was often based upon a fiction:

> The problem with classical contract law was that its foundation rested on the essential premise that contracts were entered into voluntarily by free individuals who were equal to each other. Differences in socioeconomic class or distribution of wealth were irrelevant . . . . [T]he law of contracts created the illusion that all men were free to enter or not enter into contracts as they chose. However, the reality was that the law of contracts during the Industrial Revolution enabled the industrialists to control the working class, who either accepted the wages offered and hours demanded or starved.

Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 10–11 (1995).
21. Gordley, *supra* note 16, at 267.
22. Sherwin, *supra* note 12, at 270–71.
23. *Id.*
24. *Id.* ("To the extent that choices are distorted . . . some forms of paternalistic intervention in private exchange may serve to protect rather than inhibit the personal autonomy of the parties.").
25. For a critical analysis of Fried's treatment of rescission, see Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 520–21 (1989).
26. RESTATEMENT (SECOND) OF CONTRACTS §§ 151-58 (1981).
27. Sherwin, *supra* note 12, at 271; *see also* CHARLES FRIED, AN ANATOMY OF VALUES 103–04 (1970). *But see* Anthony T. Kronman, *Paternalism and the Law of Con-*

B. Economic Theories of Contracts

Another commonly stated objective of contract law is to encourage promissory exchanges. Underlying this objective is the belief that such exchanges are beneficial to the economy.[28] The reliability of promises encourages promissory exchanges.[29] Ensuring the security of transactions[30] serves the broader society by enhancing trust and facilitating transactions,[31] which benefit a credit economy. Closely related to and corresponding to this utilitarian view of the function of contracts are theories that examine contracts in terms of wealth maximization.[32] One of the most visible and influential proponents of the law and economics philosophy,[33] Richard Posner,[34] views contracts as

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tracts, 92 YALE L.J. 763, 797 (1983) ("The will-based theories of obligation that dominate the intellectual scene today obscure the complexity of our law of contracts by putting before us a wholly denatured conception of the person in which passion and moral imagination have no place. Whatever in our law of contracts is centrally concerned with these matters has, as a result, become mysterious and been brought under suspicion from a moral point of view. The rediscovery of judgment as a topic of interest and importance would be a step in the other direction.").

28. *See generally* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983); Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683 (1986).

29. *See* E. ALLEN FARNSWORTH, CONTRACTS §§ 1.2–1.3 (2d ed. 1998) [hereinafter FARNSWORTH, CONTRACTS]; POUND, *supra* note 13, at 133–34.

30. POUND, *supra* note 13, at 133–34 ("[M]en must be able to assume that those with whom they deal in the general intercourse of the society will act in good faith, and as a corollary must be able to assume that those with whom they so deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. Hence in a commercial and industrial society, a claim or want or demand of society that promises be kept and that undertakings be carried out in good faith, a social interest in the stability of promises as a social and economic institution, becomes of the first importance. This social interest in the security of transactions, as one might call it, requires that we secure the individual interest of the promise that is, his claim or demand to be assured in the expectation created, which has become part of his substance.").

31. *See generally* Richard Craswell, *Two Economic Theories of Enforcing Promises*, *in* THE THEORY OF CONTRACT LAW 19 (Peter Benson ed., 2001); Gordley, *supra* note 16, at 294 (considering, for example, the importance of the "virtues of prudence, temperance, fortitude, and justice" in contracting).

32. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 356–57 (1990) ("'[W]ealth maximization' [is a] term often misunderstood. The 'wealth' in 'wealth maximization' refers to the sum of all tangible and intangible goods and services, weighted by prices of two sorts: offer prices (what people are willing to pay for goods they do not already own); and asking prices (what people demand to sell what they do own) . . . . The fallacy . . . lies in equating business income to social wealth."); *see also* POLINKSY, *supra* note 28, at 10 (discussing standard assumptions of economic analysis, including consumer sovereignty, exogenous preferences, and utility maximization).

33. For criticisms of the law and economics movements, see generally ATIYAH, *supra* note 15, at 150–78. Atiyah explains:

efficient vehicles for allocation of resources because parties would not agree to an exchange unless each party believed that she would be better off as a result.[35] Contract law should reduce the costs of promissory exchanges by encouraging performance through the use of sanctions for breach.[36]

Not surprisingly, law and economic theorists tend to disfavor contract defenses based upon equitable principles, particularly those based on hardship and unfairness.[37] Such defenses leave a contract vulnerable to judicial inquiry into the substance of the bargain, undermining the principle that contracting parties are in the best position to determine the value of a given good or service. Certain contract defenses, however, may provide a useful economic function. For example, fraud and duress defenses may be used to deter conduct that would otherwise diminish trust and, consequently, reduce willingness to enter into contracts.[38] In general, however, economic theorists disapprove of contract defenses in all but a few, narrowly defined cases.[39]

C. Distributive Justice or Achieving Fairness

In addition to the objectives of promoting individual autonomy and ensuring the security of transactions, contract law strives to achieve fairness and equity. Typically parties do not enter into contracts with the primary purpose of achieving social justice, the usual forum in-

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> One of the most curious phenomena of the law-and-economics theorists represented especially by Richard Posner (but with many followers) is the way in which they are so often able to demonstrate that "the common law" is efficient in its result though its reasoning may be awry . . . . [w]hat do these economists mean by the "common law"? . . . Much of [the law and economics literature] seems over-simplified to the point of unreality.

Id.; *see also* Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990).

34. For a critical analysis of Posner's work, see Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7 (1991).
35. ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 1–2 (1979). Critics have argued that an individual may fail to maximize wealth due to cognitive errors or because she has other interests, such as fairness. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Law and the Limits of Contract Law*, 113 YALE L. J. 541, 550 (2003).
36. Schwartz & Scott, *supra* note 35, at 4–5.
37. Sherwin, *supra* note 12, at 269.
38. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAWS §§ 4.6–4.7 (3d ed. 1986); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 298 (1975) (discussing fraudulent misrepresentation as a defense to a contract suit).
39. *See* POSNER, *supra* note 38, § 4.7 ("Economic analysis reveals no ground other than fraud, incapacity and duress (the last narrowly defined) for allowing a party to repudiate the bargain . . . .").

stead being the courts or the legislature.[40] However, while parties may not enter into contracts with the end goal of promoting fairness or equity, most contracting parties expect to be treated fairly and equitably. Various doctrines are intended to protect individuals from contracts that are unfair or inequitable, even if the traditional elements of an enforceable contract—such as offer and acceptance, consideration, and specificity of terms—are present. For example, contract law has traditionally allowed a party to void an agreement based upon lack of mental capacity.

The notion of fairness becomes especially relevant when there are disparities in the information or resources available to the contracting parties.[41] These disparities are particularly common where form agreements are involved, as further discussed in subsection III.A.2.b. Redistribution of wealth, usually accomplished through legislation,[42] is sometimes judicially achieved through contract interpretation.[43] Interpretive issues that are defined as factual may be sent to juries, which have a well-deserved reputation for favoring Davids over Goliaths.[44] Not surprisingly, many form agreements now include express language that the parties shall resolve any disputes through arbitration[45] to avoid allowing an interpretive issue before a jury.

Defenses relying upon the concept of fairness[46] permit judges to rectify situations on an individualized basis that might otherwise fail to meet the requirements of a legal defense. Such judicial scrutiny, however, leaves the defendant vulnerable to questions regarding her competence in making important decisions. While such paternalism

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40. *But see* Julian S. Lim, Comment, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 585 (2003) ("[A] predominant part of the agenda of this Comment is to dispute the persistent notion that contract law is separate from social and fairness issues, and is independent of social factors such as race.").

41. Whitford, *supra* note 12, at 953.

42. For example, the Consumer Protection for New Californians bill requires certain California businesses that negotiate in four major Asian languages to have contracts written in those languages. S. AB 309, 2003–04 Leg., Reg. Sess. (Cal. 2003).

43. Whitford, *supra* note 12, at 954 ("[O]ne way to counteract undue advantage gained through contract is simply to interpret contracts consistently with substantive justice, regardless of the words used in the writing. It is no news that there is a long history of such interpretations.").

44. *Id.*

45. The following is an example of arbitration language: "Except as otherwise provided for in this Agreement, any claim, dispute or controversy arising between the parties out of or in relation to this Agreement, or breach thereof, which cannot be satisfactorily settled by the parties, shall be finally settled by arbitration upon the written request of either party, in accordance with the rules of the American Arbitration Association."

46. While the notion of fairness permeates legal defenses, it provides the basis for equitable defenses. *See generally* Sherwin, *supra* note 12, at 273–74.

may be a lesser evil than the enforcement of an oppressive agreement, it may have other unintended, negative effects. For example, some critics have argued that the doctrine of unconscionability, discussed in subsection III.B.1, may reinforce negative stereotypes of African–Americans.[47]

D. A Dynamic Theory of Contract Law

Many commentators have written about the lack of a complete theory of contracts.[48] The proffered reasons for this absence are varied, including the variety of contract types to be covered,[49] the confusion wrought by the sheer number of contract theories,[50] and the courts' general disinterest in academic scholarship.[51] Into this fray, I throw one more possibility, which is that in order for contract theory to have practical applicability, it must reflect and address evolving social norms and needs. Classical law was structured by dichotomies, the most fundamental being between the individual and the state.[52] Much existing contract doctrine reflects this dichotomy, viewing the promissory exchange either as an individual right or as a matter of public policy, binding because the court determined it served social needs.[53] In reality, however, a contract involves both individual and societal interests and any given theory of contract should examine both, rather than explain why one should always prevail over the

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47. *See* Chase, *supra* note 20; *see also* Muriel Morisey Spence, *Teaching* Williams v. Walker–Thomas Furniture Co., 3 TEMP. POL. & CIV. RTS. L. REV. 89 (1993) (discussing the difficulties of teaching this landmark unconscionability case). *But see* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 934 (1997) (stating that to ignore that stereotypes and prejudices based on race that may affect the contracting process "relegates race and gender as irrelevant, misplaced" and "[t]he failure to consider the possible effect of negative stereotypes and prejudices upon the advantaged party underscores the deficiencies of the unconscionability doctrine").
48. *See, e.g.*, Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 141 (2004) (arguing that "individualistic theories do not capture or reflect the distinctive moral center of promise and contract"); Schwartz & Scott, *supra* note 35, at 543; *see also generally* P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1974); GRANT GILMORE, THE DEATH OF CONTRACT (1974).
49. Schwartz & Scott, *supra* note 35, at 543 ("Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be. These gaps are unsurprising given the traditional definition of contract as embracing all promises that the law will enforce.").
50. *See* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990).
51. E. Allan Farnsworth, Essay, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 225 (1990) ("Viewed from the academe, the most significant non-event of the decade was the failure of contract theory to have a significant impact on practice.").
52. Feinman, *supra* note 50, at 1286.
53. *Id.* at 1286–87.

other. Instead of establishing principles to support a given doctrine or theory, contract law should explain, establish, and uphold rules of behavior.[54] In other words, it should be adaptive, complex, substantive, and dynamic, rather than stringent, binary, formalistic, and static.[55]

Melvin Eisenberg sets forth the principles of dynamic contract law[56] as follows:

> First, but only if appropriate conditions are satisfied, and subject to appropriate constraints, contract law should effectuate the objectives of parties to a promissory transaction.
>
> Second, the rules that determine the conditions to, and the constraints on, the legal effectuation of the objectives of parties to promissory transactions, and the manner in which those objective are ascertained, should consist of the rules that would be made by a fully informed legislator who seeks to make the best possible rules of contract law by taking into account all relevant propositions of morality, policy, and experience (the *Legislator*). When more than one such proposition is relevant, the Legislator should exercise good judgment to give each proposition proper weight, and to either subordinate some propositions to others, or craft a rule that is the best vector of the propositions, considering their relative weights, and the extent to which an accommodation can be fashioned that reflects those relative weights to the fullest practicable extent.[57]

Thus, the theory of contract law is the theory of the "best content of contract law over the long run, not the theory of what contract law should be at any moment of time when institutional constraints are taken into account."[58] While dynamic contract law rejects single value theories of contracts, it considers values and ideas from differing schools of thought, even if those values conflict.[59] For example, while dynamic contract rejects the relational contract[60] position that contract is not promise-based,[61] it supports the notion that contracts are relational. The intent and actions of the parties should therefore be viewed in the context of that relationship. Similarly, while neither

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54. As Melvin Eisenberg asserts, "doctrines have a role to play in substantive legal reasoning, but that is because of the social values that underlie doctrinal stability, not because doctrines are either self-evident or established by deduction." Eisenberg, *supra* note 2, at 1753.
55. *Id.* at 1745.
56. In his article, Eisenberg uses the term "basic contracts principle" to describe the principles that I will refer to as "dynamic principles" in this Article. I have used the term "dynamic" instead of "basic contract" to avoid confusing anyone not familiar with the discussion introduced in Eisenberg's article. *See generally id.*
57. *Id.* at 1745.
58. *Id.* at 1747.
59. *Id.*
60. *See* Paul J. Gudel, Essay, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763 (1998); Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000).
61. Eisenberg, *supra* note 2, at 1747 ("The basic contracts principle rejects the position, most closely associated with relational contract theory, but also with the works of others, such as Atiyah, that contract law is not, or ought not be, promise based.").

furthering individual autonomy nor providing economic incentives to contracting should be the sole or primary objective of contract law, the values of individual autonomy and wealth maximization should be taken into account and examined. A dynamic theory of contract does not strive merely to supplant any existing theory; rather, it considers the tenets proposed by various theories in order to reach the best rule for a particular situation. By not slavishly adhering to a "school of thought," a dynamic theory of contracts has the freedom to address issues on a substantive level instead of rationalizing results to conform to formalistic principles. Strict adherence to one philosophy of contract law results in myopia. Any given contract theory cannot be expected to trump every aspect of every other theory every single time.[62]

Dynamic contract principles make sense because they express the reality of the human condition. Human desires are not so easily definable or capable of categorization as legal doctrine might suggest. As Menachem Mautner writes:

> Typical of the human condition is the desire for more than one thing at the same time. It is also typical to both want and not want the same thing at the same time. In contract, the logic of the law . . . is usually binary. The law usually applies one of two competing, mutually exclusive categories, each one unqualified and unambiguous.[63]

The application of contract law should be highly contextualized, depending not upon any single word, act, or rule. Individuals are driven by different desires and motivations that may vary on any given day or overwhelm at the same time. Events occur that are unpredictable, even if they meet the legal definition of "foreseeability."[64] Contracts are not created in a vacuum—parties exist in an environment filled

62. Philosophies of contract law often borrow from each other. For example, economic theories presume individuals should have the right to make economic decisions for themselves, and that doing so, leads to greater efficiencies benefiting the larger society. *See* Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343, 358 (1995) (discussing one of the "central tenets" of an "economic approach" to contracts as "deferring to individual autonomy"). Randy Barnett, an autonomy theorist, relies to a certain extent on economic arguments to explain why his presumption in favor of specific performance might be reversed where the seller would experience hardship and the buyer could easily purchase a replacement good. Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL. 179 (1986).

63. Menachem Mautner, *Contract, Culture, Compulsion, or: What is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRES L. 545, 574 (2002).

64. For example, few would have predicted the occurrence of the plane hijackings on September 11, 2001. Yet, the hijacking was deemed to be reasonably foreseeable. *See In re* September 11 Litigation, 280 F. Supp. 2d 279 (S.D.N.Y. 2003).

with social norms, values, and morals.[65] To ignore the context in which a promise was made[66] is to ignore the reality of human interactions.[67] Decision making is further complicated by constraints on cognitive ability that may vary from individual to individual.[68] The Nobel economics laureate Herbert Simon developed the theory of "bounded rationality" to explain how and why people make decisions with incomplete information.[69] Unlike neoclassical economics, which "is based on the assumption that humans are perfectly rational and will make choices to optimize their gains," bounded rationality recognizes that people "satisfice"; they make the best decisions with the limited information they have.[70] Parties to a contract may make decisions based on inaccurate or incomplete information due to a variety of factors.

To consider the vacillations of human nature and the limitations of human awareness and knowledge does not mean, however, that the law should disregard the need to ensure the security of transactions. A dynamic application of the law views transactions holistically by taking into consideration the emotional aspects of making contracts as well as the more detached business aspects, such as the calculation and expectation of profit. The analysis of contract should examine every significant and relevant aspect of the transaction, from the moment of conception to the filing of the complaint.

A dynamic theory, because it considers evolving societal needs and values, is best able to address modern contractual issues. Rather than viewing a contractual dispute as an isolated category, it recognizes that one dispute may fall into several doctrinal categories. Instead of

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65. Eisenberg, *supra* note 2, at 1747 ("Part of the human social condition is that many values are relevant to the creation of a good world, some of which will conflict in given cases. Contract law should not attempt to escape these moral and social conditions.").

66. Considering the relevant conditions of the promise does not mean that the existence of the promise itself should not be considered. *Id.* at 1747 ("[C]ontract law normally does not get off the ground unless a party has used an expression that is or can fairly be interpreted to be a promise . . . .").

67. A recent study has shown that parties to a contract themselves "look to context [not just the words on the page,] for guidance on issues of contract creation." Deborah A. Schmedemann, *Beyond Words: An Empirical Study of Context in Contract Creation*, 55 S.C. L. REV. 145, 146 (2003).

68. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995) ("[H]uman rationality is normally bounded by limited information and limited information processing.").

69. *See generally* Duncan K. Foley, *Rationality and Ideology in Economics*, 71 SOC. RES. 329 (2004); Andrew W. Lo, *The Adaptive Market Hypothesis: Market Efficiency from an Evolutionary Perspective*, 30 J. OF PORTFOLIO MGMT. 15, 15–29 (2004).

70. Constance Holden, *The Rational Optimist: Will Computers Ever Think Like People? This Expert on Artificial Intelligence and Cognitive Science Asks, Why Not?*, PSYCHOL. TODAY, October 1986, at 54, 56.

focusing on written or verbal words to create a contract, a dynamic approach considers what the parties meant when they said or did what they said or did. A dynamic approach envisions contractual intent as encompassing more than the meaning of words on a page; it considers why the parties entered into the agreement and whether their contractual objectives continue to be met in light of changing circumstances.

A dynamic approach also considers the normative effect of the transaction itself. Contracts that involve personal relationships would have different policy implications than those involving purely commercial ones.[71] Thus, the rules governing the enforceability of a premarital contract would, and should, differ from the analysis of a commercial sales agreement.

Finally, while contract law should promote the objectives of autonomy and efficiency, it should not do so *at any cost*. A contract is not comprised of disparate elements but, instead, embodies an entire transaction (or series of transactions). Consequently, contractual disputes should be approached holistically. An examination of the dispute should not focus solely on a particular word or an isolated act, but on the entirety of the contract and the conduct of the parties before, during, and after contract formation. Judges should consider the social and policy implications of their decisions, yet not be so fearful of customizing justice that the ruling does not fit the circumstances of each particular case.[72] Judges also should not be fearful of deviating from established precedent if it appears that society has evolved such that the application of existing precedent no longer makes sense. Contract law should take into consideration the relationship of the parties, as well as the larger societal context affected by, and affecting, the agreement. A dynamic approach recognizes that the law should

71. The Supreme Court of California recognized that there are

> obvious differences between the remedies that realistically may be awarded with respect to commercial contracts and premarital agreements . . . . The obvious distinctions between premarital agreements and ordinary commercial contracts lead us to conclude that factual circumstances relating to contract defenses that would not necessarily support the rescission of a commercial contract may suffice to render a premarital agreement unenforceable.

In re Marriage of Bonds, 5 P.3d 815, 830 (Cal. 2000).

72. The "just result" principle articulated by Harry Prince reflects, to a certain extent, a dynamic approach in that it advocates that courts take into account "all equities of the case, including such factors as the status of the parties, the risk of out-of-pocket loss or windfall gain, whether either party has engaged in culpable or meritorious behavior, and any public interests at stake." Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence, and Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557, 563 (1998). Whereas the just result principle focuses on the outcome of a decision, a dynamic approach would, however, prioritize the intent of the parties and the effect of time upon such intent.

not only reflect the expectations and conduct of the parties, but influence them.[73]

In fact, contract law has already evolved to a certain extent to reflect changing social norms.[74] Whereas classical contract law strictly applied narrow rules and doctrines,[75] modern or neoclassical contract law tends to consider social or equitable factors.[76] For example, under classical contract law, a promise modifying a duty under a contract not fully performed lacked consideration.[77] The modern view, embodied by the *Restatement (Second) of Contracts*, states a different rule:

> A promise modifying a duty under a contract not fully performed on either side is binding
>
> (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
>
> (b) to the extent provided by statute; or
>
> (c) to the extent justice requires enforcement in view of material change of position in reliance on the promise.[78]

This rule reflects dynamic principles. Its objective is to set a normative standard—to state the "best rules" and not necessarily the rules that most courts have followed.[79] It is individualized—focused on the modification of a specific contract—rather than formalistic and binary, applicable to all modifications (i.e., if a modification is made without consideration, then it is not enforceable). It is subjective—examining whether the circumstances giving rise to the modification were anticipated by the given parties—rather than objective, asking whether the circumstances were "reasonably anticipated" or could have been anticipated by a "reasonable person" and whether there was a material change of position in reliance (instead of "reasonable reliance"). It is dynamic because it considers circumstances after con-

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73. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1135–39 (1986); Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 675 (1990).

74. K. M. Sharma, *From "Sanctity" to "Fairness": An Uneasy Transition in the Law of Contracts?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 95, 95–97 (1998). Contract law is not the only area that has evolved to reflect societal changes. For example, new defense strategies, such as the battered woman syndrome and the cultural defense, have arisen which reflect society's increased awareness of the issues particular to battered women and cultural minorities.

75. Feinman, *supra* note 50, at 1286–87.

76. Sharma, *supra* note 74, at 100–01 (arguing that "contractual sanctity," resulting from the reverence for individual autonomy, "has been either gradually replaced or, at least, supplemented by other competing considerations of justice, paving way for the emergence of a new contractual morality . . . .").

77. 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7.36 (4th ed. 1992).

78. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

79. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 510 (1998).

tract formation rather than simply at the magical moment of acceptance.[80]

Modern courts, too, have increasingly adopted a view of contracts that is in accordance with dynamic principles.[81] However, this adoption by the courts has not been consistent or uniform in all jurisdictions.[82] Even where adoption of a particular dynamic principle is widespread, the rationale for such adoption varies.[83] Unfortunately, when courts have issued rulings that felt instinctively right, they have had to reason around existing rules that, strictly applied, would have led to a different result. Thus, while courts continue to recite well-established doctrinal rules, some have engaged in analysis and rendered results that are inconsistent with a strict application of those rules in order to achieve a result that is "fair." Contract rules of interpretation or "default rules" have been subject to this type of inconsistent decision-making.[84] For example, courts often cite the plain meaning rule, yet very few adhere to it.[85] Part III of this Article dis-

80. The U.C.I.T.A., applicable to shrinkwrap or clickwrap licenses, also illustrates dynamic principles, as demonstrated by the following comment:

> Contract formation is often a process, rather than a single event. A rule that a contract must arise at a single point in time and that this single event defines all the terms of the contract is inconsistent with commercial practice. Contracts are often formed over time; terms are often developed during performance, rather than before performance occurs. Often, parties expect to adopt records later and that expectation itself is the agreement. Rather than modifying an existing agreement, these terms are part of the agreement itself.

UNIF. COMPUTER INFO. TRANSACTIONS ACT § 202 cmt. 4, 7 U.L.A. 275 (2002 & Supp. 2005).

81. Eisenberg, *supra* note 2, at 1745. A recent survey of six sections of the *Restatement* that contradicted longstanding, traditional rules found that, despite the innovativeness of these sections, the majority of the courts surveyed accepted them. *See* Maggs, *supra* note 79.

82. Maggs, *supra* note 79, at 510 ("The American Law Institute's decision to include a rule in the *Restatement (Second)* does not mean that a majority of courts have adopted that rule. The *Restatement (Second)* strives to state the best rules, not necessarily the rules that most courts have followed.").

83. *Id.* at 527 ("First, a few courts appear to have followed the rules on grounds of precedent. Second, a few other courts appear to have followed the new rules for policy reasons. Third, several other courts adopted the rules because statutes or case law require them to follow the *Restatement (Second)* absent contrary authority. Fourth, the remaining courts appear to have accepted the rules on grounds of convenience; rather than examine precedent or policy arguments, courts voluntarily deferred to the ALI's view of what the law should be.").

84. Ostas & Darr, *supra* note 62, at 381 ("When a disruptive event has not been addressed by the parties *ex ante*, and neither party is at fault, the courts use equitable notions based on community fairness norms to divide the loss between innocents.").

85. Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1729–30 (1997) ("Our sample consists of the first twenty cases cited by *American Jurisprudence 2d* as authorities for the rule. All twenty cases indeed contain one expression or another of the rule. However, it

cusses the importance of rules of contract interpretation and demonstrates how they may actually undermine the objectives of contract law. This Part focuses on the problems specific to form agreements, although many of the general issues may be applied to customized agreements.

III. THE NEED FOR A DYNAMIC APPLICATION OF INTERPRETATION RULES

Dynamic contract law should effectuate the objectives of parties to a contract "if appropriate conditions are satisfied and subject to appropriate constraints."[86] Modern contract law has moved away from the objective and standardized character of classical contract law rules to rules that are individualized and, sometimes, subjective.[87] In the area of interpretation, the focus has shifted, to a certain extent, from the outward conduct of the parties to their internal thoughts[88] and to the surrounding circumstances. For example, the *Restatement (Second) of Contracts* states:

> Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed. In cases of misunderstanding, there must be inquiry into the meaning attached to the words by each party and into what each knew or had reason to know.[89]

Similarly, the modern judicial approach to contract rules of interpretation has reflected a more substantive examination of the facts of a particular case. In the past, courts were reluctant to interfere with contracts based upon their perceived fairness. More and more, however, courts are willing to review the fairness of a contract.[90]

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seems that only one or two of them actually follow it! In five cases, no question of interpretation was in fact discussed and thus no meaningful comparison may be drawn between the court's rhetoric and its practice. In two of the remaining cases, the court held that the contract was in fact ambiguous, and thus extrinsic evidence was admissible even under the PMR's own terms. Eleven of the remaining thirteen cases stated the PMR, yet explicitly or implicitly (but clearly) considered the effect of surrounding circumstances, previous or subsequent dealings between the parties . . . default rules, or the economic social and public policy background of the transaction."); *see also* Prince, *supra* note 72, at 557 (noting that California courts have consistently applied a contextual analysis while claiming to apply the plain meaning rule).

86. Eisenberg, *supra* note 2, at 1754.
87. *Id.*
88. *Id.* at 1756–58.
89. RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. b (1981).
90. Chase, *supra* note 20, at 38; Zamir, *supra* note 85, at 1749 ("[C]ourts frequently interpret contracts in a tendentious manner to attain just, fair, and reasonable results. They interpret contracts against the drafter, in favor of the public interest, and in accordance with predetermined conceptions of the desirability or undesirability of certain types of clauses. At times, they do so explicitly; at times, tacitly.").

Yet, this shift away from objective factors and standards to a more substantive review has not been uniform[91] or even acknowledged. In fact, many of the interpretation rules ostensibly only to be used to regulate the process of contracting are actually used to regulate the content of contracts.[92] The U.C.C., for example, contains many provisions that require the parties to act in good faith and in a reasonable manner in the creation of a contract but that do not pertain to the substantive terms of that contract.[93] A review of relevant case law indicates that such a judicial analysis has not been limited to the process of contracting but was influenced by the results of that process.[94]

A. Overview of Contract Rules of Interpretation

Contract disputes arise in a variety of different situations. One of the most common types of disputes involves the interpretation of a word or writing.[95] The resolution of the dispute requires determining both the intent of the parties and the meaning of the terms of their agreement.[96] Contract interpretation is essential to determining whether a contract was formed and, if so, the nature of each party's obligations.[97]

Not surprisingly, contract rules of interpretation are varied and numerous.[98] While they may vary from jurisdiction to jurisdiction,[99]

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91. Maggs, *supra* note 79, at 508–10 (stating that the *Restatement* rules are not those necessarily followed by the courts). In fact, Farnsworth notes that, at least with respect to the role of reliance, there has been a trend favoring formality. Farnsworth, *supra* note 51, at 218–22.
92. Zamir, *supra* note 85, at 1745 ("[A]n examination of judicial practice reveals a tendency to use information regulation as a means for regulating content. According to the definition of 'conspicuous' in section 1-201(10) of the UCC, the use of capital letters or 'larger or other contrasting type or color' should suffice to meet this requirement. However, several courts have refused to enforce such disclaimers when they have been printed on the reverse side of a form, reference to them on the front page was not conspicuous enough, or the consumers' attention was not specifically drawn to them.").
93. *Id.* at 1746; *see also* U.C.C. § 2-305(2) (2004) ("A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.").
94. Zamir, *supra* note 85, at 1746.
95. Prince, *supra* note 72, at 567–68.
96. Mark K. Glasser & Keith A. Rowley, *On Parole: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 661 (1997) ("When litigation results [from contractual disputes], the threshold issue for the parties, their counsel, and the court are often the same: What are the complete terms of the parties' agreement, and what was the parties' intent in entering into it?").
97. Prince, *supra* note 72, at 567–68.
98. Schwartz & Scott, *supra* note 35, at 547 ("Contract law has more rules regulating various aspects of the contracting relationship than are needed solely to perform its enforcement and interpretation functions."). The authors further note that statutory drafters and courts often adopt inefficient default rules and standards. *Id.*

they can generally be classified into four basic categories: *definitional rules, gap fillers, evidentiary rules,* and *judicial guidance rules.*[100] "Definitional rules" of interpretation seek to determine what the parties meant by the words they used in the contract. Modern courts tend to use definitional rules that consider both the objective meaning of words as well as the parties' subjective understanding of those words. The *Restatement (Second) of Contracts* sets forth definitional rules of interpretation as follows:

> (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
> (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
> (3) Unless a different intention is manifested,
> (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
> (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.[101]

"Gap fillers" refer to court-supplied terms regarding issues the parties have failed to address.[102] The *Restatement* states: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is

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99. *See* Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73 (1999). Rowley explains:

> Over time, courts and scholars have recognized certain "rules" or "maxims" of construction and interpretation to guide courts and litigants in their efforts to give effect to the parties' mutual intention at the time of contracting. These rules appear in no code, and there is less than universal agreement among courts and commentators as to whether all of the maxims . . . are legitimate guides to construction and as to what priorities, if any, courts are to observe among the various rules.

Id. at 82.

100. The Author gratefully acknowledges Melvin Eisenberg's suggestion of the inclusion of a taxonomy. I have categorized the interpretation rules in this Part according to their function in a given case. Some interpretation rules may fit into two categories depending on how they are applied. The plain meaning rule, for example, states that where a writing appears to be complete and is not facially ambiguous, the court must interpret the words in accordance with their ordinary meaning and may not resort to extrinsic evidence. *See* CALAMARI & PERILLO, *supra* note 9, § 3.10. The purpose of the plain meaning rule is thus to help determine the meaning of a particular word or phrase as well as to limit the admissibility of extrinsic evidence. Thus, the plain meaning rule may be categorized as both a definitional rule as well as an evidentiary rule. Trade usage, as another example, may be used to interpret terms and to imply terms—thus it is both a definitional rule and a gap filler, depending on the way it is used by the court.

101. RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

102. *See generally* Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Bargains*, 2004 WIS. L. REV. 323 (2004).

supplied by the court."[103] These gap fillers tend to embody industry norms or customs.[104]

"Evidentiary rules" of interpretation, such as the parol evidence rule[105] and the four corners doctrine,[106] govern the admissibility of extrinsic evidence. While evidentiary rules govern *what* courts can consider, "judicial guidance rules" instruct *how* a judge or jury should evaluate a disputed term or provision. Many judicial guidance rules involve the weighing of contractual terms, such as the presumption favoring the nondrafting party[107] or the presumption favoring specific terms over general terms.[108] Often, judicial guidance rules, such as the strict construction of guaranty agreements and exemption clauses, are derived from policy or legislative decisions.[109]

Typically, the courts will rely to varying degrees upon these rules of interpretation[110] to guide their examination of such disputes.[111]

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103. RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981).

104. Holder v. Swift, 147 S.W. 690, 691 (Tex. Civ. App. 1912) ("[W]hen both parties to a contract are engaged in the particular trade they will be presumed to have knowledge of such custom. It is not necessary in such a case to prove actual knowledge . . . ." (quoting J.E. Smith & Co. v. Russell Lumber Co., 72 A. 577, 579 (Conn. 1909))).

105. Shocklee v. Mass. Mut. Life Ins. Co., 369 F.3d 437 (5th Cir. 2004); Singer v. West Publ'g Corp., 310 F. Supp. 2d 1246 (S.D. Fla. 2004); Norwest Bank Minn. v. Midwestern Mach. Co., 481 N.W.2d 875, 881 (Minn. Ct. App. 1992).

106. Under the four corners doctrine, if a contract is unambiguous on its face, a court may not look to extrinsic evidence to determine its meaning. *See, e.g.*, *In re* Minn. Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830 (8th Cir. 2003); Kerin v. U.S. Postal Serv., 116 F.3d 988 (2d Cir. 1997).

107. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27 (rev. ed. 1998 & Supp. 2005).

108. *See generally* Glasser & Rowley, *supra* note 96 (discussing interpretation rules under Texas law).

109. Other examples include strict construction of exemption clauses and disclaimers. *See id.* at 689; *see also* Guillory v. Morein Motor Co., 322 So. 2d 375, 378 (La. Ct. App. 1975) (regarding waiver of warranties); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 77–78 (N.J. 1960) (same).

110. *See, e.g.*, So. Pac. Transp. Co. v. Santa Fe Pac. Pipelines, Inc., 88 Cal. Rptr. 2d 777, 782–83 (1999) ("Faced with contract language that is reasonably susceptible to more than one meaning, certain general rules of contract interpretation come into play to aid the court in resolving ambiguity."). For a general analysis of default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 94 (1989); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

111. Some interpretation rules, such as the plain meaning rule, have diminished in importance. *See* Eisenberg, *supra* note 2, at 1768 ("[U]nder modern contract law . . . the plain meaning rule has been largely abandoned."). Further,

> [a]ny determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

These interpretation rules[112] provide the backdrop against which the contract will be examined[113] and have been the subject of much academic discussion.[114] A party's contractual obligations are not limited to what is specifically stated in the written agreement.[115] In some cases, the courts may supply terms or "gap fillers" where the parties have entered into a contract but failed, either intentionally or not, to

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RESTATEMENT (SECOND) OF CONTRACTS § 212(1) cmt. b (1981). Many courts, however, continue to use the plain meaning rule to decide issues of contract interpretation. *See, e.g.*, Barron Bancshares, Inc. v. United States, 366 F.3d 1360, 1375–76 (Fed. Cir. 2004) ("If the terms of a contract are clear and unambiguous, they must be given their plain meaning—extrinsic evidence is inadmissible to interpret them . . . . In this case, because the . . . provisions of the contract are clear and unambiguous, we must construe them according to their plain meaning, without resort to parol evidence."); *see also* Shocklee v. Mass. Mut. Life Ins. Co., 369 F.3d 437, 440 (5th Cir. 2004) ("Under Louisiana law, '[w]hen the words of a contract are clear and explicit and lead to no absurd results, no further interpretation may be made in search of the parties' intent.' As a result, if a contract is unambiguous on its face, the 'contract's meaning and the intent of its parties must be sought within the four corners of the document and cannot be explained or contradicted by extrinsic evidence.'" (quoting LA. CIV. CODE ANN. art. 2046 (1987); Am. Totalisator Co. v. Fair Grounds Corp., 3 F.3d at 810, 813 (5th Cir. 1993))); Starpower Commc'ns, LLC v. Federal Commc'n Comm'n, 334 F.3d 1150, 1153 (D.C. Cir. 2003) ("[T]he Commission was obliged to apply the contract law of Virginia, including the rule that 'where the terms of the contract are clear and unambiguous, we will construe those terms according to their plain meaning.'").

112. Glasser & Rowley, *supra* note 96, at 661–62 (noting a distinction between "construction" and "interpretation" of a contract, and remarking that while the terms are often used interchangeably, "*interpretation* of a contract is the process of determining the meaning of the words and symbols used in the contract, while *construction* of a contract is the process of determining the legal effect of those words and symbols in light of many factors external to the contract itself" (citing 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 534, at 7–9 (1960))). In this Article, because I intend to address both "construction" and "interpretation," I shall use the word "interpretation" to include both meanings.

113. Zamir, *supra* note 85, at 1710. Zamir explains:

> Contract interpretation and supplementation is conventionally conceived of as a multistage process, in which various sources, including express terms, course of performance, course of dealing, trade usages, default rules, and general standards of reasonableness, are sequentially resorted to . . . . A competing theory, inspired by Karl Llewellyn, maintains that the decisionmaker should be free to consider all the elements of the [contract] . . . .

Id.; *see also* Glasser & Rowley, *supra* note 96 (examining rules of construction used by Texas courts).

114. The parol evidence rule in particular has been the subject to much discussion. *See* Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35 (1985); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998); Lawrence M. Solan, *Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87 (2001).

115. *See, e.g.*, Hadjiyannakis, *supra* note 114 (exploring the relationship between implied terms and the parol evidence rule).

address certain issues.[116] In other cases, the law may presume certain standards or obligations unless they are specifically disclaimed.[117] For example, the U.C.C. provides an implied warranty of merchantability for goods that holds the seller liable for breach unless such warranty is expressly disclaimed.[118] Consequently, a party to a contract should be aware of the effect of these interpretation rules during the negotiation process.[119]

1. *How Strict Application of Interpretation Rules Undermines Contract Law Objectives*

The goal of the courts in contract interpretation is to find the solution that the parties would have enacted if they had addressed the problem during negotiations.[120] The justification for the court's limited role in contract interpretation is based upon both autonomy and economic efficiency objectives.[121] The autonomy view holds that the exercise of state coercion against individuals to a contract must be justified.[122] Such coercion is justified if the court simply ascertains what the individuals have themselves agreed to do.[123] The efficiency view holds that the parties entered into a contract in order to maximize the surplus that their deal can create.[124] If the court enforces a solution other than what the parties adopted, the maximization objective is defeated.[125] In practice, however, the interpretations adopted by the courts have tended to reflect their political philosophies or normative goals.[126] The stated intention of providing interpretations that reflect the intent of the parties has not resulted in judicial decisions free of

116. *Id.* at 35–36.
117. *Id.*
118. U.C.C. §§ 2-314, 2-316 (2003).
119. *See* Glasser & Rowley, *supra* note 96, at 661 ("[N]o lawyer should draft a contract or adopt a contract litigation strategy without accounting for the effect of these rules and principles.").
120. Schwartz & Scott, *supra* note 35, at 568–69.
121. *Id.* at 569.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Peter W. Schroth, *Language and Law*, 46 AM. J. COMP. L. SUPPLEMENT 17, 28 (1998) ("[J]udges . . . sometimes assert linguistic compulsion for results actually reached by legal reasoning, and more frequently add linguistic reasons—but only when they happen to point toward the same conclusion—to their opinions alongside the legal reasons that really underlie the results. Whatever certain Supreme Court Justices may pretend in their opinions, the average well trained lawyer or judge understands the task of applying a statute to a particular case better before the linguistic research and analysis are undertaken than the non-lawyer linguist does when it is completed.").

normative judgments.[127] They have, however, sometimes served the strategic purpose of defusing political criticism.[128]

In addition to the practical difficulty—and questionable desirability—of rendering interpretations free of the values of the judiciary,[129] there are disadvantages to strict application of interpretation rules. If the interpretation of a contract depends upon rules that are not intuitive to a non-lawyer, and the default rule (i.e., gap filler) is not what a party intended or desired, then the will of the contracting parties is not furthered and the experience of self-actualization through bargaining is thwarted.[130] Furthermore, if application of the rules results in unexpected contractual interpretations, individuals may hesitate to enter into agreements or refrain from entering into them altogether. At the very least, the application of non-intuitive interpretation rules would prompt a party to seek the guidance and assistance of legal counsel, which may decrease the number of transactions (or at least slow the completion of those transactions), increase the cost of transactions,[131] and deter those with few resources from engaging in

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127. Prince, *supra* note 72, at 564 (noting that judges use the standard or rule of interpretation "that they think will give rise to a just result in the particular case . . . . [U]nder a guise of interpretation, a court will actually enforce its notions of 'public policy,' which is 'nothing more than an attempt to do justice" (quoting CALAMARI & PERILLO, *supra* note 9, § 3-16)).

128. For example, Professor Jim Chen contends that the "new textualism of the Rehnquist Court" has:

> cloaked itself in a shroud of quasi-scientific linguistic analysis, seeking semantic shelter among lexicographic islands in a sea of uncertainty. Armed with *ad hoc* linguistic reasoning and its choice of dictionaries, the next textualism suggests that exclusive reliance on the 'ordinary meaning of . . . language in its textual context' and the 'established canons of construction' will shield judges from the pernicious influences of pragmatism and contextually contingent interpretation.

Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1267 (1995) (citations omitted). While Chen was referring to statutory interpretation, the criticism is equally applicable to contractual interpretations.

129. Schroth, *supra* note 126, at 27–28. Schroth explains:

> The task of judges is judging . . . . This task is entrusted to judges because of their legal training and experience. It is difficult to say whether it is worse that some judges—even Supreme Court Justices!—feel the need to "legitimize" by pretending they mechanically follow linguistic science or some other science rather than doing their jobs or that there is such hostility to judges that they may be correct.

Id.

130. Eisenberg, *supra* note 2, at 1769 ("A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." (quoting Pac. Gas. & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968))).

131. The existence of interpretation rules increase the costs of transactions for those unfamiliar with the rules as well as those who wish to contract out or around them. *See* Zamir, *supra* note 85, at 1755–56. Zamir explains:

legally binding contracts. In anticipation of how courts may apply interpretation rules, the parties might engage in inefficient contracting behavior.[132] For example, they may spend time crafting complex provisions to address unlikely scenarios out of fear that their failure to do so would result in a court's application of a standard to which neither party would have agreed.

Consequently, a strict application of interpretation rules slows down the rate of economic transactions and keeps out new players; both these effects in turn increase market stagnation and undermine the "economic efficiency" objective of contract law.[133] The complexity of the rules puts a contractually inexperienced party—or a party without a lawyer—at a disadvantage to a more sophisticated one. Because of their sheer number and complexity, prior knowledge of interpretation rules aids a party in contract drafting. A party already familiar with the interpretation rules can contract out or around certain default provisions; on the other hand, a party unfamiliar with these rules may not realize that by agreeing to a particular provision, he or she is giving up an advantage typically implied by the courts. In addition, by deterring those with little money to spend on legal counsel from entering into business transactions, the application of interpretation rules weakens the ancillary objective of contract law—that of promoting fairness. Because the rules work to maintain the status quo in favor of those with more resources or greater bargaining power, they perpetuate a social and economic injustice against those who may have business ambition but little money. Given the high cost of legal fees and the seeming complexity and mystery of contract law, an individual might be inclined to make decisions that would minimize chances of business success or forgo a business venture for a more secure and certain field which has fewer risks but limited financial rewards.

> A central function of default rules . . . is to reduce transaction costs. A default rule that reflects what most contracting parties would have wished to incorporate into their contract saves them the costs of negotiating and formulating it themselves. At the same time, the nonmandatory nature of the rule indicates that there may be some transactions in which it is worthwhile for the parties to contract around it. However, in many cases, the very existence of a default rule, like the existence of an established usage, imposes additional costs on parties wishing to lay down a contrary or different term in their contract.

Id.

132. Schwartz & Scott, *supra* note 35, at 604 (writing of gap-filling standards that "[t]he state wastes resources in drafting them; the parties waste resources in contracting out; and when courts are expected to use standards actively to police bargains, parties may create sets of rules they would otherwise have preferred to omit").

133. *Id.* at 608 ("[I]nefficient defaults only raise transaction costs unnecessarily.").

2. *The Interplay of Interpretation Rules with Evolving Business and Social Norms and Needs*

Evolving societal and business norms and needs affect, and are affected by, contract law and the established rules of interpretation. This section focuses on two significant changes—the increase in contracts between parties of different cultural and linguistic backgrounds,[134] and the rise in the use of form agreements.[135]

a. *Cultural Assumptions Underlying Interpretation Rules*

If courts resort to interpretation rules without giving proper consideration to language and cultural issues in reviewing a contractual dispute, the American-born, native English speaker has an inherent advantage because United States contract law assumes that both parties are American-born, native English speakers.[136] However, the increasing globalization of commerce makes this assumption inaccurate.[137] The Internet and improvements in transportation have enabled participation in international commerce for economic players who would have, in the past, been prevented from doing so for a lack of resources. Even a decade ago, global commercial transactions were limited to multinational corporations dealing in large dollar sales; today, anyone with a credit card and Internet access can participate in commerce worldwide. As technology enables even small dollar transactions to occur across international boundaries,[138] the potential for

134. *See generally* Steven Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1029–30 (1996); Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441 (2002); Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635 (1997).

135. *See generally* Barnett, *Consenting to Form Contracts, supra* note 19, at 627 ("From video rentals to the sale of automobiles, form contracts are everywhere.").

136. Steven Bender has written that:

> American law has little patience for immigrants who arrive unable to understand English . . . . As consumers, immigrants unable to understand English are left largely to the morals of the marketplace. Existing consumer protection regulation too often assumes that consumers are proficient in English . . . . Sadly, this gap in protection has made some Latinos/as and other language minorities the victims of choice for unscrupulous merchants who prey on their inability to understand the terms of the bargain.

Bender, *supra* note 134, at 1029–30.

137. *See* Sanchez, *supra* note 134, at 636 ("[T]he U.S. American practitioner, now more than ever before, operates in a world society and economy constituted not only of an international society and economy but also of interdependent nations' societies and economies.").

138. Ponte, *supra* note 134, at 469 ("The Internet's low economic barriers to entry invite participation in commerce . . . by small entities and individuals who cannot

conflict due to language or cultural misunderstandings grows.[139] Therefore, an understanding of the parties' cultural norms and biases is essential in order to understand their contractual intent.[140]

For example, because of the influence of Confucianism[141] and Taoism,[142] the cultures of East Asian nations have been characterized as

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afford direct participation in many traditional markets . . . . These low barriers and greater participation . . . also mean a greater incidence of small transactions." (quoting Henry R. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 699 (2000))).

139. One commentator notes that while contract law may be compared in countries sharing a Western legal tradition because their market economies are relatively homogeneous, comparisons between Western and non-Western systems (e.g., German law versus Chinese law) must take into account the underlying political, economic, and cultural conditions. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal System*, 45 AM. J. COMP. L. 5, 21–22 (1997). Another commentator has noted that:

> Foremost among the differences that affect international business negotiations are the two contrary approaches to making decisions. Western business standards are specifically task-oriented and thus rely greatly on the individual's apprehension of facts and figures . . . . Asian business cultures on the other hand emphasise [sic] the importance of maintaining long-term relationships. Facts and figures, they think, might change tomorrow, but it is the strength of the relationship that enables business partners to weather such changes.

U–En Ng, *You Talkin' to Me*, NEW STRAITS TIMES (Malaysia), Apr. 9, 2003, at 6.

140. *See* Bryan A. Liang & Anita C. Liang, *Lies on the Lips: Dying Declaration, Western Legal Bias, and Unreliability*, 5 LAW TEXT CULTURE 113, 125–26 (2001). The authors explain:

> The general linguistic conventions . . . must also be understood and have been experienced by the listener. This brings cultural norms and biases to the very forefront of understanding of meaning. In conjunction, an understanding and knowledge of the context of the original speech is essential; beyond the physical circumstances of the authorial context, the social and thus cultural bias between the parties must be understood and known, including the events and circumstances that led up to the author's speech . . . Thus, subjective meaning requires at a minimum, assuming similar backgrounds, commentaries, and retorts, a knowledge of the speaker's linguistic conventions, specific physical and social contexts, and all other important factors . . . .

Id. at 126.

141. Shin–yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN–PAC. L. & POL'Y J. 13 (2000), *available at* http://www.hawaii.edu/aplpj/pdfs/13–peng.pdf.

142. Patricia Pattison & Daniel Herron, *The Mountains are High and the Emperor is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 482 (2003). The authors explain:

> Governmental intervention through rules and laws is not only considered to be unnecessary, but also detrimental to the society . . . . Taoism focuses on the disdain for the legal rules that Westerners take for granted. In an extenuated way, Taoism would seemingly put contractual relationship, and subsequent obligations, into some kind of metaphysical or transcendental realm which must be realized, not through some kind of Western-style negotiation, but on self-realization. This model is totally foreign to Western concepts of law.

less litigious than the United States.[143] Confucianism emphasizes dispute resolution through collective social responsibility and mutual concession.[144] Accordingly, the literal meaning of the words on the page might be less important than the spirit or purpose of the transaction.[145] In China, the signing of a contract often indicates only the existence of a relationship and, consequently, the *commencement* of negotiations.[146] A contract might thus be signed that intentionally contains incomplete terms or terms that differ from what a party might ultimately desire.[147] Rather than expending time and good will negotiating every conceivable negative scenario, more faith is placed upon the nonjudicial resolution of issues when, and if, they occur.[148]

Id.

143. The notion of contract as a means of implementing individual autonomy is a distinctly Western notion. *See* Alexander J. Bolla, Jr., *The (Im)probable Future in Japanese Charter Parties: The Language of Law*, 29 J. MAR. L. & COM. 107 (1998) ("Western contract and charter party models predominantly base obligation on the notion of a consensual promise—that declaration of intent to act or forbear in a specific way, thereby justifying the promisee's understanding that the promisor is bound."). By contrast, the Japanese concept of community coupled with "insiderness" "blurs a responsive and tolerant Western understanding of negotiation and contracting with those from the Japanese culture." *Id.*

144. Peng, *supra* note 142, at 13:9–13:13; *see also* Pattison & Herron, *supra* note 142, at 478–80 ("Confucian concepts are critical to remember in . . . discussion of contract law. They impact not only the Western understanding of sanctity of contract, but also the whole concept of rule of law.").

145. Peng, *supra* note 141, at 13:21 ("For Asians, vague language is often necessary to ensure consensus on sensitive issues. Ambiguity is almost an art form; it is viewed as a useful device in mitigating conflict and building common positions and confidence . . . . Asians tend to avoid legalism and emphasize group "harmony" and "consensus." To most Asians, disputes and negotiations disturb group harmony.").

146. Pattison & Herron, *supra* note 142, at 460.

147. The 1999 enactment of the Uniform Contract Law by the Chinese government "attempted to bring Chinese business practices into . . . conformity or consistency with . . . Western practices." *Id.* However, the adoption of this legislation does not eliminate deeply rooted cultural differences. *Id.* at 461. As Pattison and Herron note, "[a]fter all the necessary legislation is enacted, one problem will still remain. How will all the new laws be enforced? One commentator has noted that, 'non-observance of these laws is quite universal.'" *Id.* (quoting Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 61 (2001)).

148. A neighbor, an immigrant from China, recently asked me to review a research and development partnership agreement that he had signed with a business partner in China. This neighbor is a scientist and an executive at a large United States biotechnology company and his business partner is the CEO of a multimillion dollar pharmaceutical company in China. The agreement was very brief and contained broad, general terms intended to capture the spirit of a partnership without outlining any of the specifics of performance (or remedies, in event of breach). It was signed by both parties without review by counsel prior to signature. Of course, as an American lawyer specializing in contracts, I had many questions regarding the terms of the agreement. My neighbor admitted that neither he nor his partner had considered all the contingencies but had faith that they would be able to resolve any conflict. After some discussion, I concluded that

Frequently, the Chinese will forego a formal contract altogether, viewing it as "unnecessary, [and] sometimes offensive, when rules of loyalty and mutual obligation structure the business environment."[149] In the United States on the other hand, the signing of a contract indicates the end of contractual negotiations.[150]

The language spoken by the contracting parties affects their understanding of the written agreement even if that agreement has been translated.[151] Many commentators have written about the difficulty in providing accurate and meaningful translations.[152] For example, "Japanese does not have a future tense grammatical component, [so]

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their optimism and the simplicity of their agreement reflected not their naivete but their cultural beliefs regarding the nature of contracts and business partnerships. As my neighbor put it, if something went wrong they wouldn't sue each other anyway—they would just go their separate ways.

149. Pattison & Herron, *supra* note 142, at 487–88.

150. *Id.* at 460. The authors note that this competing view of contract formation often results in misunderstanding:

> Westerns view contract formation as the culmination of a negotiating process and period . . . . From the Chinese perspective, the "final" contract signifies that a relationship exists and terms–negotiations may now continue. The "final" contract signals the beginning for real contract negotiations. Is it surprising, then, that Westerners view Chinese, in this context, as unethical in failing to fulfill their supposedly agreed-upon contractual obligations.

Id. The Japanese are also often criticized by their Western contractual partners for failing to abide by the precise terms of a contract. Bolla, *supra* note 143, at 112. Yet, as Bolla notes, strict adherence to contractual terms is often viewed by the Japanese as "undue rigidity." *Id.*

151. *See* Sanchez, *supra* note 134, at 658–59 ("Language symbols, grammatical structures, meanings, sounds, intonation, and accent are culturally defined. Culture and enculturation form ideas, methods of analyses, perceptions, behaviors and beliefs. The language selected to structure and convey these cultural phenomena reflects cultural content. Language is a product of culture and, simultaneously, is formative of culture . . . . Language is understood because of culture."); *see also* Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 189 (2002) ("There are features inherent to language that can contribute to misunderstanding, such as the multiple meanings or references of words and expressions. Speakers may not know all the nuances, and even if they do, they may believe that some of these are not at all applicable to their legal situations and so they do not feel compelled to specify which meaning or reference is intended."); Schroth, *supra* note 126, at 39 ("[L]anguage is not a set of labels for objects and concepts that exist independent of any particular language; rather everything we know and are is shaped by, and shapes, our language.").

152. *See, e.g.*, Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 50 (1998) ("[C]ommunication is doomed to imperfection. Perfect communication by means of human language would require that all interlocutors have identical cultural backgrounds and physical makeups. Difficulties in transmitting concepts across cultural–linguistic differences are related to the level of abstraction connoted by the words in question."). Curran also notes that "[w]hen translating, one discovers that one transmits only a portion of the original." *Id.* at 56.

the future is indeterminate and probable . . . ."[153] Because Western cultures, in contrast, view a promise as a "present intent to be bound to a future performance," Japanese must "traverse[ ] from doubt to certainty in the probable mood."[154] Legal concepts are often difficult to convey when the speakers have different linguistic backgrounds and even a single word may have multiple linguistic associations.[155] Noam Chomsky has stated that "although there is much reason to believe that languages are to a significant extent cast in the same mold, there is little reason to suppose that reasonable procedures of translation are in general possible."[156] Even among native English speakers, there may be differences. Regional dialects and pronunciations may affect a party's understanding of the terms of a contract.[157] Even the same language may have a "plurality of discourses"[158] as is evidenced by the different forms of English spoken by an Australian, a Bostoner, a New Yorker, and a Londoner.

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153. *See* Bolla, *supra* note 143, at 110.

154. *Id.* Alexander Bolla states that the goal is "to convey the futurity portion of a charter party promise from West to East while coupling the promise with obligation." *Id.* at 111.

155. For example, Gloria Sanchez illustrates the "difficulty of communicating the same legal concept" by explaining how a single word—investment—is understood by a Spanish and an English speaker:

> In Spanish, the term investment translates to "inversi6n." The terms "investment and "inversi6n" have different Latin roots. In English, "investment," from *investire*, means "to install, to surround, to clothe in a garment;" whereas "inversi6n" in Spanish, from *invertire*, means "to change position, to turn over or turn around." This variance in meaning suggests that the terms differ diametrically: in the United States "investment" seeks long-term benefits, while in Mexico, "inversion" seeks short-term profit.

Sanchez, *supra* note 134, at 662.

156. NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 202 n.17 (1965). Some of the difficulties of effective translation may be attributed to the "unconscious" and metaphorical nature of the "conceptual systems" governing human behavior. *See* Liang & Liang, *supra* note 140, at 119. The authors further note that "[m]etaphors . . . highlight some aspects of our experiences; yet they necessarily hide other aspects of those experiences, making it difficult to conceptualize our experiences in other terms." *Id.* at 120.

157. Curran notes that distortion prevents identical understanding of the same concept, even between individuals of the same nation:

> Each person's cultural context is unique to some extent, such that no two people's understanding of a concept will be identical in any discourse outside of purely symbolic ones, such as that of mathematics. It has also been proposed that a word never has the same meaning twice, neither when used more than once by the same person, nor when used by different people.

Curran, *supra* note 152, at 49. That notwithstanding, the likelihood of effective communication increases "the more interlocutors share in terms of their cultural contexts." *Id.* at 50–51.

158. *Id.* at 54–55.

Even within a particular region, cultural and linguistic differences may affect the parties' contractual intentions. In Latin American countries, despite the regional proximity and existence of a common language (for all countries except Brazil), these differences affect the way business is conducted.[159] Argentina has shown more initiative in the area of Internet commerce, while Colombia has suffered from political turmoil.[160] Although Brazil has "more money and a larger population than Argentina," its e-commerce efforts have been hindered by its geography and language.[161] Even with respect to those nations with Spanish as a common language, there are different dialects, idioms, and slang that may change the meaning of words from region to region.[162]

A consideration of cultural and linguistic differences, however, does not mean deferring to the law of the non-American party's country. A dynamic approach to contract interpretation should not be mistaken for a relativistic approach. The fact that many Latin American legal systems do not recognize a digital signature[163] does not mean that an electronic contract subject to United States law should not be binding.[164] Nor should the decisionmaker fall into the trap of broad generalizations and stereotyping in an effort to recognize differences between the parties.[165] Still, the cultural and linguistic differences

159. Luz E. Nagle, *E-commerce in Latin America: Legal and Business Challenges for Developing Enterprise*, 50 AM. U. L. REV. 859, 862 (2001).

160. *Id.* at 862–63.

161. *Id.* at 862.

162. *Id.* at 866–67 ("Despite what many people wrongly assume, Latin America is not a single entity. It consists of independent countries with complex and diverse geography . . . These countries contain non-homogenous markets that, despite sharing a common language (with the exception of Brazil), differ economically, politically, culturally, technologically and demographically. As for language, it is somewhat simplistic to assume that the Spanish spoken throughout Latin America is the same, or that one dialect and one form of slang exists throughout the region. One idiom of Spanish does not bridge seventeen different countries, as words change meaning from region to region and can pose problems for an e-commerce business marketing itself through Latin America.").

163. *Id.* at 917.

164. Latin American countries tend to require more contract formalities than are necessary in the United States. *See id.* at 916 ("For the creation of a right, the law requires certain contracts to be finalized in written form, while other contracts require writing, notarized documents and registration, and authentication by handwritten signature. Thus, any e-transaction taking place in countries that have yet to enact e-commerce legislation may prove unenforceable."). Nagle further notes that "[i]t is still uncertain how Latin American judges will handle electronic judges. Few judges are technologically savvy. Many do not have computers, and for several judges Internet access 'could still be considered a privilege,' especially outside the main cities." *Id.* at 918 (citation omitted).

165. In the criminal law context, courts have sometimes used stereotypes to inaccurately portray the cultural background of the defendant. *See* Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Anal-*

between the parties may have a significant effect on their understanding of the contract or of the bargaining process. A failure to acknowledge these differences assumes a norm (i.e., that the bargaining parties are both native English speakers who share the same cultural and linguistic frames of reference) that may not be in accordance with reality. By taking into consideration *who* the parties are, a dynamic approach fulfills one of the primary objectives of contract interpretation, which is to ascertain and effectuate the intention of the parties. An understanding of the cultural and linguistic background of the contracting parties can only enhance the ability to determine those intentions.[166]

Cultural and linguistic differences abound in international transactions as well as in transactions between and among residents of the United States. "[M]any U.S. residents are [non] native . . . speakers"[167] and many non-native speakers are business owners.[168] Census reports demonstrate a rapid rise in Latino/a and Asian owned businesses,[169] increasing the odds that a party to a contract may be negotiating in a language that is not her primary one. Beyond purely linguistic differences, a party's background and experience may affect the contractual context, even among those sharing the same geographical boundaries.[170] Anthony Chase, for example, has noted that because classical contract law rested on the illusion that contracts were entered into voluntarily by free individuals, its application historically failed to alleviate the oppression of African-Americans, who may have been deceived or coerced into transactions.[171] Blake Morant has ar-

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ysis, 27 N.M. L. REV. 101, 117–21 (1997) (describing two cases in which evidence of cultural backgrounds was "misused").

166. In other words, to truly "get inside the heads" of the bargaining parties, "it is essential to have a thorough understanding of what underlies their thinking." Pattison & Herron, *supra* note 142, at 462 (internal quotation marks omitted).

167. Lim, *supra* note 40, at 579.

168. *Id.* at 586 (speaking about the 1997 U.S. Census Bureau report which indicated that Latina/os and Asians owned approximately 2.1 million, or 10.2%, of all non-farm businesses in the United States).

169. *Id.* at 586–87; *see also* Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233 (2003) ("During the later part of the twentieth century, women-owned and minority-owned business proprietorships increased exponentially . . . [t]he number of minority-owned businesses rose in the later half of the twentieth century from 8.8% to 12.5%.").

170. The same issues raised by cultural and linguistic differences occur between and among citizens of the same nation as between and among citizens of different nations, although the degree of those differences will vary. Curran, *supra* note 152, at 91.

171. *See* Chase, *supra* note 20, at 65 ("If we are to achieve a more comprehensive view of the intersection of the law and the lives of African-American people, then we must begin to interrogate the significance of the ideological diversity within our culture.").

gued that the objectivity of contract law is "illusory" with respect to many real-world transactions.[172] A dynamic application of contract law recognizes that the experiences, resources, native language, socio-economic, and cultural background of each party affect that party's bargaining position and/or understanding of the agreement.[173] Without taking these factors into account, the default is the status quo, meaning that with respect to interpretation rules, the party most familiar with the English language and American business practices will have an advantage. Without an express acknowledgment of the roles that language and culture play in a transaction, the law assumes that there are no differences and that all bargaining parties are native English speakers, who are born and raised in the geographical region of the governing law and who speak the same dialect indigenous to that region.[174]

Failure to consider differences that exist between parties who share the same geographical boundaries may also undermine another objective of contract law—that of achieving distributional justice.[175] Not only are members of a language or cultural minority affected as individuals, but the inability of contract law to consider these differ-

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172. Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 69–70 (1998). Morant explains:

> [T]he objectivity and abstraction fostered by the principles of contractual theory have an illusory quality when viewed in terms of actual human contexts. Because bargainers are affected and influenced by environmental and societal stimuli, their resultant conduct may not conform to the egalitarian goals of contractual rules. Indeed, the very act of bargain formation . . . represents an interpersonal dynamic that automatically implicates subjective notions such as judgment, information processes, bias, opportunism, and discretion.

Id.

173. *See, e.g.*, Chase, *supra* note 20, at 39–40 ("The effect of the historical treatment of African–Americans as property and as the subject of contracts undoubtedly has affected the white perception and attitudes towards African–Americans and contracts."). Patricia Williams has written extensively on the difference that race makes in the contracting process. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

174. *See* Chase, *supra* note 20, at 65–66 ("With the changing shape of the American economy, perhaps it is time to renew the dialogue and develop strategies that are more appropriate for a culture whose interests, needs, and relative social positions are far more diverse than ever before. While the historical significance of the unifying notion of race cannot be eluded, the diversity of present needs suggests that a cultural perspective be employed to understand ourselves and to prepare for present and future legal questions that will be far more difficult than proving that we are human beings.").

175. As one commentator has noted, "[b]y avoiding the language-based issues of Spanish- and Asian-language-speaking business owners, contract law unavoidably upholds and endorses the pro-English norm, furthering the disempowerment of these racial–language minorities." Lim, *supra* note 40, at 602–03.

ences denies their existence and thus, their relevance and importance.[176]

b. The Problem of Form Agreements

Form contracts have been the subject of much discussion in past years. Several recent developments have increased the relevance of such a discussion. The increase in online commercial transactions and consumer purchases of software has resulted in a rise in the use of "shrinkwrap" and "clickwrap," or "click," agreements. Each day, more consumers of varying ages and educational backgrounds use the Internet for a wide array of important activities such as banking, investing, shopping, and paying bills. These activities are often subject to the terms of an electronic agreement that acts as a barrier to engagement. The user is required to accept the terms of the agreement or is prohibited from proceeding further. The rapid pace of modern life has also resulted in the acceleration of the rate at which everyday transactions are completed. Consumers look for ways to minimize the time they spend completing a transaction in order to maximize the time they spend enjoying the fruits of that transaction. For example, a typical consumer might prefer to rapidly complete the paperwork required to rent a boat—and thus maximize the time spent enjoying the boat—rather than spend time reading and understanding each term in the form. A lack of enjoyment associated with the transaction—for example, the rental of a car needed to attend a dreaded business meeting—usually does not diminish the desire to complete the task as rapidly as possible. This desire to minimize time spent on the *process* of completing a transaction has resulted in an increased dependence upon form agreements while at the same time increasing the importance of restricting such agreements. While the consumer renting a boat is inclined to ignore the terms of the form agreement that she is signing in order to speed the procedural aspect of the transaction, her failure to read enhances the likelihood that she is signing an agreement that contains terms that she opposes. Even if she were to take the time to carefully read the contract, it is unlikely that she would have the ability to negotiate the terms of the contract, because the party administering the contract probably lacks the authority to change any of its provisions.

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176. *Id.* at 603 ("The ubiquity of English in contract and market transactions is . . . disempowering—it reminds language–racial minorities that English is championed as the language of American society, rendering all other languages irrelevant, if not objectionable . . . In sanctioning an English-only practice that necessarily neglects the language rights of non-English speakers, contract law thus implicitly reinforces the supremacy of the English language."); *see also* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

Other factors complicating the issue of form agreements are the increasing globalization of commerce and the diversity of the United States population. The increased potential for misunderstanding as a result of cultural and linguistic differences raises questions regarding the wisdom of using form agreements in both international and domestic commercial contexts. Because form agreements contain terms that have not been specifically negotiated, they increase the probability of misunderstanding or miscomprehension of a word or provision.

The application of interpretation rules to form agreements or "contracts of adhesion"[177] is also disconcerting. Form agreements and standard clauses are intended to streamline the negotiation process for both parties, but actually tend to benefit the drafter.[178] Although some interpretation rules (i.e., judicial guidance rules) are intended to even out the parties' bargaining positions, the more experienced party—usually the party with more financial resources—is often able to draft a contract so as to minimize the impact of these rules.[179] Todd Rakoff has questioned whether contracts of adhesion should be enforced at all given that "[t]he great majority of form terms merely furnish alternatives to terms that the legal system will provide to flesh out simply stated bargains . . . . [M]any of the terms in typical form documents are specifically designed to displace clear rules of law

177. The type of form agreement that is of concern here is that commonly referred to as a "contract of adhesion." Todd Rakoff has identified seven traits of such a contract:

> (1) The document . . . is a printed form that contains many terms and clearly purports to be a contract.
> (2) The form has been drafted by, or on behalf of, one party to the transaction.
> (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
> (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
> (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
> (6) The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party.
> (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.

Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983). With the exception of item (7), this definition applies to my use of the phrase "form contract."

178. *See generally* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

179. Steven Bender has examined the shortcomings of existing laws intended to protect non-English speaking consumers. *See* Bender, *supra* note 134, at 1036–77.

that would otherwise govern the transaction in question."[180] For example, a general rule of construction states that any ambiguous term shall be construed against the drafter of the agreement. However, in most jurisdictions, the drafting party is able to contract out of this presumption by including an express provision[181] in the form agreement. The nondrafting party, on the other hand, usually has little or no ability to negotiate the provisions of a form agreement.[182] This is particularly true where the transaction is between a consumer and a commercial entity, but may also be true where both parties are commercial entities.[183]

The parol evidence rule is another interpretation rule that has received much scrutiny by legal scholars while receiving very little scrutiny by parties to a contract.[184] The parol evidence rule states that when a contract purports to be a final integrated agreement, evidence of prior or contemporaneous written or oral agreements cannot be introduced to vary the terms of the contract. Consequently, the boilerplate of many agreements contains a merger or integration clause that expressly purports that the contract is the final statement of the in-

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180. Rakoff, *supra* note 177, at 1183.

181. The following is an example of a standard provision negating the presumption against the drafter: "This Contract will be construed in accordance with the plain meaning of its language and neither for nor against the drafting party." This Author has seen the following provision in many forms that claim that the agreement was jointly prepared, even though that was not in fact the case: "This agreement shall be construed without regard to the party or parties responsible for the preparation of the same and shall be deemed as prepared jointly by the parties hereto. Any ambiguity or uncertainty existing herein shall not be interpreted or construed against any party hereto."

182. Notwithstanding the weaker party's inability to negotiate standard clauses, the agreement may nevertheless contain a provision belying that reality. It may state, for example, "Each of the parties hereto states that it has read each of the paragraphs of this agreement, has had the opportunity to avail itself of legal counsel of its choice during negotiations of this agreement, and is freely and voluntarily entering into this agreement under no duress and that it understands the same and understands the legal obligations thereby created."

183. *See* Schwartz & Scott, *supra* note 35, at 545 (proposing a theory of contract applicable only to transactions between commercial entities that "can be expected to understand how to make business contracts" and acknowledging that not all commercial entities are so situated).

184. Eisenberg notes that while the parol evidence rule has not been abandoned, it has been diminished in two ways:

> First, the modern view is that the rule has no application to interpretation, and therefore does not bar evidence of negotiations prior to the moment of contract formation that bears on issues of interpretation. Second, under modern contract law the issue under the parol evidence rule is not the standardized issue, whether similarly situated abstract reasonable parties would have intended a writing to supersede earlier agreements, but the individualized issue, whether the actual parties had that actual intention.

Eisenberg, *supra* note 2, at 1770.

tent of the parties and that it merges all prior or contemporaneous agreements between the parties.[185] This clause is typically placed at the end of the document with other miscellaneous provisions that may appear to be of little consequence to the parties.[186] Parties to a contract, especially those not represented by counsel, may haggle over the pricing terms but rarely bother with the boilerplate. Even if a party questions the meaning of a particular miscellaneous provision, she may be told that it has little significance and is "standard" or may be given an inaccurate oral explanation. In those situations, the parol evidence rule may bar the introduction of that oral explanation to the detriment of the nondrafting party.

An objection might be raised that a consumer or legal entity has the option of refusing to sign a form agreement. This choice may not be realistic.[187] Form agreements have become so prevalent that a person who refuses to sign such an agreement would not be able to participate in many essential commercial transactions, such as buying a house or a car. Requested changes to a form agreement are often flatly refused and, even if it was possible to negotiate the printed terms, the nondrafting party might be unaware that it has the ability to do so. Further, the cost of acquiring the information needed to understand the agreement might deter the nondrafting entity from engaging in such negotiations.[188] Finally, the market might be such that a party might not realistically have the option of hiring counsel to review the terms of the form agreements. The purchaser of a home, for example, is typically asked to sign closing documents on the day of

185. The following is an example of an integration clause found in form agreements: "This Agreement constitutes the entire agreement between the parties on the subject hereof and supersedes all prior or contemporaneous agreements, negotiations, representations and proposals, written or oral."

186. The language in the boilerplate is viewed even by sophisticated parties as unimportant and nonnegotiable. *See generally* Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133 (2003) (discussing the general reluctance to evaluate form contract provisions, including the boilerplate).

187. *See* Rakoff, *supra* note 177, at 1192 ("[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms." (quoting Williams v. Walker–Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965))).

188. *See* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 597 (1990) ("The first cost of acquiring information concerning contract terms is the time the consumer must spend reading the document. Because of the immense number of form contracts the typical consumer encounters, the cumulative time investment would be considerable . . . . The cost to the consumer is made all the more excessive by the high cost of understanding a term's legal significance . . . [C]ostly research is generally required to understand the legal effect of a particular term. Obviously consumers will not be able to undertake such research for every form they sign. Neither is it economically viable for consumers to hire experts to interpret these documents.").

escrow close. A first-time homebuyer may be unaware of the volume of documents awaiting her or may be unwilling or unable to expend the resources to hire an attorney. In many states, such as California, the presence of an attorney is not customary at closing. Any attempt to negotiate the terms of the closing documents is usually met with resistance.[189] If the buyer, for example, objects to the clause compelling arbitration, she may be told that the provision is standard, that all must agree to it, that nobody ever objects, and that any changes will delay the closing of escrow and will result in the need to change all the documents. Requests to change seemingly inconsequential provisions may be met with suspicion or hostility. A common condition of the offer is that the closing must occur by a particular date, so a delay might enable the seller to keep the buyer's good faith deposit or put the property back on the market. In areas where real estate prices continue to skyrocket at a rapid pace, the buyer might be reluctant to risk re-entering the competitive bidding war involved in buying a home over distasteful boilerplate language. Consequently, the buyer usually skims the documents, keeping an eye out only for typographical errors that might be changed on the spot without delaying the scheduled closing.

Thus, form agreements do not reflect the ideal contracting situation contemplated by will theorists.[190] Where an individual or entity lacks the ability to negotiate terms, her autonomy is severely limited.[191] While she has agreed to participate in the transaction generally, she has not agreed to the particulars that define that transaction. For example, the homebuyer—whose bargaining power is already limited in a seller's market—has agreed to purchase a house at a particular price, but has no say in whether she will arbitrate any disputes. The best she can do is hope that a dispute situation never arises. If the only realistic way for an individual to purchase a home is to abide by the procedures established by the real estate industry, then she has no choice but to sign the documents as is, with no changes, or else forgo participation in what has been touted as the "American dream"—home ownership. The exercise of her autonomy is confined and the self-actualizing goals of contract law are diminished.[192] Form

189. This Author speaks from her experience as a third-time home buyer. At each closing, I was informed in express terms that I had no ability to make any substantive changes and any attempt to do so would delay and, perhaps, prevent, closing.

190. Rakoff, *supra* note 177, at 1235–37.

191. Sharma notes that the view of freedom of contract as exhibiting free choice and individualism is misplaced given modern-day contracts that are often "one-sided, often unread, and unbargained standard form contracts." Sharma, *supra* note 74, at 112–13.

192. Hager has noted that contract enforcement generally results in coercion, which complicates the discussion of autonomy:

contracts thus do not further the autonomy objective because they often limit—not enhance—an individual's participation in transactions.[193]

Although click and shrinkwrap agreements raise the same issues as form agreements, there is a significant distinction to be made between click or shrinkwrap agreements and other consumer form agreements. Because of the nature of software, there are certain legal requirements to maintain ownership on the part of the software licensor. The click agreement evolved as a way to ensure that a software user understood that she had purchased or come into possession of a *license* to use the software—she did not own the software. The click agreement was an express acknowledgment of a license, not a transfer of ownership. The user presumes that the terms of a click agreement, which may seem ubiquitous, are substantially the same. Her click means that she agrees not to use the software for anything other than its intended use. She is not agreeing to undertake any obligation other than that. She does not expect to incur any responsibilities or to act in an affirmative manner. In fact, if an agreement that looked like a standard click agreement did contain terms that stated "by opening this package, you agree to purchase the license for XXX dollars," it would likely be deemed to be unenforceable, falling in the same category as credit card solicitations.

Randy Barnett has argued that clickwrap and other form agreements are justifiable under a consent theory. He states that "if consent to be legally bound is the basis of contractual enforcement, rather than the making of a promise, then consent to be legally bound seems to exist objectively."[194] In other words, if one clicks "I agree" to the terms on the box of a click license agreement, "[t]here is no doubt whatsoever that one is objectively manifesting one's assent to the terms in the box, whether or not one has read them. The same obser-

> The problem, of course, is that in contract-enforcement disputes, one party has concluded that performance will actually contradict her well-being. Contract enforcement therefore becomes a matter of involuntary exchange rather than voluntary. While it may be tautologically true that voluntary exchanges improve the well-being of both parties, the same cannot be said of involuntary exchanges. Hence, an "efficiency" argument for stringent contract enforcement becomes dubious. There is, moreover, a fairness question: why should the interests of the party who gains from enforcement be advanced at the expense of the reluctant party?

Hager, *supra* note 34, at 31.

193. The amount of control that an individual feels over a transaction may be correlated to a positive effect on that individual's well-being. Yuval Feldman, *Control or Security: A Therapeutic Approach to the Freedom of Contract*, 18 TOURO L. REV. 503, 532–33 (2002). Thus, a diminished sense of control would impede that positive effect, supporting the concept that there are "therapeutic advantages of using personally negotiated contracts and not prewritten form[s]." *Id.*

194. Barnett, *Consenting to Form Contracts*, *supra* note 19, at 635.

vation applies to signatures on form contracts."[195] Although there may not be any doubt that the party is consenting to be legally bound, the more pressing question is *what is the party consenting to be legally bound to do*? There must be parameters to the party's consent. Barnett states that a realistic interpretation of what clicking "I agree" means is "I agree to be legally bound to (unread) terms that are not radically unexpected."[196] In fact, such consent would more accurately be only to terms that are standard for that type of agreement. A party's expectation when viewing a click agreement (without actually reading its terms) is that it does not deviate in any substantial way from any other click agreement found on the Internet.[197] As Karl Llewelyn stated:

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms . . . which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of the agreement . . . .[198]

A party realizes that clicking on the agreement requires her to refrain from committing certain understood acts; she would, however, be surprised if a click meant that she was limiting her existing rights or undertaking an onerous affirmative obligation. Thus, a party would agree that her click meant that she agreed not to make copies of the software, not to pirate the software, and not to sell the software. She is not, however, agreeing to refrain from purchasing other software, surfing the Internet, or doing any other act that she previously had the right to do.[199] She is also not consenting to purchase the software

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195. *Id.*

196. *Id.* at 637.

197. Michael Meyerson has proposed a framework for enforcing consumer form contracts that he terms the "doctrine of reasonable expectations, with the focus on the reasonable expectations of the consumer." Meyerson, *supra* note 188, at 611. Meyerson argues that because "sellers can discover the reasonable expectations of a consumer at far less cost than the reverse," such a doctrine is economically efficient. *Id.*

198. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960), *quoted in* Home Fed. Savings & Loan Ass'n v. Campney, 357 N.W.2d 613, 618 (Iowa 1984).

199. As David McGowan notes, the issue of whether to apply a particular interpretation rule in the context of a clickwrap or shrinkwrap agreement often depends upon the judge's own beliefs and presumptions. Thus, while the trade usage doctrine is relevant to determining the validity of shrinkwrap or clickwrap agreements, the usage must be in accordance with normative goals:

> [S]uppose a party claims that it is standard practice for certain types of agreements to include punitive forfeiture provisions for nonperformance or to pledge the promisor's first-born child as security for performance.

(unless that is clearly set forth in a separate page where she is obligated to fill out credit card information), distribute the software, or tell others how wonderful it is, even if the terms of the agreement so state. In other words, the terms of the agreement should not deviate substantially from those typically found in similar agreements. The click agreement does not take away rights previously held by the user; it is merely setting limitations on the rights granted to the user by the licensor.[200] To the extent that they take liberties that extend beyond the scope of what is expected, form and click or shrinkwrap agreements are problematic even under a consent theory.

Form agreements may also undermine efficiency goals. Where a consumer or business[201] has not reviewed and understood the provisions of an agreement, it cannot be expected to have considered the risks and costs associated with entering into the transaction. The option available to it—non-participation—would lead to market stagnation if other consumers or businesses took the same position. As a practical matter, a consumer is not likely to have the resources or the motivation to organize a boycott of a particular product or practice resulting from unhappiness over a form agreement. The argument that the market would correct such consumer dissatisfaction is faulty in that it ignores the realities of organizing disparate individuals who are not affiliated in any way and have no association other than a common desire to purchase a product. Thus, the fact that consumers continue to sign form agreements does not reflect their willing acceptance of such terms, but their lack of realistic alternatives.

> If proved, these practices would not count as usages on which courts would rely in interpreting agreements. In these two examples, the proposed usage would conflict with other contract rules: the prohibition on punitive liquidated damages and the rule that courts may decline to enforce unconscionable terms.

David McGowan, *Recognizing Usages of Trade: A Case Study from Electronic Commerce*, 8 WASH. U. J.L. & POL'Y 167, 168 (2002). The doctrine of unconscionability, however, may be too inadequate in certain situations to guard against unfairness. *See infra* subsection III.A.2.b.i.

200. A standard provision in clickwrap agreements limits the licensor's liability for damages caused by the software. A clickwrap agreement also typically provides that there is no warranty provided by the licensor. The limitation of liability and the "no warranty" provision are conditions to the grant of the license; they are not restrictions on rights existing prior to the grant of such license. They are intended to refute the presumptions implied by law in the absence of such provisions. They do not require the user to either assume new obligations or to refrain from exercising previously held rights.

201. Morant has noted that many of the issues surrounding form agreement apply where the nondrafting party is a small business. Morant, *supra* note 169, at 233 ("The preformed agreement, however, may also serve as an opportunistic bargaining tool for the drafter. Usually drafted by the more advantaged bargainer, the standard form may contain clauses that secure the advantaged party's expectations, but also prejudice the interests of the more disadvantaged party.").

A primary argument in favor of form agreements is that they lower transaction costs. Todd Rakoff, for example, has acknowledged that form contracts are beneficial to the market economy because they enable firms to increase their organizational efficiency[202] by standardizing terms and stabilizing the incidents of doing business, thereby reducing transaction costs.[203] This efficiency argument is true, however, only: (1) for the drafting entity;[204] (2) if the nondrafting party does not hire legal counsel to review the agreement; and (3) if the nondrafting party is a commercial entity. The contracting process between two commercial entities is often quite different from an agreement between a consumer and a commercial entity. For example, a corporation purchasing software may be familiar with the terms of a form licensing agreement because it has likely engaged in similar transactions for other divisions or operations. Furthermore, a commercial entity is more likely than a consumer to have the time and money to have legal counsel review the documents. Finally, because the corporate entity's purchase of the software is likely to involve a substantial amount of money and the hope of additional sales to different divisions, the drafting party is less likely to have a "take-it-or-leave-it" attitude and more likely to negotiate the terms of the form agreement. The possibility of future transactions is an incentive for the drafting party to cooperate with the nondrafting party both in determining the terms of the contract and in the performance of those terms.[205]

The software provider's cost-benefit analysis of whether to negotiate a contract is different when the other party is a consumer making a one-time software purchase. The dollar amount at stake is likely small for the software provider, even if the amount is substantial for the consumer. There is no possibility of sales to other divisions. The possibility of future sales to the same consumer may not be substantial enough to warrant the legal fees associated with negotiating the terms of a contract. The software provider may not want to spend the time to vary the standard form because such time would detract from

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202. Rakoff includes among these efficiencies coordination among departments, use of expensive managerial and legal talent, provision of a check upon the acts of sales personnel, and maintenance of internal power structure. Rakoff, *supra* note 177, at 1222–23.

203. *Id.* at 1220–22.

204. Sharma notes that "the liberal fiction that all the effects of a contract should be attributed to the will of those who made it still persists through contract law today, even though the overwhelming majority of contracts are the product of the will of only one of the contracting parties." Sharma, *supra* note 74, at 115.

205. Schwartz and Scott refer to this type of incentive as creating a "self-enforcing" agreement because "the threat by either party no longer to deal with the other is sufficient *in and of itself* to induce performance." Schwartz & Scott, *supra* note 35, at 557.

other consumer sales or set a precedent that would be costly considering the low dollar amount of such sales.

Thus, the efficiency argument in favor of form agreements is one-sided. While a standard form contract may result in costs savings for the drafting party, the economic benefits for the other party may be nonexistent. In particular, where the nondrafting party is a consumer and not a commercial entity, the advantages of a form agreement are negligible while the disadvantages are numerous. One could argue that the consumer benefits from the software provider's lower transaction cost, but this is true only if the savings are in fact passed along to the consumer in the form of a lower retail price. The consumer has no real freedom to contract and no real opportunity to negotiate terms. She only has the option of either signing the agreement as is, or forgoing the purchase of the software.

The interplay of contract interpretation rules with form agreements often results in situations that skew to the advantage of the party with greater resources. Assume, for example, that a software engineer has decided to do some part-time consulting. A large software company asks her to develop a program for a fixed fee. The company asks her to sign their "standard consultant agreement." Because the consultant wants the business and because she does not want to spend her savings hiring an attorney, she signs the agreement. The fee is lower than market for the work she will be doing, but she justifies the assignment as a way to get more business from the same company. She also reasons that she can reuse some of the non-client specific related code or routines that she develops for future projects.[206] In the consulting agreement is a provision stating that the work she creates for the company will be a "work for hire."[207] The

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206. The reuse of code and tools that does not contain client confidential information is common in the development of the same type of program.

207. The "work for hire" doctrine arises under statute, Copyright Act of 1976, 17 U.S.C. § 101 (2000), and "work made for hire" is defined in that section as follows:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire.

Id. Although the statutory provision pertains to copyrights, a typical contract expressly includes all intellectual property rights. The following is an example of a standard "work for hire" clause in a consulting agreement:

> Consultant hereby acknowledges and agrees that all worldwide rights, title and interest in an to any work product, including any work prepared by Consultant that is eligible for U.S. copyright protection or protection under the Universal Copyright Convention, the Berne Copyright Convention and/or the Buenos Aires Copyright Convention, shall be a

provision is very broad, granting the company exclusive rights to all the work that will be delivered by the engineer. The software engineer is not concerned about the provision because it seems that the meaning of "work for hire" is obvious—she is creating a program (i.e., a work) and the company will pay her for it (i.e., for hire) and would thus will be entitled to use it. She may not understand the legal concept of "rights" as embodying not just the right to possess the media but also the associated intellectual property rights. Even if she realizes that the company will have the right to make copies of the program and the right to sell it, she may not understand that this means that she no longer has the right to use any part of the program in any way, shape, or form.[208] In any event, the software company tells her that it does not change its standard consulting agreement, that all its consultants sign it, and if she does not, the job will just go to someone else. The software engineer does not realize that the broad "work for hire" provision will prevent her from using any part of the program for any subsequent project. If she develops a template for the commissioned program with the intent of reusing that template for future projects, she will be in violation of her agreement if she in fact reuses any part of that template, or any code, without the software company's express consent. A common interpretation rule states that "contract terms must be interpreted according to any special meaning given to them by usage, and technical terms are interpreted as generally understood in the industry."[209] As she is engaged in the software industry, she may be deemed to know the industry meaning of "work for hire" even if she lacked actual knowledge.[210]

> "work made for hire" and ownership of all copyrights and all other intellectual property rights (including all renewals and extensions) shall be the sole property of Company. In the event that any Work Product is deemed not to be a "work made for hire" for any reason, Consultant hereby grants, transfers and assigns to Company all worldwide rights, title, and interest in and to the Work Product, including, without limitation, all patent rights, copyrights, trade secret rights and other proprietary rights therein, including all renewals and extensions thereof.

208. In my nearly ten years of practice as a lawyer in Silicon Valley, including heading the legal department of a multinational software company, there have been countless times when very intelligent and savvy business people and engineers have failed to grasp the "work for hire" concept, even after much explanation. The legal concept ran counter to their understanding of the way business was actually conducted.

209. So. Pac. Transp. Co. v. Santa Fe Pac. Pipelines, 88 Cal. Rptr. 2d 777, 785 (Cal. Ct. App. 1999) (citing CAL. CIV. CODE §§ 1644, 1645 (2005)); *see also* Aceros Prefabricados, S.A. v. Tradearbed, Inc., 282 F.3d 92, 102 (2d Cir. 2002) ("[U]sage of trade is relevant not only to the interpretation of express contract terms, but may itself constitute contract terms.") (internal punctuation omitted).

210. *See supra* note 208 and accompanying text.

i. The Limits of the Unconscionability Doctrine

Traditionally, "the goal of contract interpretation [was] to determine the parties' actual . . . intentions."[211] As noted in section III.A, however, the determination of that intent can be complex and is susceptible to being compromised during the interpretive process. Thus, the parties may have intended to enter into an agreement, but the parameters of that agreement may be unclear or circumstances may arise that were not contemplated by one or both of the parties. Intent, therefore, becomes subject to certain assumptions and conditions existing both at the time of contract formation and afterward. For example, in *Patel v. Ali*,[212] a seller entered into a contract to sell her home. Prior to the closing, the seller developed cancer, lost a leg, and had two more children. In addition, her husband was sent to jail. Consequently, at the time of the closing, the seller was "heavily dependent on nearby relatives and . . . neighbors"[213] and did not want to move. Her reason for entering into the agreement—move to a better location, receive cash for equity—had been subordinated by subsequent events.

Many commentators contend that social values should, and do, play an important role in the interpretive process.[214] As a result of both legislation and judicial decisions regarding contract interpretation, the twentieth century has seen court decisions shift from determining the intent of the parties to examining principles of fairness.[215] Because of the limits of existing contract law, however, the courts may lack a doctrinal peg upon which to hang their decisions. A court may be in the awkward position of having to work from a desired result backwards to anchor the decision to a legal framework.

The unconscionability doctrine is most commonly associated with contract law's attempt to incorporate principles of justice into contract dispute resolution. The unconscionability doctrine enables a judge to refuse to enforce a contract in order to void an "unconscionable" re-

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211. Zamir, *supra* note 85, at 1714.

212. Patel v. Ali, [1984] 1 All E.R. 978; *see also* Sherwin, *supra* note 12, at 282–84 (discussing the case in the context of equitable defenses).

213. Sherwin, *supra* note 12, at 282.

214. Juliet Kostritsky states that "[t]he prior failure in the academic literature to articulate a framework for identifying solutions that can improve social welfare in cases of omissions stems, in part, from a failure to accept increasing social welfare as the justification for legal intervention." Juliet P. Kostritsky, *When Should Contract Law Supply a Liability Rule or Term?: Framing a Principle of Unification for Contracts*, 32 ARIZ. ST. L.J. 1283, 1296 (2000).

215. Sharma, *supra* note 74, at 112; *see also* Kostritsky, *supra* note 214, at 1283 ("The twentieth century has witnessed the expansion of several contracts doctrines, such as promissory estoppel and good faith, which have involved courts in supplying terms not expressly negotiated by the parties."); *see generally* HUGH COLLINS, THE LAW OF CONTRACT 270–300 (4th ed. 2003) (reviewing attention to fairness in contracting in statutory and common law).

sult.[216] Generally, an unconscionable agreement offends notions of "decency,"[217] and involves unfair surprise, grossly unfair results, or parties who have greatly unequal bargaining power. The applicability of unconscionability as a defense is limited because a review of the contract is restricted to events existing at the time of formation. In addition, unconscionability requires a high standard of unfairness. Courts which limit their analysis to the confines of the doctrine may end up with results that are "unfair" but that do not rise to the level of unconscionability.[218]

Under the U.C.C., "[t]he principle is one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risk because of superior bargaining power. The basic test is whether . . . the contract clause involved was so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[219] Many courts have adopted Arthur Corbin's test for unconscionability, which examines whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place."[220] The *Restatement (Second) of Contracts* states that a bargain "is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party."[221] Many commentators have noted that the elements required to prove unconscionability are vague.[222] The vagueness of the doctrine leaves the determination of unconscionability to the discretion of the presiding

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216. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *see also* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

217. Gimbel Bros., Inc. v. Swift, 307 N.Y.S. 2d 952, 954 (Civ. Ct. 1970).

218. *See, e.g., Ex parte* Foster, 758 So. 2d 516 (Ala. 1999) (holding that an arbitration provision in an insurance form was not unconscionable); NEC Technologies, Inc. v. Nelson, 478 S.E.2d 769 (Ga. 1996) (holding a provision excluding incidental or consequential damages in standard form for sale of television did not render agreement unconscionable); Smith v. Harrison, 325 N.W.2d 92 (Iowa 1982) (holding that a long term farm lease for substantially less cash rent was only a "bad bargain" and not unconscionable); Estate of Link v. Wirtz, 638 P.2d 985 (Kan. 1982) (holding that a rental for twenty year lease period was not unconscionable even though passage of time made deal look "unfair").

219. U.C.C. § 2-302 cmt. 1 (2004).

220. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 128 (1952).

221. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

222. Phillip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513 (2003) (discussing "why after nineteen years . . . legal scholars feel that they were unable to provide courts with a 'reasoned elaboration of what is unconscionable'" (quoting Robert Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337, 337 (1970))); Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 53 (1984) (noting that "there must be hundreds of reported cases in which unconscionability is men-

judge[223] resulting in inconsistency of court decisions. For example, courts in some contexts have held that mandatory arbitration clauses are unconscionable and therefore unenforceable while others have held that they are valid.[224] In several notable cases, an "unfair" contract was upheld because it did not rise to the level of "unconscionability," even though there was no other vehicle for rescission.[225] Blake Morant has noted that consumers are typically reluctant to plead unconscionability as a defense (probably because of its low success rate),[226] and the burden on commercial entities in proving unconscionability is even higher.[227]

The power of the doctrine of unconscionability is further limited because it is only available as a defense, and not as a source of affirmative relief.[228] Thus, it cannot be used as a mechanism for seeking damages. Relying upon the doctrine of unconscionability is not only limited in its practical application—it is problematic from a theoretical perspective, as well. The doctrine of unconscionability is used to rescind a contract, meaning that the contract has already been deemed to exist. In many cases, however, the very issue to be resolved is whether a contract existed at all or, if it does exist, what it means. Under the unconscionability doctrine, it is established that a contract was in fact made and that the provisions mean what the non-rescinding party says, but the contract must nonetheless be nullified in order to save the weaker party from its own actions.[229] Thus, the un-

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tioned, but its meaning is no clearer now than it was before the Code was enacted").

223. *See* U.C.C. § 2-302 (2004) (enabling a judge to exercise his or her discretion in determining unconscionability as a "matter of law").

224. *See Ex parte* Foster, 758 So. 2d 516 (Ala. 1999) (holding the arbitration provision in an insurance form was not unconscionable). *But cf.* Armendariz v. Found. Health Psychcare Serv., 6 P.3d 669, 692 (Cal. 2000) (holding that absent a "modicum of bilaterality," it is "unfairly one-sided" for an employer with superior bargaining power to impose arbitration on employees).

225. Patel v. Ali, [1984] 1 All E.R. 978 (although refusing to allow specific performance, also refusing to rescind the contract); *see also supra* note 218 and accompanying text.

226. Morant, *supra* note 169, at 266. Morant observes that "[i]f consumers seldom obtain relief from an unconscionability plea, it logically follows that non-consumer parties, such as businesses that are generally deemed more sophisticated than consumers, would garner even less success with the defense." *Id.*

227. *Id.*

228. *See* Sanders v. Colonial Bank of Am., 551 So. 2d 1045 (Ala. 1989) (per curiam); Cal. Grocers Ass'n, Inc. v. Bank of Am., 27 Cal. Rptr. 2d 396 (Cal. Ct. App. 1994) (stating that CAL. CIV. CODE § 1670.5(a) (2005) phrases the doctrine in defensive terms and does not create an affirmative cause of action).

229. As Chase notes, the case most often used in law school textbooks to illustrate the doctrine of unconscionability is *Williams v. Walker–Thomas Furniture Co.*, 350 F.2d 44 (D.C. Cir. 1965), which involved African-American consumers. Chase states that because unconscionability cases typically involve the use of psychological pressure to exert influence over those who are "irresolute, feeble, or weak,"

conscionability doctrine is paternalistic, inflicting psychic damage upon those it seeks to protect precisely by granting them such protection.[230] Further, because it is used only as a defense, it fails to provide a means by which bargaining parties can empower themselves and maximize the "individual autonomy" objective of contract law. A party who is able to get out of a contract by claiming unconscionability is appealing to the benevolence of an individual judge. The doctrine does not "further the will of the parties" because it is used solely as a defense, not as a means through which an agreement is enforced. The shortcomings inherent in the unconscionability doctrine do not require that the doctrine be abolished but suggest that there should be another means by which parties can enforce (or defend against) a form contract that does not reflect what they thought they had agreed to.

The unconscionability doctrine serves its purpose of providing judges a means to nullify otherwise valid agreements for reasons of public policy. There are many circumstances, however, where an agreement does not rise to the level of unconscionability yet does not conform with social norms of fairness in bargaining. Furthermore, many disputes arise not because a party wants to rescind a contract on fairness grounds, but because the parties disagree as to the meaning of a particular provision. In other words, it is unlikely that a party would enter into an agreement with the intent of later seeking rescission on grounds of unconscionability. In most cases, the parties have entered into the contract with the intent of performance, but later discover that each party has a different interpretation of one or more provisions that alter the performance required under the contract. Finally, even if the contract reflects the intent of the parties at the time of formation, circumstances may arise which change either the nature of the contract or a party's ability to perform, as illustrated by the *Patel* case. Most courts, and the U.C.C., require that the conditions of unconscionability exist at the time the contract was made.[231] Therefore, the unconscionability doctrine may be inapplicable because the unfair circumstances did not exist at the time the contract was entered into. This is true despite changed circumstances that could lead to unforeseen hardship for one party. A dynamic approach would

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the widespread use of *Walker–Thomas* has the effect of "equating African–Americans with the 'irresolute, feeble, or weak.'" Chase, *supra* note 20, at 39.

230. *Id.* As Chase observes, *Walker–Thomas* implies that "the condition of blackness creates a need for protection by the paternalistic white power structure." *Id.*; *see also id.* at 57 (discussing the implication in the case that "African–Americans as a group are to be protected from their own inability to make decisions").

231. *See* U.C.C. § 2-302(1) (1977) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . .").

require the consideration of such changed circumstances in determining enforcement of the agreement or the remedy for breach thereof.

IV. A DYNAMIC ANALYSIS OF CONTRACT INTERPRETATION

This Part examines how a dynamic approach to contract interpretation should be applied. Section IV.A examines three cases involving at least one changing business practice discussed in Part III, and at least one interpretation rule. While these courts purported to apply an interpretation rule to reach their respective results, the courts in fact used the interpretation rule to justify, rather than to guide, its decision. This section then analyzes the facts of each case, using a dynamic approach in its application of the interpretation rules. Section IV.B provides guidelines for using contract interpretation rules in a dynamic fashion.

A. A Dynamic Analysis of Three Cases

1. *Use of Custom and the Creation of Business Norms*

In *Cunningham Packing Corp. v. Florence Beef Co.*,[232] the plaintiff seller sued the defendant buyer after the buyer rejected the seller's shipment of beef. Under the sales agreement, Cunningham agreed to sell to Florence four loads of Australian boneless beef, guaranteed to be "85% chemical lean."[233] That day, Cunningham sent to Florence four identical Sales Confirmation Orders, one for each of the four loads.[234] The following was typed on each order: "THIS ORDER SUBJECT TO CONDITIONS OF SALE ON FACE AND REVERSE SIDE HEREOF."[235] Further, "[o]n the reverse side, under the Conditions of Sale," was the following:

> In the event Buyer claims product covered by this contract is less than the chemical leanness specified in this contract, Seller has the right to arrange independent testing. Should the product test less than the guaranteed chemical leanness, Seller will allow for excessive fat content based on selling price, and Buyer will accept such as *full settlement*.[236]

Between the time when the beef was ordered and received, "the price of beef had fallen and it continued to fall."[237] After receiving the shipments, the beef was tested for "chemical leanness," and "[t]he results showed the loads to be 83.86%, 81.54%, 81.74% and 80.96%."[238] "Florence notified Cunningham of the test results," and two other lab-

232. 785 F.2d 348 (1st Cir. 1986).
233. *Id.* at 349.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*

oratories retested the beef, determining that it was "84.7%, 83.25%, 83.6%, and 83.5% chemical lean."[239]

The packing company then "recognized that the beef delivered did not fully satisfy the contract requirement of 85% chemical lean" and notified Florence that it would credit its account for the price adjustment as set forth in the "Guidelines for the Settlement of Fat Claims" published by the Meat Importers Council of America.[240]

The court permitted the plaintiff seller to introduce evidence that it was the custom in the meat industry for the seller to reduce the purchase price when testing revealed that the meat shipped did not satisfy contract specifications. It did not, however, permit the defendant buyer to introduce expert testimony to establish that there was a custom in the trade that the Guidelines did not apply if the beef was not originally processed and shipped as per the contract's specifications.[241] The court cited the general rule of contract interpretation that evidence of custom and usage is relevant to contract interpretation.[242] The court noted that Massachusetts law provided that "the express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade."[243] The court reasoned that because "the express terms on the Sales Confirmation Orders called for the buyer to accept as '*full settlement*' an allowance for excessive fat content based on the selling price," the proffered testimony was not consistent with the express terms and was properly excluded.[244]

Several concerns are raised by the court's conclusion. First, the "express terms" referred to by the court were contained in the Sales Confirmation Orders, presumably forms created by defendant Cunningham. The "express terms" were on the reverse in the printed language under the "Conditions of Sale."[245] One could reasonably argue that the terms contained on the back of a printed order confirmation were not the "express terms" contemplated by the Massachusetts legislature in that they were not negotiated or acknowledged by the parties.[246] It could also be argued that the proposed testimony was not

239. *Id.*
240. *Id.*
241. *Id.* at 351.
242. *Id.* at 351; *see also* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981).
243. *Cunningham Packing*, 785 F.2d at 351.
244. *Id.*
245. *Id.* at 350.
246. In fact, the notes accompanying the statute indicate the contrary as they state that the policy objective underlying Massachusetts General Laws chapter 106 section 1-205 is the same as that underlying sections 1-203 and 2-302. Section 1-

inconsistent with the express terms, because they could reasonably be construed as meaning that the Buyer could receive a partial or full refund but could not sue Seller for lost profits or consequential damages. The court stated that the Sales Confirmation Orders called for the buyer to accept as "full settlement" an allowance for excessive fat content, but the Order did not indicate what that allowance had to be. Nowhere in the Order was it stated that the buyer was barred from seeking a full, instead of a partial, refund. It is not clear that the unequivocal meaning of the words "Seller will allow for excessive fat content based upon selling price and Buyer will accept such as full settlement" was "Seller will reduce the purchase price pursuant to the Guidelines promulgated by the Meat Importers Council and Buyer must agree to such Guidelines and cannot return the goods for a full refund."

The defendant buyer also appealed on the grounds that the lower court improperly used the parol evidence rule to justify the exclusion of the evidence. The court of appeals noted that:

> Among the many evidentiary rulings the trial court made rejecting evidence Florence offered, one finds a number of instances in which the ruling could conceivably have been based upon the parol evidence rule . . . . Although the record contains some language that might suggest the trial court relied on the parol evidence rule, as a whole the record demonstrates that the trial court's main concern was with relevance, lack of foundation and possible jury confusion.[247]

Both the lower court and the court of appeals rejected the defendant's attempted use of custom and trade usage to enforce a norm of ethical business conduct. From the time that the defendant placed the order and the time it was delivered, the price of beef had fallen.[248]

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203 provides an obligation of good faith in contract performance or enforcement. Section 2–302 provides as follows:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

MASS. GEN. LAWS ch. 106, § 2-302.

247. *Cunningham Packing*, 785 F.2d at 351.

248. Although statistics for beef imports from Australia from December 1979 to January 1980 were not available, the following statistics demonstrate a significant increase in beef prices generally during this time:

Market price for slaughter steer via Nebraska Direct (Choice 2–4; 1100–1300lbs)

December 1979 – $68.55

January 1980 – $66.10

Market price for slaughter steer via Omaha (Choice 2–4; 1100–1300 lbs)

Shortly after receiving the loads, Florence had them tested. The results of that testing revealed the chemical leanness of the beef to be 83.86%, 81.54%, 81.74%, and 80.96%. When two different laboratories again tested the beef, the averaged results were 84.7%, 83.25%, 83.6%, and 83.5% chemical lean. The disparity between the results of the tests conducted at the request of Florence and those conducted by the two independent laboratories seems to indicate that the defendant was acting in bad faith in an attempt to get out of an agreement that would result in it paying more than the then-current market price.

By contrast, the plaintiff seller appeared to be acting fairly and ethically. When confronted with the test results, Cunningham offered to reduce the purchase price pursuant to industry guidelines. The court permitted the introduction of the Guidelines to establish custom on the basis that they, unlike the defendant's evidence, could "reasonably be construed as consistent with the express terms."[249]

The court was enforcing a norm of business conduct by refusing to permit the defendant to rely upon a technical breach to avoid a contract that would be less profitable given prevailing market conditions. Unfortunately, it hid this laudable goal behind the guise of an even-handed application of interpretation rules. The court would likely have reached a different conclusion if the defendant's motivation was less suspect—if the price of beef had risen, for example. Perhaps most troubling is the court's exclusion of expert testimony on the basis that it was inconsistent with the express terms on the back of the Sales Confirmation Orders. Given the one-sidedness of printed order confirmation slips, the court may be establishing a dangerous precedent in relying upon their terms to exclude testimony that would establish custom.

A dynamic approach might reach the same conclusion, but with a different analysis. First, the court would need to determine what the parties intended. The intent of the parties may be determined by their words or their conduct prior to, during, and after contract formation. The touchstone for intent is that the parties act honestly and in good faith. There is no legal or policy related reason for enforcing contractual intent made dishonestly or in bad faith.

December 1979 - $67.78
January 1980 - $66.32
Market price for slaughter steer via Texas (Choice 2–4; 1100–1300 lbs)
December 1979 - $69.66
January 1980 - $67.17
Market price for slaughter heifer via Omaha (Choice 2–4; 1000–1200 lbs)
December 1979 - $66.50
January 1980 - $61.30

U.S. Dept. of Agriculture, *Livestock Prices*, *available at* http://usda.mannlib.cornell.edu/data-sets/livestock/94006/livestocklprices.xls (last visited Nov. 11, 2005).

249. *Cunningham Packing*, 785 F.2d at 351.

Next, a dynamic approach would consider any circumstances that might justify an outcome that does not enforce the intent of the parties. These circumstances would include the broader societal effect of enforcement, such as the impact on business or social policy. It would also consider the normative effect of judicial decisions and the philosophy that the law should not only reflect the expectations and conduct of the parties, but influence them.[250]

In this case, the central point of inquiry would be: "What did the parties intend when they entered into an agreement to buy/sell beef guaranteed to be eighty-five percent chemical lean?" Did they mean that any percentage below eighty-five would be insufficient? The answer might seem simple—ask the buyer. In this case, however, there are reasons why the buyer might answer dishonestly. The price of beef had fallen substantially during the time between contract formation and the time of rejection. Furthermore, Florence's independent test results differed from the subsequent test results by a significant percentage—which might lead to the conclusion that Florence was seeking to escape its contractual obligations through dishonest means.

If, however, Florence had presented credible evidence supporting its contention that the beef had to be no less than eighty-five percent chemically lean, the result regarding intent would be different. For example, evidence that Florence had contracted with McDonalds for the sale of no less than eighty-five percent chemically lean beef would lend credibility to its position.

The second part of a dynamic analysis would consider broader societal and policy implications. In this case, the beef was being shipped from Australia. Shipments of beef from Australia are typically transported by boat and take several weeks. Because of the duration of time involved, permitting buyers to reject shipments of Australian beef without good cause would create a one-sided advantage in favor of United States buyers who would benefit from market fluctuations. The Australian supplier, on the other hand, would have incurred substantial shipping expenses and lost opportunity costs. Consequently, Australian beef suppliers would be less inclined to conduct business with United States buyers, resulting in harm to the United States beef industry in particular, and to United States trade in general. Furthermore, because the plaintiff Cunningham was willing to pay for the price differential between eighty-five percent chemical lean beef and the beef that was actually supplied, Florence would likely not have suffered any financial harm.

The court in *Cunningham Packing Corp.* mentioned the rise in beef prices and the disparity in testing values without directly invoking the relevance of these factors in its analysis. Instead, the court referred to

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250. *See* Sunstein, *supra* note 73, at 1135–39; West, *supra* note 73, at 675.

the terms on the back of the Sales Confirmation Orders in order to exclude the defendant's expert testimony regarding custom. If the facts had been different, it seems unlikely that the court would have accorded those terms the same weight. For example, if Florence had entered into an agreement with a third party to supply eighty-five percent chemically lean beef, the court may have been more amenable to permitting the expert testimony or it might have reached a different conclusion regarding the "express" nature of the terms on the order confirmations.

2. *The Normative Agenda Behind a "More Reasonable" Interpretation of Chicken*

The well-known case of *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*[251] also involves international trade and misunderstanding. In *Frigaliment*, the plaintiff, a Swiss corporation, entered into two contracts with defendant for the purchase of "chicken."[252] At issue was whether defendant had breached by shipping stewing hens instead of young chickens for broiling and frying.[253] The first contract, dated May 2, 1957, confirmed the sale of

> US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated 2 ½-3 lbs and 1 ½-2lbs each all chicken individually wrapped in cryovac, packed in secured fiber cartons or wooden boxes, suitable for export
> 75,000 lbs. 2 ½-3lbs. . . $33.00
> 25,000 lbs. 1 ½-2lbs. . . $36.00
> per 100lbs FAS New York
> scheduled May 10, 1957. . .[254]

The second contract, also dated May 2, 1957, was identical except that only 50,000 pounds of the heavier chicken were called for, the price of the smaller birds was $37 per 100 pounds, and shipment was scheduled for May 30. When the initial shipment arrived in Switzerland, plaintiff discovered that the young chickens were stewing chickens or "fowl." On May 28, plaintiff sent two cables complaining that the larger birds in the first shipment were "fowl."[255] The defendant refused to recognize plaintiff's objection and sent a cable announcing, "We have ready for shipment 50,000 lbs. chicken 2 ½-3, 25,000 lbs. broilers 1 ½-2lbs.," and asked for an immediate answer "whether we are to ship this merchandise to you and whether you will accept the merchandise."[256] There were several more cable exchanges until plaintiff replied on May 29,

251. 190 F. Supp. 116 (D.C.N.Y. 1960).
252. *Id.* at 117.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 120.

> [c]onfirm again that merchandise is to be shipped since resold by us if not enough pursuant to contract chickens are shipped the missing quantity is to be shipped within ten days stop we resold to our customers pursuant to your contract chickens grade A you have to deliver us said merchandise we again state that we shall make you fully responsible for all resulting costs.[257]

The plaintiff buyer stated that although the initial cables between the parties were predominantly in German, they used the English word "chicken" and not the German word "Huhn." Plaintiff buyer claimed that the use of the English word "chicken" was intended to mean only young chickens rather than the more inclusive German word "Huhn," which included both broilers and stewing chickens.[258] The plaintiff also contended that there was a definite trade usage that "chicken" meant "young chicken."

The court engaged in a dynamic analysis when it noted that because the defendant had only started in the poultry trade, he was

> within the principle that "when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear by providing either that he had actual knowledge of the usage or that the usage is so generally known in the community that his actual individual knowledge of it may be inferred."[259]

The court seemed to question the sincerity of the plaintiff's belief that the larger chickens meant broilers and fryers when, at the time of contract

> the price for 2 ½-3lbs broilers was between 35 and 37 cents per pound, and that when defendant entered into the contracts, it was well aware of this and intended to fill them by supplying fowl in these weights. [Defendant] claims that plaintiff must likewise have known the market. . .[260]

The court concluded that the defendant believed that it could comply with the contract by delivering stewing chickens in the 2 ½ to 3 pound size. The court noted that the defendant's subjective intent

> would not be significant if this did not coincide with an objective meaning of 'chicken.' Here it did coincide with one of the dictionary meanings, with the definition of the Department of Agriculture Regulations. . .with at least some usage in the trade, with the realities of the market, and with what plaintiff's spokesman had said.[261]

The court glossed over the plaintiff's intent,[262] stating that the "plaintiff has the burden of showing that 'chicken' was used in the narrower

257. *Id.*
258. The court disregarded this argument based upon defendant's testimony that when he asked plaintiff's agent "what kind of chickens were wanted, received the answer, 'any kind of chicken,' and then in German, asked whether the cable meant 'Huhn' and received an affirmative response." *Id.* at 118.
259. *Id.* at 119 (quoting 9 WIGMORE, EVIDENCE § 2464 (4th ed. 1940)).
260. *Id.* at 120.
261. *Id.* at 121.
262. *But see* Sanchez, *supra* note 134, at 663–65 (discussing *Frigaliment* as an example of a presumably good faith linguistic error based on a cultural misunderstanding).

rather than in the broader sense." The court's dynamic analysis, however, contradicted its purported reliance upon the "objective" meaning of the word "chicken." The court acknowledged the good faith of the defendant's intent, while expressing doubt about the nature of the plaintiff's interpretation:

> It is scarcely an answer to say, as plaintiff does in its brief, that the 33 cents price offered by the 2 ½-3 lbs 'chickens' was closer to the prevailing 35 cents price for broilers than to the 30 cents at which defendant procured fowl. Plaintiff must have expected defendant to make some profit—certainly it could not have expected defendant deliberately to incur a loss.[263]

Finally, even if the plaintiff, in good faith, misunderstood the defendant's interpretation of the word "chicken," the exchange of cables after the delivery of the first shipment should have made clear the miscommunication. The court, by dismissing the complaint, indicated that it would not enforce a contract where both parties, subsequent to formation, realized the basis for the contract was a misunderstanding. In this case, enforcement would have resulted in defendant sustaining a loss of between two to four cents per pound, plus shipping costs. Rather than concluding that the defendant's interpretation of chicken prevailed because it was "broader," a more appropriate justification for its decision would have been that business norms favored nonenforcement of the contract.

3. *Ambiguity and Form Agreements—Justifying Policy with Rules*

In *Castle v. Caldera*,[264] the plaintiff was an Army officer who sought a declaration that the Army's denial of his resignation request was unlawful. The Army filed a motion for summary judgment that the plaintiff was required to complete his active duty service obligation.

In 1995, Castle applied for a program in the army which enabled him to attend advanced schooling at the Army's expense. As part of the enrollment process, he signed a Statement of Service Obligation ("SSO"). The SSO contained the following provision:

> 1. In accordance with Chapter 10, para 10-3(2), AR 351-3, I understand that by participating in the [Program], I will incur an active duty obligation (ADSO) of three times the length of the education or training for the first year of [sic] portion thereof. Participation for periods of education or training in excess of 1 year will result in an ADSO of three times the length of the training, until a maximum of six years is incurred. This adso [sic] commences upon completion or termination of my education/training. All provisions of AR 351-3 apply.[265]

The third paragraph stated:

263. *Frigaliment*, 190 F. Supp. at 120.
264. 74 F. Supp. 2d 4 (D.D.C. 1999).
265. *Id.* at 6.

> 3. I understand that in the event I voluntarily withdraw, or as a result of misconduct, fail to complete the required ADSO, I will reimburse the United States the cost of advance education, which includes tuition, books, supplies, and other costs clearly identified as paid by the United States, IAW paw 10-2, AR 351-3. This does not include pay allowances, or travel expenses.[266]

Castle argued that he understood paragraph 3 to mean that he could voluntarily withdraw from his ADSO at any time as long as he reimbursed the Army for the cost of his education.[267] The Army, on the other hand, argued that the first paragraph clearly stated that the plaintiff, by participating in the program, would "incur an active duty obligation."[268] In addition, the Army argued the last sentence of paragraph 1 incorporated by reference the provisions of AR 351-3; section 10.2 of AR 351-3 provides that a resignation or request from active duty "will not be favorably considered except . . . when in the best interest of the Government and under applicable law."[269]

In response, Castle countered that the relationship between paragraphs 3 and 1 was ambiguous and that the agreement could be reasonably interpreted as requiring only that the plaintiff reimburse the Army for educational expenses in order to resign.[270]

The court framed the issue as "whether the SSO itself 'admits of only one reasonable interpretation' such that there is no genuine issue of material fact as to its meaning."[271] In determining this issue, the court stated that the "standard mode of contract interpretation not only presumes that the 'reasonable person knows all the circumstances surrounding the making of the contract,' but it also requires that a 'reasonable person [be] bound by all usages which either party knows or has reason to know.'"[272] The court then concluded that "the only reasonable interpretation of the SSO" was that the plaintiff had no right "to buy out his service obligation."[273]

The court's conclusion is surprising given that the defendant's motion was for summary judgment. As the court noted, summary judgment is proper if all the pleadings and other documents show that "there is no genuine issue as to any material fact."[274] The court purported to use an objective standard of interpretation in reviewing the SSO, yet a reading of paragraph 3 of the SSO supports the plaintiff's claim of ambiguity. A reasonable person could infer that the phrase,

266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 16.
270. *Id.*
271. *Id.* (quoting United Mine Workers of Am. v. Pittston Co., 984 F.2d 469, 473 (D.C. Cir. 1993)).
272. *Id.* at 11 (quoting Intercounty Constr. Corp. v. Dist. of Colum., 443 A.2d 29, 32 (D.C. 1982)).
273. *Id.*
274. *Id.* at 10.

"I understand that in the event I voluntarily withdraw . . . I will reimburse the United States . . ." means voluntary withdrawal is an option provided there is reimbursement. The paragraph does not explicitly prohibit voluntary withdrawals after enrollment in the Program which would make the purported meaning much clearer, nor does it expressly state that since voluntary withdrawals are not permitted that such withdrawals would constitute desertion. Interestingly, the court failed to apply the common interpretation presumption in favor of the nondrafting party and against the drafting party—in this case, the United States Army.

A closer look at the court's decision reveals that it selectively applied interpretation rules, not because there was no genuine issue of material fact, but for policy reasons. The court referred to the DA Form 3838 in the first few paragraphs of its opinion. That form contained the following statement:

> I understand and agree that if selected for training any tender of resignation or request for release from active duty on my part will be disapproved until the total period of obligated active service is completed, except for the convenience of the Government or in case of extreme compassionate circumstances
>
> . . . .
>
> I understand that my service obligation will be computed in accordance with AR 351-3.[275]

The DA Form 3838 was part of the application for the program but was never signed by the plaintiff or an Army representative. The court lamented that "[t]his action may never have been commenced had the Army obtained plaintiff's signature on DA Form 3838, which provides in the plainest of terms" that the plaintiff is not permitted to resign until the completion of the period of obligated service.[276] It bemoaned the fact that "that did not happen, nor does the SSO contain the Obligatory Statement's unmistakable admonition. The door to this litigation thus opened."[277] The court appeared rueful that due to what it considered an administrative error, the active service obligation of the SSO was put into question.

The court noted that the Army was "severely understaffed in positions requiring officers with plaintiff's education and skills"[278] and that plaintiff was scheduled to assist in "major renovations planned for the 121st Evacuation Hospital" in Korea.[279] Furthermore, his absence "could degrade the current climate of health care in the region for all soldiers there, and ultimately affect the readiness of the force in that region."[280] The court hid behind a purported objective interpre-

275. *Id.* at 6.
276. *Id.* at 10.
277. *Id.*
278. *Id.* at 7.
279. *Id.*
280. *Id.* at 7–8.

tation of the contract in order to render an opinion based upon policy favoring the Army. As the court stated in its conclusion, "[g]iven the shortage of officers with plaintiff's attributes and training, the Army understandably concluded that it could not afford to allow Major Castle to renege on his obligation to put to work in the Army's service the new skills he had acquired at the Army's expense."[281]

A dynamic approach to contract interpretation would strive first to ascertain what the parties intended by entering into the agreement. More specifically, did they intend for Castle's enrollment into the program to mean that he should be unable to terminate his active duty obligation for any reason whatsoever?

The Army, having a policy and a history behind the program, can easily establish its intent. In determining Castle's intent, however, the court must address the threshold issues of whether he acted honestly and in good faith. In other words, was he lying when he claimed that he thought he could avoid his active duty obligation by reimbursing the Army? Under a dynamic approach, the standard is not what a "reasonable" person would have thought, but what Castle *actually* thought.

In this case, the court seemed to doubt Castle's honesty and good faith:

> Plaintiff is an officer on active duty in the United States Army where he has spent his entire career. Indeed, plaintiff is by all accounts an intelligent, highly-educated, and well-trained military officer. He has an enviable record of academic achievement, having earned a bachelor's degree, a master's degree, and is now on the verge of a [sic] earning a doctoral degree. When plaintiff tendered his resignation, he stated that he 'understood that this resignation, if accepted, will be accepted under Honorable conditions' . . . . The 'if accepted' caveat reveals at least some recognition by plaintiff that he did not have a right to extinguish unilaterally his active duty obligation. There is certainly no evidence that any Army officer ever told plaintiff, or that he relied on any representation, that he could pay his way out of his ADSO.[282]

The court continued:

> The Program was created 'to provide medical and dental manpower for the all-volunteer Army' and 'was not a scholarship program designed to benefit the public at large . . . . Plaintiff instead claims that he reasonably understood the SSO to mean that the Army promised to send him to Harvard, to cover all of his expenses, to continue to disburse his military salary, and that in return, he promised only to reimburse all educational expenses should he have second thoughts about fulfilling his side of the bargain.[283]

The court failed, however, to consider other relevant aspects supporting plaintiff's stated intent. As previously noted, the provisions of paragraph 1 and 3 are ambiguous at best, and arguably inconsistent if read as intended by the Army. Furthermore, the court's reliance on

281. *Id.* at 13.
282. *Id.* at 12.
283. *Id.*

the incorporation by reference of AR 351-3 in the SOS unfairly burdened Castle. This type of incorporation by reference raises the same issues of fairness raised by fine print boilerplate in form agreements.

The court also failed to consider circumstances arising after contract formation that might have affected the analysis of the plaintiff's intent in entering into the agreement. The court noted the harm to the Army that could occur if the plaintiff was relieved of his active duty obligation; however, it only mentioned in passing the reasons for the plaintiff's resignation, which included "hardships that extended military services had imposed on his family and particularly his wife's ability to provide their children with a 'proper Jewish upbringing and Hebrew schooling.'"[284] Given that Castle's new orders required him to be stationed in Korea, it would appear that the hardships to his family would have been compounded. The court spent a great deal of time discussing and rationalizing the Army's policy but completely disregarded the implications of that policy on Castle's family or his right to freedom of religion, nor did it discuss the sticky issues of involuntary servitude which were thereby raised. A dynamic analysis might not necessarily have resulted in a different outcome, but it would have forced the court to openly address and weigh the policy considerations underlying its decision.

B. Guidelines for a Dynamic Approach to Contract Interpretation

A dynamic approach to contract interpretation strives to effectuate the intent of the parties. In many cases, however, the intent of the parties is not readily determinable and courts must resort to interpretation rules. This section suggests how the four categories of interpretation rules discussed in section III.A. should be applied using a dynamic approach.

1. *Definitional Rules of Interpretation*

Definitional rules of interpretation should be used only to determine what the parties meant when they said what they said (or wrote what they wrote). Because they should be applied only to discern the meaning of the words as used by the contracting parties, the courts should use them only to help uncover the *subjective* intent of the parties—*not the objective meaning of the words.* They may, however, be used to assist in the determination of whether the parties' stated intent was in fact that party's *actual, honest* intent. In other words, definitional rules may be helpful in determining the veracity of the parties' stated understanding of a word or phrase. For example, assume *X* enters into a contract with *Y* whereby *X* agrees to pay *Y* "fifty

284. *Id.* at 7.

dollars" to mow X's lawn. Assume that Y mows X's lawn and X states that by "fifty dollars" she meant fifty "Monopoly" dollars, whereas Y assumed she meant fifty "U.S." dollars. The courts should apply relevant definitional rules of interpretation to determine the credibility of X's understanding—X's *actual and honest* understanding—instead of simply accepting X's claimed understanding. Thus, the court could determine that the "generally prevailing"[285] meaning of the word "dollars" means U.S. dollars, not Monopoly dollars. The applicability of the definitional rules of interpretation should not be a foregone conclusion, however. For example, if X and Y were mother and daughter, and X has in the past paid Y in Monopoly money (which she can later redeem for special privileges, such as staying up late or driving the family car), the definitional rules should not apply. In other words, the court should not follow the "generally prevailing meaning" of the word "dollars" to subvert the actual intent of the parties.

2. *Gap Fillers*

Where parties have omitted a relevant term, a dynamic approach would avoid implying terms that the parties would not have agreed to themselves. If the parties to a contract intentionally avoided addressing a particular issue in the contract because they were unable to reach a resolution and considered the possibility of that issue arising an unlikely event, the courts should not intervene to provide that term. For example, assume X enters into a contract to supply software and services to Y. The parties agree to the number of software licenses, the price, and the scope of the services. They disagree, however, as to what happens in the event that service level targets are not met. Because they assume that the likelihood of X not meeting those targets is low—and because X needs to close the deal before the end of the quarter—they execute the contract and agree to resolve the issue at a later date. If a disagreement subsequently arises regarding the service level targets, the court should not intervene by providing a term to which the parties had not agreed. On the other hand, a gap filler could be used if the court determines that it is one that the parties would have agreed to had they considered the relevant issue. For example, assume that X and Y entered into the above mentioned agreement, but failed to even consider the issue of service level targets. In that case, the court should supply a gap filler that assumes industry norm averages unless the parties introduce evidence that they had not intended to resort to industry norms. This might be the case if, for example, X were a start-up and had agreed to provide software and services at a price far below the industry average. In that case, Y might have understood that X could not perform

285. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) (1981).

in accordance with industry standards yet considered the lower price an acceptable trade-off for the subpar service; this might also be the case if, for example, *Y* had its own software services group and entered into the agreement with *X* primarily because it desired *X*'s software.

3. *Evidentiary Rules*

Formalistic evidentiary rules, such as the parol evidence rule and the four corners rule, should not be used under a dynamic approach. These rules were created to limit the admissibility of evidence. Yet, there is no compelling reason why contract disputes should be subject to special evidentiary rules. Although there may be some cases where using evidentiary rules of contract interpretation may enhance the reliability of the evidence, there are usually other ways to attain the same objective, namely by applying the rules generally applicable to the admissibility of evidence. Evidentiary rules may also unfairly impact minorities because they assume that both parties share the same linguistic and cultural context, which is often by default assumed to be the majority language and culture. Evidentiary rules thus ignore the significance of preexisting relationships and nonverbal communication and wrongly assume linguistic certainty.[286] As discussed in Part III, parties with access to lawyers are often aware of these evidentiary rules and thus can plan accordingly, while those with limited resources and limited access to lawyers may be unaware of these nonintuitive, formalistic evidentiary rules. Consequently, these rules may be subject to misuse. For example, assume *X* buys a car from *Y*. Prior to signing the agreement, *X* asks *Y* whether the car will come with air-conditioning. Assume further that *X* is a native Spanish speaker. *Y* tells *X*, in Spanish, that the car comes with air conditioning. *X* signs the contract, even though there is in bold, large letters, a provision stating that the vehicle does not come equipped with air conditioning. The parol evidence rule should not be used to bar evidence of the conversation between *X* and *Y*.

4. *Judicial Guidance Rules*

Some of the same concerns with the use of evidentiary rules of interpretation are raised by the use of judicial guidance rules. Because they are not intuitive, judicial guidance rules have the potential to unfairly advantage the savvier party, the one who knows the "rules of the game." Unlike evidentiary rules, however, judicial guidance rules reflect a policy objective. Thus, while they should not be applied automatically, the underlying policy objective should be taken into consideration in determining their applicability in any given case. For example, the presumption favoring the nondrafting party assumes

286. *See generally supra* subsection III.A.2.

that the drafting party was, at contract formation, in the best position to resolve language ambiguities. Generally, this would be true since it can be assumed that a party understands the terms in its standard contract. But this may not be true in all cases. Assume that *X* is a small business owner who, due to limited resources, uses the same form agreement for every transaction, even though each transaction differs in some material way. *X* cannot have her lawyer review every contract that she signs due to budgetary constraints. Assume that the nondrafting party, *Y*, is a large corporation. *Y* requests modifications to *X*'s standard form contract, stating that *X* must incorporate the provisions as they are nonnegotiable, "standard" terms for *Y*. While the modifications are technically still "drafted" by *X*, the presumption should no longer be applicable.

On the other hand, assume that the parties execute *Y*'s standard form agreement. *Y* has in-house legal counsel who must approve every agreement entered into by the sales department. It can be assumed that *Y* has read and understood the terms in its standard form agreement and the presumption should apply.

V. CONCLUSION

Ideally, interpretation rules serve an important function in filling gaps in contracts. In practice, they often create assumptions that one or both parties never intended. For some, the interpretation rules are guidelines that serve to increase a party's comfort level that in the event of a dispute, the contract will not be subject to the wholly subjective whims of the judge or jury.[287] For others, the rules only add to the uncertainty and complexity of a transaction. Their existence may function as a secret "code" that keeps out nonmembers by requiring contracting parties to engage lawyers to decipher the meaning of words that should be knowable. Individuals without the money to spend on legal fees are at a disadvantage during the negotiation process and others may refrain from entering into transactions altogether.

Contract rules of interpretation should not be applied automatically in every situation involving a contract dispute. In this Article, I have proposed guidelines for a dynamic application of interpretation rules. In applying any rule of interpretation, the determination of the intent of the parties should be the primary objective. Generally, rules of contract interpretation that are more intuitive[288] will assist in this endeavor while those that are more formalistic and procedural will

287. Of course, the determination of whether a rule is "intuitive" for a party would require consideration of the cultural and linguistic frames of reference for that party.

288. But, as David McGowan notes, a review of shrink-wrap licensing cases shows that:

not. There should then be consideration of any underlying or conflicting policy considerations. Thus, as a general matter, because *evidentiary rules* are less intuitive and more formalistic, they have no role in a dynamic analysis. *Judicial guidance* rules, which are often policy-based, should be applied if the underlying policy objective of the particular rule is promoted in a given case. *Gap fillers* and *definitional rules* should be applied to the extent that they shed light on the credibility of the parties and the veracity of their stated intent; however, they should not be used where their underlying purpose is to uphold a norm to which the parties have not agreed (or would likely, not have agreed).

A commonly accepted objective of contract law is the enforcement of the intention of the parties with certain limitations. An understanding of those intentions requires an understanding of the parties' background—in other words, the experiential and intellectual framework from which they are operating. The rise in global commerce, the increased use of the Internet and the concomitant use of click agreements, and the increasing diversity of the United States population require that formalistic rules of contract interpretation (in particular, evidentiary rules) described in Part III, be approached dynamically. The intention of a party in signing a contract may be affected by her understanding of its validity, its purpose and the words on the page. In some cases, form is substance in that it affects the likelihood that the terms have not even been read.

A dynamic approach considers the various issues and policy goals affected by the application of interpretation rules.[289] On one hand, a

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> [A] judge's own beliefs and presumptions affect the decision whether to recognize a usage of trade . . . judges became more willing to accept post-order shrink wrap terms as a method of forming an agreement as they either became more familiar with that method or came to accept economic arguments used to justify recognition of that method.

McGowan, *supra* note 199, at 169.

289. As Reimann notes, comparative law scholars may be ahead of contract law in recognizing the importance of a dynamic approach:

> [W]e have learned to look beyond legal systems and families as static and isolated entities. Conscious of their historic contingency and ongoing development, we have come to think, in a more dynamic fashion, primarily of *legal traditions* . . . . Comparative law has also come to look at the world in terms of coexisting *legal cultures*, i.e., as parts of larger social structures consisting of economies, religions, social habits, etc. . . . . We realize that we need to consider rules in context, i.e., at least within the existent procedural and institutional frameworks, and, if we want to grasp their deeper meanings, also within their socio-economic and cultural environments. And we know that we must observe not only the law on paper but also the law in action, i.e., the application and interpretation of rules and their true force and effect including, perhaps, their impotence.

Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 677–79 (2002).

party to a contract requires some certainty that a transaction will not be undone simply because a term was omitted or the other party misunderstood the meaning of a word or provision. On the other hand, the court should consider the broader societal and policy implications of its decision. In fact, many interpretation rules were intended to promote policy goals of social and moral fairness.[290] In some cases, however, the interpretation rules may work against the interests of justice if strictly or uniformly applied to a given *type* of contract, without considering other relevant factors such as the experiences of the parties or the presentation of the contractual terms.

Often courts reference an interpretation rule but misapply it in order to avoid a particular result. A dynamic approach provides a doctrinal peg upon which to hang a decision. More importantly, it frames the discussion and analysis of issues relevant in a given case within the larger societal context.

290. Zamir, *supra* note 85, at 1725–26, 1749 (stating that insurance policies are generally interpreted in favor of the insured). *But see* Waller v. Truck Ins. Exch., 900 P.2d 619 (Cal. 1995) (denying plaintiff's recovery for noneconomic damages under a commercial general liability policy).