ANTI-STEREOTYPING THEORY AND CONTRACT LAW

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ABSTRACT

Women gained the right to contract in the nineteenth century, but it nevertheless remains relevant to ask whether modern day contract law discriminates against women. In answering this question, this Article applies anti-stereotyping theory to contract law. This anti-discrimination theory is most commonly used in equal protection and Title VII cases, but its relevance is not limited to such applications. Analyzing contract law doctrines through the lens of anti-stereotyping theory reveals contract law's gender biases. Contract law endorses an "economic men" rule and a "domestic women" exception. Thus, economic concerns, which are generally associated with men, are at the core of contract law. Other values, which are generally associated with women, are at the margins. This hierarchy is based on gender stereotypes and is thus discriminatory. This Article suggests that contextual contract law should be used to transcend such stereotypical and binary thinking and to make contract law more inclusive and egalitarian.

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Introduction

Anti-stereotyping theory has governed sex-discrimination law for more than four decades. Both in the constitutional law and the employment law contexts, distinguishing between men and women based on stereotypes is considered discriminatory. This Article argues that anti-stereotyping theory is also applicable to contract law. An examination of contract law doctrines through the lens of this theory serves to reveal the gender dimensions, aspects, and biases of contract law. Other scholars have argued that contract law is not gender-neutral.[1] This Article adds to this scholarship by using anti-stereotyping theory to provide a systematic and sophisticated assessment of contract law's gender biases. Moreover, this theory provides a framework for instilling notions of equality into contract law doctrines.

This Article has four Parts. Part I of this Article briefly outlines anti-stereotyping theory, according to which the State may not reinforce traditional gender roles. This complex and rich theory has challenged laws that reflected a "separate sphere" mentality and reinforced the breadwinner-homemaker dichotomy. It has highlighted the ways in which the State's perception of differences between men and women has translated into concrete social inequalities and gender-differentiated sex and family roles. These stereotypes perpetuate the oppression and subordination of women and are the root of societal inequality between the sexes.[2]

The notion that the State may not reinforce stereotypical sex-based roles goes further than an equal protection analysis of statutes under the Fourteenth Amendment.[3] This notion—that laws reflecting stereotypical gender norms are discriminatory—is applicable in the field of contract law as well. Before applying anti-stereotyping theory to contract law, Part II of this Article compares anti-stereotyping analysis of contract law with anti-subordination analysis of contract law. This Article recognizes the great theoretical importance of anti-subordination theory, a theory of equality advocated by various contract law scholars focusing on power imbalance, but ultimately highlights the advantages of the anti-stereotyping theory in the context of contract law.

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[1] Debora L. Threedy, *Dancing around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 Wake Forest L. Rev. 749, 750–51 (2010). *See also infra* note 56.

[2] For gender stereotypes as a form of discrimination, see generally Rebecca J. Cook & Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives 104–130 (2010).

[3] For the State's obligation to eliminate gender stereotypes, see generally *id.* at 71–103.

In light of these advantages, Part III of this Article applies anti-stereotyping theory to contract law, using the doctrines of consideration, unconscionability, duress, damages, and interpretation as examples. It reveals the ways in which contract law reinforces an "economic men"-"domestic women" dichotomy. In other words, contract law reinforces a market-home dichotomy which directly correlates to a men-women dichotomy. In the past, contract law doctrines excluded women's experiences and perspectives. While men's economic concerns were addressed by contract law, women's domestic concerns remained outside the scope of contract law. Nowadays, the discrimination is more subtle.[4] Currently contract law formulates an economic rule and a non-economic exception. This binary in contract law perpetuates stereotypes of contractual parties as being economic men, while domestic women are relegated to the margins of contract law. Contract law treats women specially, carving out paternalistic rules to protect them.

Based on this analysis, Part IV of this Article outlines the changes to the above contract law doctrines needed in order to make contract law more egalitarian. As a basic starting point, contract law should reject old-fashioned notions about women and men. More demandingly, in order to make contract law more inclusive, there is a need to look beyond men's interests and incorporate women's experiences. The most challenging change suggested is the rejection of the rule-exception model and the endorsement of a contextual contract law. Anti-stereotyping theory is optimistic: Just as the law adopted traditional gender norms, so too can it reject stereotypical thinking.

I. Anti-Stereotyping Theory

Justice Ginsburg was a leading figure in developing anti-stereotyping theory as a lawyer at the ACLU, as a law professor in the 1970s, and later as a Supreme Court Justice. Drawing on the work of John Stuart Mill, she challenged the "separate spheres" binary and the reinforcement of gender roles and stereotypes by social institutions.[5] Ginsburg's theory did not target the classification or subordination of women, but rather the way in which social institutions maintain traditional gender norms. As Cary Franklin argues, anti-stereotyping theory is a rich theory,[6] in contradistinction to formalistic, sex-blind, formal equality theory. It is a critique of social institutions and

[4] Martha Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 Yale J.L. & Feminism 545, 553 (2006) ("Although legal doctrine no longer deprives married women and African Americans of contractual capacity, legal doctrine drags its disinherited self behind it by incorporating elements of the old rules in canonical cases.").

[5] Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 2, 41–42 (1975).

[6] Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 93 (2010).

practices that compel conformity with traditional gender roles. Ginsburg challenged laws that reflected a "separate sphere" mentality and reinforced the breadwinner-homemaker dichotomy.[7] She targeted the way in which the State's codification of differences between men and women translated into social inequalities and sex-differentiated gender and family roles. She highlighted the bias inherent in the entrenchment of gender role stereotypes,[8] and argued that such stereotypes perpetuate the oppression and subordination of women,[9] and are the root of gender- and sex-based inequality.[10] Indeed, "[s]tereotyping analysis presents a powerful way to attack sex discrimination."[11]

Anti-stereotyping theory profoundly changed constitutional law and many of the leading sex-discrimination cases are based on anti-stereotyping theory. The following reviews some of these landmark cases, in many of which Justice Ginsburg was involved. In *Reed v. Reed*,[12] Ginsburg challenged an Idaho state probate law that preferred men over women for the role of estate administrator after a family member's death. She argued that the law reinforced the traditional roles of men as economic decision-makers, and women as nurturers, incapable of such complex decision-making. In *Moritz v. Commissioner of Internal Revenue*,[13] Ginsburg challenged a fed-

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[7] Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 L. & INEQ. 17, 19 (1988). *See also* Wendy Webster Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41, 45–49 (2013).

[8] Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 47 (2004) ("[B]y working tirelessly to overcome stereotypes in law, Justice Ginsburg has reduced typecast thinking in our everyday lives.").

[9] Deborah Jones Merritt, *Hearing the Voices of Individual Women and Men: Justice Ruth Bader Ginsburg*, 20 U. HAW. L. REV. 635, 637 (1998). *But see* Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 54 (2010) (arguing that the relationship between gender stereotypes and gender equality is complicated).

[10] Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 783–84 (2010). *See also* Ruth Bader Ginsburg, *A Postscript to* Struck by Stereotype, 59 DUKE L.J. 799 (2010) (recalling her work on *Struck*).

[11] David H. Gans, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law,* 104 YALE L.J. 1875, 1906 (1995). *See also* Luke A. Boso, *Dignity, Inequality and Stereotypes*, 92 WASH. L. REV. 1119, 1122 (2017); Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 414–15 (2013); Roger Craig Green, *Equal Protection and the Status of Stereotypes*, 108 YALE L.J. 1885, 1887 (1999); Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex-Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095, 1095–96 (2009); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 994 (2007); Barbara Stark, *State Responsibility for Gender Stereotyping*, 17 J. GENDER, RACE & JUST. 333, 334 (2014); Barbara Stark, *Anti-Stereotyping and "The End of Men,"* 92 B.U. L. REV. ANNEX 1, 1–2 (2012); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462 (2007).

[12] Reed v. Reed, 404 U.S. 71 (1971).

[13] Moritz v. Comm'r Internal Revenue, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

eral tax law that provided care-giving deductions to women, widowers, or divorced men, but denied the deductions to a single man caring for his sick mother. This law, she asserted, also perpetuated stereotypes of women—and only women—as being caregivers. In *Frontiero v. Richardson*,[14] Ginsburg challenged a federal law that provided automatic benefits for military wives but provided the same for military husbands only if they were able to prove financial dependency on their wives. This law, she claimed, was based on stereotypes of women as economically dependent on their husbands, in contrast to men, who the law presumed to be economically independent. Similarly, in *Califano v. Goldfarb*,[15] Ginsburg challenged a federal law that provided social security survivor benefits for widows without regard to their dependency on their husbands and provided similar benefits for widowers only once the latter could prove their financial dependency on their wives.[16] This law, too, reinforced the notion that men are automatically presumed to be more economically well-off than women, and thus not in need of survivors' benefits.

The famous case of *United States v. Virginia* concerned the Virginia Military Institute ("VMI"), which had one program for men and an alternative program for women.[17] The State of Virginia argued that physiological, psychological, and sociological differences between male and female cadets made integrating VMI impossible. In response, Justice Ginsburg, writing for the majority, stated that sex-segregated education perpetuates a "separate sphere" tradition that denies women educational opportunities. The Court rejected Virginia's argument, and Ginsburg held that Virginia's position was based on stereotypes about women and the roles they might play in society post-graduation. The claimed differences between the sexes "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[18]

In *Nevada Department of Human Resources v. Hibbs,*[19] an employee (Hibbs) took leave under the Family and Medical Leave Act to care for his

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[14] Frontiero v. Richardson, 411 U.S. 677 (1973).

[15] Califano v. Goldfarb, 430 U.S. 199 (1977).

[16] *See also* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[17] United States v. Virginia, 518 U.S. 515 (1996).

[18] *Id.* at 534. *See also* Kelsey R. Chapple, Note, *Sports for Boys, Wedding Cakes for Girls: The Inevitability of Stereotyping in Schools Segregated by Sex*, 94 TEX. L. REV. 537, 538 (2016); Juliet A. Williams, *Learning Differences: Sex-Role Stereotyping in Single-Sex Public Education*, 33 HARV. J.L. & GENDER 555, 556–57 (2010).

[19] Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 724 (2003). *See also* Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1472 (2008); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1873 (2006); Joan C. Williams & Stephanie Bornstein, *The Evolution of 'FReD': Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1316 (2007); Joan C. Williams, Hibbs *as a Federalism Case;* Hibbs *as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 383 (2004); Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of*

ailing wife. He then sued his employer (the State of Nevada) seeking damages for violation of this act. Analyzing the statute, Justice Rehnquist held that:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis . . . By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.[20]

In this case, the Court emphasized how stereotypes about women's domesticity fuel discrimination in the employment context. Recently the Supreme Court addressed the issue of inequality in acquisition of U.S. citizenship by a child born abroad when one parent is a U.S. citizen and the other is a citizen of another nation.[21] The law had one rule for unwed fathers and another rule for unwed mothers. Justice Ginsburg held that this distinction violated the fourteenth Amendment, and stated:

> [n]o 'important [governmental] interest' is served by laws grounded . . . in the obsolescing view that 'unwed fathers [are] invariably less qualified and entitled than mothers' to take responsibility for nonmarital children . . . Overbroad generalizations of that order . . . have a constraining impact, descriptive though they may be of the way many people still order their lives. Laws according or denying benefits in reliance on '[s]tereotypes about women's domestic roles' . . . may 'creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role

Family Responsibilities Discrimination, 41 U. S.F. L. REV. 171, 180 (2006); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90 (2003).

[20] *Hibbs*, 538 U.S. at 736–37.

[21] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1682 (2017). *See also* Bridget J. Crawford, Kathryn M. Stanchi & Linda L. Berger, *Feminist Judging Matters: How Feminist Theory Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 189–94 (2018).

> of primary family caregiver.' . . . Correspondingly, such laws may disserve men who exercise responsibility for raising their children . . . In light of the equal protection jurisprudence . . . discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.[22]

As these cases demonstrate anti-stereotyping is an established theory under anti-discrimination law. Some of the aforementioned cases dealt with men who did not conform to gender roles.[23] By acting in ways stereotypically correlated with women, these men challenged the way the State reinforced traditional gender roles. Other cases challenged statutes that disadvantaged women by limiting them to traditional gender roles. According to Ginsburg, men as well as women should be free from gender stereotypes. Anti-discrimination law repudiates the way in which laws limit the options of men and women by channeling them toward gender-conforming behaviors.[24] Accordingly, the law should neither assume the existence of nor be based on traditional gender roles.

Anti-stereotyping theory has also been used in Title VII litigation.[25] In other words, this theory is not limited to constitutional law, but is used to examine work relations as well.[26] In these cases, anti-stereotyping theory exposes "how workplace structures rely on stereotypes associated with pro-

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[22] *Morales-Santana*, 137 S. Ct. at 1692–93.

[23] Franklin, *supra* note 6, at 132.

[24] Emily Winograd Leonard, Note, *Expecting the Unattainable: Caseworker Use of the 'Ideal' Mother Stereotype Against the Nonoffending Mother for Failure to Protect from Child Sexual Abuse Cases,* 69 N.Y.U. ANN. SURV. AM. L. 311, 319 (2013).

[25] *See, e.g.*, Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 938 (2016). *See also* Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1299 (2012); Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Faces of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 262 (2013); Zachary R. Herz, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 400 (2014); Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 593 (2011); Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of 'Carers' in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31, 41 (2006). For Justice Ginsburg's contribution to Title VII discrimination cases, see Martha Chamallas, Ledbetter*, Gender Equity and Institutional Context*, 70 OHIO ST. L.J. 1037 (2009).

[26] For general literature about stereotypes in the employment context, see generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (discussing subtle cognitive bias under employment discrimination law); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990) (discussing internal and external stereotyping in the workplace); Nadine Taub*, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980) (discussing stereotypical attitudes of both employees and employers); Heather K. Gerken, Note, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824 (1993) (discussing sex-stereotypes job interview questions).

tected class status to disadvantage members of that class."[27] The Supreme Court used anti-stereotyping theory in its ruling in the famous *Price Waterhouse v. Hopkins*.[28] In that case, Ann Hopkins sued her employer, Price Waterhouse, claiming that the decision not to admit her as a partner amounted to discrimination based on her sex. The evidence showed that the decision not to promote her was indeed influenced by stereotypes. In Hopkins' evaluations, one partner described her as "macho," another suggested that she "overcompensated for being a woman," a third recommended she take "a course at charm school," and a fourth advised that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Court accepted Hopkins' discrimination claim, stating that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[29] Furthermore, the Court stated that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[30] The Court's reasoning was that such stereotypical thinking disadvantages women in the workplace. Hopkins was condemned for not acting as a "real woman," and was passed over for promotion because she did not conform to gender roles. Generally, the Court recognized that "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[31] Put differently, anti-stereotyping theory "exposes how workplaces are designed around norms and cultures that favor certain protected classes."[32]

Part III of this Article broadens the use of anti-stereotyping theory from workplace relations, in particular, to contract relations generally. As Anita Bernstein argues, stereotyping is "endemic in the United States, not just in the workplace."[33] Though Bernstein's work focuses on racial stereotypes, her conclusion is valid for gender stereotypes as well. Before expanding the use of anti-stereotyping theory beyond employment contracts this Article now turns to other theories of equality and highlights the strengths and advantages of the anti-stereotyping theory.

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[27] Bornstein, *Unifying Antidiscrimination Law, supra* note 25, at 938.

[28] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). *See also* Herz, *supra* note 25, at 422; Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 27 (1990).

[29] *Price Waterhouse*, 490 U.S. at 250.

[30] *Id.* at 251.

[31] *Id.*

[32] Bornstein, *Unifying Antidiscrimination Law*, *supra* note 25, at 939.

[33] Anita Bernstein, *What is Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 662 (2013).

II. Anti-Stereotyping Theory and Anti-Subordination Theory

There are several different theories of equality, as anti-discrimination literature is rich and diverse.[34] Formal equality theory requires that women and men be treated the same, while substantive equality theory demands that the differences between women and men be taken into account. According to the former, a rule of law must treat men and women equally ("equal treatment"), while according to the latter theory, the rule of law must yield equal results and effects ("equal outcome"). Some theories support special treatment of women and affirmative action, and some hold them as discriminatory. Some theories focus on the similarities between men and women (sameness theories), and other theories focus on the distinctions between them (difference theories). Some theories of equality aim to assimilate women in the world of men, and other theories aim to accommodate women's needs. Some theories of equality advocate for gender blindness, while other theories advocate for anti-classification. Yet other theories strive to remedy past discrimination, promote diversity, or guarantee impartiality. Some theories focus on biological differences between men and women, while other emphasize cultural and social differences. This brief overview only summarizes the main theories in a nutshell with the aim of giving a glimpse of this rich and diverse scholarship; elaborating on these theories is beyond the scope of this Article. Furthermore, many of these theories have little direct relevance to contract law. For this reason, this Part focuses on only one theory of equality—anti-subordination—which is widely used in law and specifically has been applied in contract law scholarship.

Anti-subordination theory focuses on the imbalance of power. According to anti-subordination theory, inequality is defined by disempowerment and weakness in relations based on power dynamics. This Part explores some of the leading literature analyzing the imbalance of power between parties in contract law. After doing so, this Part goes on to compare anti-stereotyping theory and anti-subordination theory in the context of attaining equality in the realm of contract law.

Max Helveston and Michael Jacobs argue that "the concept of superior bargaining power plays a critical role in contract law."[35] Similarly, Clare Dalton writes: "The stories told by contract doctrine are human stories of

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[34] *See generally* Katharine T. Bartlett, Deborah L. Rhode & Joanna L. Grossman, Gender and Law: Theory, Doctrine, Commentary (7th ed. 2016); Martha Chamallas, Introduction to Feminist Legal Theory (3d ed. 2013).

[35] Max Helveston & Michael Jacobs, *The Incoherent Role of Bargaining Power in Contract Law*, 49 Wake Forest L. Rev. 1017, 1017 (2014). *See also* Daniel D. Barnhizer, *Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract—Symposium Introduction*, 2006 Mich. St. L. Rev. 841 (2006) (exploring the use of inequality of bargaining power as a critique of contract law).

power and knowledge."[36] And according to Blake Morant, "power has an indelible impact on the formation, performance and ultimate regulation of contracts."[37] Indeed, various scholars have analyzed the inequality of bargaining power in contract law doctrines. The following does not exhaust this literature, but rather focuses on a few prominent examples from within this vast body of scholarship.

Danielle Kie Hart argues that the process of contract formation is the locus from which power in contracting emanates, and in which it becomes entrenched. Furthermore, Hart argues that policing doctrines do not affect the power disparity.[38] More generally, she asserts that imbalances of power, rather than freedom and consent, form the cornerstones of the modern system of contract law, and that contract law promotes and privileges these power imbalances.[39] Daniel D. Barnhizer analyzes the doctrine of inequality of bargaining power and concludes that courts apply limited, incomplete, and often incorrect legal conceptions of bargaining power asymmetries, thereby disregarding real power disparities.[40] The result, in such cases, is that the legal concept of inequality of bargaining power remains a grossly imprecise tool for policing power relationships between contracting parties. Other scholars highlight additional doctrines that can be used to police the misuse of bargaining power. For example, duress enables the disempowered party to resist the enforcement of the contract while limiting the leverage of the empowered party.[41] Unconscionability is another doctrine that polices power abuses by forbidding unscrupulous tactics and protecting the poor from entering into exploitative one-sided contracts.

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[36] Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1113 (1985). *See also* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988) (the social contract is based on power relations between men and women).

[37] Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 926 (2006).

[38] Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 219 (2009).

[39] Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 4–5 (2011). *See also* Danielle Kie Hart, *Revealing Privilege—Why Bother?*, 42 WASH. U. J. L. & POL'Y 131, 141 (2013); Danielle Kie Hart, *Cross Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation*, 12 NEV. L.J. 54, 55 (2011).

[40] Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 199–222 (2005).

[41] M. H. Ogilvie, *Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract*, 26 MCGILL L.J. 289, 289 (1981); John P. Dawson, *Economic Duress—An Essay in Perceptive*, 45 MICH. L. REV. 253, 253 (1947); Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO. L.J. 201, 202 (1996). *See also* HILA KEREN, CONTRACT LAW FROM A FEMINIST PERSPECTIVE 186 (2004) (Heb.).

Meredith Miller explores the asymmetry between sophisticated and non-sophisticated parties in contract law.[42] After addressing the importance of the sophisticated parties-unsophisticated parties dichotomy in contract law, Miller suggests a definition for parties' sophistication based on the imbalance of information and resources. Robin West claims that some parties enter contracts under conditions of subordination.[43] West challenges the economic analysis of contract law, according to which contracts enhance the welfare of the parties and promote their autonomy. She highlights the situations in which parties enter into contracts as an act of submission to authority.

Anti-subordination theory challenges the presumption of equality between contracting parties. It aims at correcting inequality in contract law by policing the power dynamics between parties. Though the aforementioned literature mostly focuses on economic disparity between parties, it contains gender and racial aspects, as well. Economic disempowerment intersects with inequality based on race and gender. Duress claims against spousal agreements reflect economic power disparities between the parties, as well as gender-based power disparities between men and women.[44] Similarly, scholars analyzing prenuptial agreements show that they favor men as a result of the power imbalance between men and women.[45] Such privileging of men is not only due to men's economic advantages over women, but is also connected to other social, cultural and emotional factors that result in weakening women's positions vis-à-vis their husbands. Other scholars demonstrate similar findings regarding the intersection of racial inequality and economic inequality.[46]

Unlike anti-subordination theory, which focuses on the power dynamics between the parties, anti-stereotyping theory focuses on how the law itself is shaped in a way that disadvantages women. Rather than seeking to correct power relations, anti-stereotyping theory aims to correct the ways in which the law *creates* gendered differences based on its adoption and promulgation of traditional gender norms. The goal of anti-discrimination law is not simply to protect members of preexisting groups from power abuse or to police the misuse of power, but rather to target the practices that tend to divide

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[42] Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 528 (2010); *see also* Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract*, 29 TOURO L. REV. 659, 663 (2013).

[43] Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 390 (1985).

[44] KEREN, *supra* note 41, at 186; Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 175 (2013).

[45] Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 233 (1994).

[46] Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 297–98 (1994); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 6 (1995).

people into dichotomous groups in the first place, such as those that focus on sex or race, rather than on common projects and identities. As shown in the third Part of this Article, anti-stereotyping theory demonstrates how contract law generally reinforces the economic men-domestic women binary, rather than repudiating old-fashioned notions of gender roles.

Anti-stereotyping theory has several advantages over anti-subordination theory in the contract law context.[47]

First, while imbalances of power are hard to define, there is extensive case law developing anti-stereotyping theory in both constitutional and employment contexts. Examining power imbalances due to gender or race is an even more difficult task than examining economic power disparities, in that it requires a deep, complex analysis of non-economic social and cultural aspects that influence the dynamics between groups. The intersection of several vectors of power—such as race, gender and class—is complex and difficult to describe and police. In contrast, anti-stereotyping theory is more easily applicable. As Cary Franklin argues, anti-stereotyping theory gives the courts a workable test with which to examine laws.[48] It provides guidelines for operation and is easier for courts to administer.

Relatedly, anti-subordination theory takes into account social power and focuses on the dynamics between social groups. Contracts, however, are formed between two parties. Thus, applying a theory regarding the dynamics between groups to the relations between two contractual parties raises certain difficulties. How are the power relations between women and men in society reflected in a marital contract? Is anti-subordination theory equally relevant to an egalitarian relationship between a husband and wife? In contrast, anti-stereotyping theory focuses on social institutions and the way they are based on traditional gender roles. This Article does not claim that relations between individual parties are detached from wider societal relations. Social power dynamics between men and women indubitably influence power dynamics between a contracting couple. But anti-stereotyping theory is best poised to engage with the sophisticated nature of such individual-group relations: contract law reacts to women's preexisting vulnerability, as highlighted by anti-subordination theory, but anti-stereotyping theory goes further and reveals how contract law also takes part in shaping women's disempowerment.[49]

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[47] For advantages of anti-subordination theory over anti-stereotyping theory, see Katharine T. Bartlett, *Feminism and Economic Inequality*, 35 L. & INEQ. 265, 273–74 (2017) (noting the shortcomings of anti-stereotyping theory). For another comparison between anti-stereotyping theory and anti-subordination theory, see Gans, *supra* note 11, at 1899.

[48] Franklin, *supra* note 6, at 121–22. *See also* Mary Anne Case, *'The Very Stereotype The Law Condemns': Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1448 (2000) (a rule quite "simple to articulate").

[49] Judith Resnik, *Opening the Door: Ruth Bader Ginsburg, Law's Boundaries, and the Gender of Opportunities*, 25 COLUM. J. GENDER & L. 81, 83 (2013) (Ginsburg "understood that law was and is a *source* of gendered identities, and not only a result.").

Second, while anti-subordination theory compares women to men by analyzing who is more powerful and more dominant, anti-stereotyping theory focuses on the law rather than on the parties. Anti-stereotyping avoids such a comparison between women and men and instead focuses on the law's neutrality, or lack thereof. Under anti-stereotyping theory, equality between men and women is achieved through equal treatment by the law, rather than through an equalization of power.

Focusing on power dynamics or on the law as the problem yields different solutions. While anti-subordination theory demands the policing of power dynamics, anti-stereotyping theory demands the application of contract law doctrines in a more inclusive and contextual manner. While the latter theory promotes equality by changing the law, the former is predicated upon the law's forbidding misuses of power. The difference here is between internal and external change. Changing the law is far from easy, as demonstrated in the fourth Part of this Article. However, neither is fundamentally changing societal power relations a simple task. Changing the law, when accomplished, sends a strong message that the same society that created inequality must fix inequality. This sort of change will inevitably affect contractual parties as well.

Anti-subordination theory runs the risk of perpetuating stereotypes of women as weak and in need of the law's paternalistic protection. Though it focuses on the dynamics between the parties and on relations of power, it risks codifying the perception of women as powerless. In contrast, anti-stereotyping theory sheds light on the law's mechanisms that weaken women. Women are not inherently or socially powerless, but rather are put in a place of weakness by the legal system itself. Anti-stereotyping does not focus on the inherent weakness or domesticity of women, but rather on the ways in which the law itself reinforces weakness and domesticity. Rather than paternalistically protecting and compelling women to seek remedy within contract law defenses, anti-stereotyping theory prohibits the State from enforcing traditional gender roles. While anti-subordination concentrates on women's vulnerability and treats them as victims, anti-stereotyping theory focuses on the legal system's flawed treatment of women and the ways in which the law is a social institution that actively participates in shaping femininity. Anti-stereotyping also avoids essentially categorizing all women as powerless victims and all men as dominating aggressors.

Gillian Hadfield examines the dilemma of choice in contract law, that is, "the conflict between promoting women's autonomy and freedom of choice on the one hand, and protecting women from the harmful consequences of choices made under conditions of inequality on the other."[50]

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[50] Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1238 (1998). *See also* Threedy, *Dancing around Gender*, *supra* note 1, at 754–55; Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700

Anti-subordination theory presents a similar dilemma: either enforce contracts to women's detriment or rely on contract defenses; either disregard power imbalances or paternalistically protect women. Anti-stereotyping theory evades this dilemma by exposing how the law itself creates women's vulnerabilities and seeking to alter the law.

Furthermore, in analyzing social relations of power, anti-subordination theory levels a critique at liberal thought in a way that anti-stereotyping theory does not. Since contract law is based on liberal ideas, applying the former theory to contract law leads to inconsistencies. Thus, applying anti-stereotyping theory to a liberal field of law such as contract law is a better fit than applying anti-subordination theory.

Moreover, anti-stereotyping theory sheds light on issues of equality that anti-subordination theory does not. Anti-subordination theory focuses primarily on the contract formation process, and on ways in which imbalances of power are manifested in negotiations. Anti-stereotyping theory is less limited. It reveals the gender bias hidden in contract law doctrines and highlights the ways in which gender inequality manifests not only in the bargaining stage of contract formation, but also in the application of contract law doctrines themselves. Anti-stereotyping theory reveals how the rule-exception structure of contract law is not gender-neutral. Power imbalances in negotiations absolutely impact a contract's substance, as posited by anti-subordination theory. Anti-stereotyping theory concurs with this important observation but takes it a step further by focusing on contract law doctrines themselves.

Anti-subordination theory illuminates the ways in which contract law privileges men and disempowers women. It has valuable insights as to how contract law perpetuates power dynamics and has made significant contributions toward the creation of a more egalitarian contract law. Anti-stereotyping theory ought not to be seen as a substitute for anti-subordination theory, but rather as an additional tool to promote equality under contract law.

III. Anti-Stereotyping Theory and Contract Law–A Pessimistic Examination: Economic Men and Domestic Women

Cary Franklin cites John Stuart Mill's argument that "the aim of a liberal society should be to eradicate all of the legal and social forces that press individuals into particular molds and onto particular paths on the basis of their sex."[51] Contract law too should be examined through the lens of anti-stereotyping principles and should constitute a part of the emancipation of men and women from prescribed gender roles. Examining contract law is especially important in the light of the fact that, in the past, women were not

(1990); Martha M. Ertman, *Mapping the New Frontiers of Private Ordering: Afterword*, 45 Ariz. L. Rev. 695, 704 (2007).

[51] Franklin, *supra* note 6, at 97.

allowed to contract due both to their perceived dependency on their husbands or fathers and to their "domesticity."[52] Women were seen as homemakers, belonging to the private sphere of the home, while contract law presided over the world of commerce, trade, and work, a world from which women were excluded. Today, of course, women contract with others regularly, but it remains essential to examine the ways in which contract law is applied solely to the economic sphere, excluding the home and many women's experiences and interests.[53] Notwithstanding the progress made in terms of women's equality, it is imperative to inquire as to whether contract law continues to reinforce the notion that domesticity and the market are opposites. As the following analysis in this Part demonstrates, anti-stereotyping theory repudiates the economic man-domestic woman dichotomy.[54]

This Part applies the principles of anti-stereotyping theory discussed in Part I to contract law to demonstrate the gender bias of modern-day contract law.[55] Anti-stereotyping theory provides a framework for the systematic exploration of gender dimensions and applications of contract law today.

The aim of this Article is not to superimpose a rigid version of constitutional law theory onto contract law. Rather, the core *essence* of constitutional law theory is used loosely and flexibly to examine contract law. The sophistication of anti-stereotyping theory enables its application beyond constitutional law. It targets stereotypes and "different spheres" division as discriminatory, irrespective of which area of the law is in question. Various scholars have argued that contract law is not gender-neutral.[56] This Article

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[52] Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1386 (1983); Carole Shammas, *Re-Assessing the Married Women's Property Acts*, 6 J. WOMEN'S HIST. 9, 15 (1994); Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 4 (1985).

[53] *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) ("In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women.").

[54] Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1190–91 (2016) (division of labor stereotyping). *See also* Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 867 (1988) (the economic man-literary woman dichotomy).

[55] This Article focuses on gender stereotypes only. Contract law's class and racial stereotypes are beyond the scope of this Article due to space limitations. For racial stereotypes, see, e.g., Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 BUFF. L. REV. 450, 457 (1964); Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233 (1965); Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R. & C.L. 335, 388 (2016).

[56] Threedy, *Dancing around Gender*, *supra* note 1, at 750–51; Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247, 1247 (1999); MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 111 (1992); KEREN, *supra* note 41 at 281; Patricia Tidwell & Peter Linzer, *The Flesh-Colored Band Aid: Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791, 794 (1991); Lea S. VanderVelde, *The Gendered Origin of the* Lumley *Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 776 (1992); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Con-*

seeks to reexamine some of this scholarship through the framework of anti-stereotyping theory.

Some of the cases in Part I deal with men who acted "like women," thereby challenging the gender norms promulgated by the various statutes.[57] This Part demonstrates the ways in which woman who contract act "like men," in a stereotypical sense, and face gender bias, as well. The men in these cases did not conform to traditional gender roles and thus did not fit within the scope of the statutes. In a similar sense, women who use contract law confront doctrines that are based on masculine assumptions. Other cases in Part I challenged statutes that perpetuated women's domesticity to their detriment. Similarly, this part shows that domestic women are disadvantaged by contract law.[58]

A. Old Cases

An examination of old cases demonstrates how women have historically been treated differently than men, as a result of stereotypical thinking about the sexes. Cases with similar factual patterns have yielded different results, depending on the sex of the parties. The following cases are examples of the way contract law was reserved for men only, and excluded women from its purview.

In the first case, *Webb v. McGowin*,[59] Webb was permanently injured while saving McGowin's life.[60] Showing his gratitude, McGowin agreed to pay Webb a monetary amount, every two weeks, for the remainder of Webb's life.[61] McGowin complied with this agreement up to the time of his death.[62] Webb then brought a complaint against the executors of McGowin's estate, asking that the court enforce the promise and that he continue to receive payments.[63] Indeed, the court enforced the contract, stating that "[w]here the promisee [Webb] cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration. . .because of the material benefit received."[64] Furthermore, the court stated that "[i]t is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor."[65] Based on these statements, the court concluded

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tracting, 19 CARDOZO J.L. & GENDER 437, 440 (2013). *See also* Carol M. Rose, *Bargaining and Gender*, 18 HARV. J.L. & PUB. POL'Y 547, 548–50 (1995).

[57] Franklin, *supra* note 6, at 146.

[58] Ben-Asher, *supra* note 54, at 1187 (integrating women in the market and integrating men in the family).

[59] Webb v. McGowin, 168 So. 196 (Ala. 1935).

[60] *Id.* at 197.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 198.

that "[i]n saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration . . . McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration."[66]

A different result was reached when it was a woman who came to the rescue. The facts of *Harrington v. Taylor*,[67] were as follows: the defendant assaulted his wife, who took refuge in plaintiff's house. The next day the defendant entered the house and again assaulted his wife. The defendant's wife knocked him down with an axe, and was ready to cut his head open or decapitate him. Plaintiff intervened and caught the axe as it was falling. The blow intended for defendant hit her hand, mutilating it badly, but saving defendant's life. Afterward, defendant orally promised to pay the plaintiff damages, but only paid a small amount of what was promised.[68] The court denied the suit for lack of consideration, stating that "[h]owever much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law."[69]

In *Webb*, the heroic man was awarded the money promised. In contrast, in *Harrington*, the nosy neighbor was discouraged from intervening in the relationship between a married couple. While *his* heroic efforts were respected and held to constitute consideration under contract law, *her* deeds were condemned and the promise made to her was deemed unenforceable. The courts' disparate treatment of the two promisees seems to have been based on gender stereotypes. Rescuing another person's life is seen as an honorable deed—amounting to consideration—when done by a man; but when done by a woman, it is not. This disparate treatment had legal and economic consequences in its reinforcement of the exclusion of women's actions from the contract realm. One can distinguish these two cases.[70] For example, the cases are from two different jurisdictions. Notwithstanding this difference, it seems that gender was a major factor impacting the case result. Gender may not be the only factor explaining the different results of these two cases, but it appears to have been a crucial one.

In the famous case of *Lochner v. New York*,[71] the Court examined a New York statute according to which no employee shall contract or agree to work more than ten hours per day in bakeries. The Court stated that this

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[66] *Id.*

[67] Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945).

[68] *Id.* at 690–91.

[69] *Id.* at 691.

[70] Stephen J. Leacock, *Echoes of the Impact of* Webb v. McGowin *on the Doctrine of Consideration under Contract Law: Some Reflections on the Decision on the Approach of Its 75th Anniversary*, 1 FAULKNER L. REV. 1, 5 (2009); W. Jack Grosse, *Moral Obligation as Consideration in Contracts*, 17 VILL. L. REV. 1, 1–2 (1971); Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1072–73 (1992).

[71] Lochner v. New York, 198 U.S. 45, 52 (1905).

statute interfered with the right to contract between employer and employee. The Court reasoned that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[72] The Court rejected the justifications offered by the State for such intervention, such as public health, safety, and welfare.

However, the Court reached the opposite decision in *Muller v. Oregon*.[73] In that case, the Court examined an Oregon statute, according to which no female could be employed in any mechanical establishment, or factory, or laundry in Oregon for more than ten hours during any one day. Distinguishing the ruling in *Lochner,* the Court stated that:

> [t]he limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. . . . The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.[74]

The freedom of contract is reserved for men, while women are subjected to the paternalistic intervention of the State. Women, according to this reasoning, need the protection of the State and thus are not as free as men are to contract. Put differently, while the State honors contracts between men, it limits women's freedom of contract. The State does not regard women's choices and autonomy in the same light as it does men's. Thus, the old notion of women as being "weak" practically limits their ability to contract and to work on an equal level with men. Women are treated as less than "real" contractual parties, and they suffer economically as a result. This Article does not argue that the *Muller* decision is necessarily wrong.[75] Rather, it is the comparison between *Lochner* and *Muller* that this Article finds instructive, in that it reveals the way in which the Court reached a different decision in these two similar cases on the basis of stereotypical thinking and old-fashioned ideas about women and men in the workplace.

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[72] *Id.* at 57.

[73] Muller v. Oregon, 208 U.S. 412, 422–23 (1908).

[74] *Id.*

[75] For an assessment of the *Muller* decision by Ginsburg, see generally Ruth Bader Ginsburg, Muller v. Oregon*: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 359 (2009).

In *Balfour v. Balfour*,[76] the court refused to enforce an agreement between Mr. Balfour and Mrs. Balfour, under which, according to Mrs. Balfour, her husband made an enforceable promise to pay her a monthly allowance. The court based its conclusion on the lack of consideration given by Mrs. Balfour in the alleged agreement, and on the grounds that such a contract was against public policy. According to the court, Mrs. Balfour's domestic obligations did not satisfy the consideration requirement. Furthermore, enforcing such promises would result in inquiring into the marital relations and interfering with their matrimonial union. Finally, the court argued, the parties did not intend to be legally bound.

A payment in return for other services, such as work, would be held as consideration, and the employment context would necessarily entail an intention to be contractually bound. However, the court in this case drew a sharp distinction between domestic services and other services and left the former outside the realm of contract law. By excluding women's work from contract results, the court ultimately denied a woman the economic support promised to her. This refusal to enforce husbands' promises of support meant that the courts allowed men to enjoy domestic services without paying for them as they would have paid for other services. Women cannot contract their domestic services and enjoy the economic advantages of contract.

These cases demonstrate how, in the past, contract law was a "men only" club.[77] Contract law excluded women and discriminated against them in a direct and obvious manner, relying on blatant stereotypes. Modern day contract law's differential treatment of men and women is more subtle and sophisticated. Contract law no longer bluntly excludes women as it once did.[78] However, it persists in carving out rules designed for men and relegating women to the margins. Men are held to be the "real" parties to contracts, while femininity is deemed to make women unfit to be true contractual parties. While women are no longer barred from the club of contract law today, they are still accorded a secondary place in its realm. Put differently, though women are allowed into the "contract law room," they are made to sit in the back of the room.[79] Rather than keeping women outside the realm of contract law, modern day contract law carves out paternalistic exceptions. Reva Siegel calls this phenomenon of preserving male privileges despite changes in the law "preservation through transformation."[80] Unsurprisingly, being

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[76] Balfour v. Balfour, 2 K.B. 571, 578–80 (C.A. 1919); *see also* Miller v. Miller, 35 N.W. 464, 464 (1887), *aff'd*, 42 N.W. 641 (Iowa 1889).

[77] Threedy, *Feminists and Contract Doctrine*, *supra* note 56, at 1250.

[78] Jill Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005); *see also* Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 HARV. L. REV. F. 19, 20 (2005).

[79] A good example of women sitting in the back of the room is Jewish Orthodox synagogues. *See* SAMUEL C. HEILMAN, SYNAGOGUE LIFE: A STUDY IN SYMBOLIC INTERACTION 28 (2017).

[80] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

relegated to the exception comes with a price. Women's marginalization by contract law is discriminatory. Women do not enjoy their right to contract on equal footing with men. Contract law still does not meet women's needs or protect their interests. Contract law persists in maintaining a men-women binary, and as a result, women's right to contract is diminished. The following subparts explore different contract law doctrines in order to demonstrate what this Article calls the "economic men" rule and the "domestic women" exception in contract law.

B. Consideration

The doctrine of consideration distinguishes between the world of exchanges and the world of gifts. Promises that are supported by consideration and therefore are bargained-for are legally enforceable. In contrast, gifts are held to be mere gratuities and are usually unenforceable. Therefore, the division is not only economic but also hierarchical. The law of contracts excludes gifts and does not accord them the same respect as it does contracts. Take, for example, the famous *Ricketts v. Scothorn* case, in which a grandfather gave a promissory note to his granddaughter according to which he would pay her a sum of money so that she would not need to work. The grandfather died, and the granddaughter sued the executor.[81] The court stated that there was no consideration:

> [T]he note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. . . . Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros., and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no quid pro quo. He gave the note as a gratuity and looked for nothing in return. . . . The abandonment of Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit, being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named. Ordinarily, such promises are not enforceable even when put in the form of a promissory note.[82]

This decision was based upon the rule of bargained-for consideration and the gift exception. There is a clear hierarchy: a contract is deemed superior to a gratuity and thus gets better legal treatment (i.e., enforcement).[83]

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[81] Ricketts v. Scothorn, 77 N.W. 365, 366 (Neb. 1898).

[82] *Id.*

[83] Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U.L. REV. 165, 189-90 (2010).

Even though, in this case, the court enforced the grandfather's promise under equitable estoppel, its ruling maintained the aforementioned hierarchy.[84] This decision enforced the separation between the economic sphere and the familial sphere. This separation is gendered: while women nowadays are not strictly limited to the latter sphere, they are still generally associated with it. Thus, the consideration rule and gift exception (via promissory estoppel) is not gender-neutral. Limiting contract law to bargained-for promises has a disproportionate impact on women. It reinforces women's secondary place in the market, and it excludes from contract law promises that are especially important to those who regularly give and receive gifts. As gifts are usually given between family members, and as women are more commonly associated with family, this exclusion has direct consequences for women. Gift shopping, for example, is "women's work" and is often considered part of their caring and labor of love.[85] This contract-gifts hierarchy mirrors and is intimately connected to the men-women hierarchy.

The doctrine of consideration also excludes women's care-work. In deciding what qualifies as consideration, contract law leaves women's care-work outside of the contract law realm. Consider the facts of *Borelli v. Brusseau*, in which a husband and wife entered into an oral agreement according to which the wife promised to care for her husband at home for the duration of his illness, thereby avoiding the need for him to move to a hospital.[86] In exchange for this around-the-clock care, the husband promised to leave the wife some of his property. Though the wife kept her end of the bargain and took care of husband until his death, the husband ultimately left the property to his daughter. The court held that "a spouse is not entitled to compensation for support . . . . Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration."[87]

As this case demonstrates, contract law perpetuates stereotypes of women as being domestic and therefore not "real" contract parties. By drawing the line between consideration and non-consideration, the court maintained a gendered hierarchy. In this case, women were excluded from the contract sphere, rendered unable to enforce promises made to them, disallowed from participating in the market, and barred from benefiting from contracts. The way consideration is interpreted and applied leaves women's work outside of

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[84] *Ricketts*, 77 N.W. at 367. For a critique of this hierarchy, see Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER RACE & JUST. 47, 49 (2013).

[85] Hanne Heen, *Money, Gifts and Gender*, *in* LABOUR OF LOVE: BEYOND THE SELF-EVIDENCE OF EVERYDAY LIFE 71, 72 (2017) (Tordis Borchgrevink & Øystein Gullvåg Holter eds., 2017); Eileen Fischer & Stephen J. Arnold, *More than a Labor of Love: Gender Roles and Christmas Gift Shopping*, 17 J. CONSUMER RES. 333, 333 (1990).

[86] Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 17–18 (Cal. Ct. App. 1993).

[87] *Id.* at 20.

the world of contracts.[88] As Ginsburg showed, stereotypes limit women's choices. Because the wife acted as a woman, contract law did not apply and the contract was not enforced.

C. Unconscionability

The doctrine of unconscionability is generally used as a defense against the enforcement of a contract. This doctrine is an exception to the general rule of enforceability of contracts and indifference to the terms of the bargain. As stated by the court in *Williams v. Walker-Thomas*:

> Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when 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. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[89]

Under the unconscionability doctrine, a court will not enforce a contract due to the unfairness and one-sidedness of its terms and the lack of knowledge of its terms by one of the parties. Thus, while protecting powerless parties from unscrupulous behavior and aggressive business practices, it treats such parties as less-than-real parties. It allows for voiding the contract for equitable reasons. The claimant of unconscionability is often portrayed in terms of their victimhood: powerless, poor, and uneducated; and the claim itself is portrayed as a paternalistic form of protection. A real contract law party has the duty to read and understand the contract and bears the full risk of contracting. Real contract law parties are expected to honor their promises and the enforcement of contracts promotes their autonomy. In other words, contract enforceability is the rule, and unconscionability is an excuse for avoiding the rule: an exception. The free market regime is the rule, and the exception deals with market failures. The unconscionability doctrine goes against the core of contract law and is thus a limited exception.

Unconscionability demonstrates the intersection of race, gender, and class.[90] The facts of the aforementioned *Williams* case are typical of cases in which the unconscionability doctrine is employed. In *Williams*, the plaintiff

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[88] For another critique of the doctrine of consideration, see David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299, 1299 (2006).

[89] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965).

[90] Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Co., 3 TEMP. POL. & C.R. L. REV. 89, 92 (1994).

was an African American single mother of seven. She was on welfare at the time when she purchased household items from Walker-Thomas, a furniture store. After buying a stereo set, Williams defaulted on her payments. The purchase agreement provided that the title would remain in possession of Walker-Thomas until the total of all the monthly payments made equaled the stated value of the item and that, in the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item. When Walker-Thomas sought to enforce the contract, Williams resisted the enforcement by claiming unconscionability. This case shed light on predatory business tactics that exploit consumers, in general, and inner-city poor—who are often found in even weaker bargaining positions—in particular. The facts of this case highlight not only the socioeconomic and racial contexts, but also the domestic—and thus arguably gendered—context: the items in question were largely household furniture and appliances.

Furthermore, the enforceability rule of contract and the unconscionability exception, taken together, contain another gendered dimension. The rule of contract is the enhancement of the welfare of the parties, and the exception deals with conscience and equity. In other words, the rule holds that contracts are based on economic considerations and motivations. The exception deals with the ethics and morality of business.[91] Parties are rational actors who aim to maximize their monetary gains from a contract. The unconscionability doctrine is an island of non-economic considerations. Dealing at arm's length—free from ethical considerations—is the economic rule, while caring for others and acting considerately toward others is the emotional exception. Though the *Williams* court condemned the irresponsible business dealings,[92] it failed to see its allocative implications. Unconscionable contracts are not only a matter of conscience, but also a matter of distributive justice. This sharp divide between business and ethics, economy and morality, commerce and emotions is itself gendered.[93] Women are more frequently associated with caring; thus acting in a considerate manner towards another party is not gender-neutral in its associations.[94] This Article does not claim that women are not driven by economic considerations or that men are immoral; however, it does seek to highlight the relevance of our *societal* conceptions of the ethics of care as being fundamentally feminine. The economic-moral divide, when viewed in this light, is intricately connected to the men-women binary.

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[91] Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 BYU L. Rev. 427, 438 (2016).

[92] *Williams*, 350 F.2d at 448.

[93] For a critique of the distinction between money and norms, see Julia Y. Lee, *Money Norms*, 49 Loy. U. Chi. L.J. 57, 61 (2017). For a critique of the notion that justice in contract law is limited to the doctrine of unconscionability, see Todd D. Rakoff, *The Five Justices of Contract Law*, 2016 Wis. L. Rev. 733, 733–34 (2016).

[94] Tidwell & Linzer, *supra* note 56, at 799.

D. Duress

Non-enforceable contracts due to duress are another exception to the rule of enforceable contracts. But as one court stated, "The doctrine applies only to . . . extraordinary situations in which unjustified coercion is used to induce a contract, as where extortive measures are employed, or improper or unjustified demands are made, under such circumstances that the victim has little choice but to accede thereto."[95] Only in extreme and rare circumstances will the court accept a claim of duress. Duress is narrowly defined, and the aggrieved party wishing to rescind the contract bears a heavy burden of proof. The norm is freedom of contract; coercion is seen as highly unusual. Free will is the presumed standard; pressure and compulsion are held to be uncommon.

This rule is based on the experiences of privileged men, while women and underprivileged men are relegated to the exception. The exception is not gender-neutral: weakness, powerlessness, and victimhood are traits commonly associated with women. The claimant of duress is thus often seen as being feminine. Patricia Williams alluded to such a perception of duress as feminine in the following recollection: "A white male student of mine once remarked that he couldn't imagine 'reconfiguring his manhood' to live up to the 'publicly craven defenselessness' of defenses like duress and undue influence."[96]

Women are not "true" contractual parties but rather are relegated to the margins of contract law. Women are awarded paternalistic protection and receive special treatment. Women are viewed as weak victims, subject to pressures and threats, while men are seen as strong and resilient. True contract parties—men—are autonomous and free agents, capable of resisting intimidation and threats. The lived experiences of women in a patriarchal society are filled with constraints to their autonomy. Women's freedom of action is curtailed, and their consent is often given under conditions of inequality and subordination. Women who ignore social pressures and act against societal norms are condemned; men who claim duress are portrayed as incompetent, and, indeed, as feminine. Take, for example, the Arthur Murray cases, in which dance students attempted to challenge the enforcement of long-term dance lesson contracts by claiming duress. Female plaintiffs outnumbered male plaintiffs and were portrayed as lonely, vulnerable, elderly widows. The male plaintiffs in these cases were also elderly and widowers, but were viewed as having more agency than the female plaintiffs.[97]

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[95] Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293, 1299 (M.D. Ala. 1999).

[96] Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 420 n.54 (1987).

[97] Threedy, *supra* note 1, at 754.

Along the freedom-duress binary, case law distinguishes between economic coercion and emotional pressure. Though both impair the will of the contracting party, only the former is legally recognized as constituting duress. The law thus comes to the aid of people facing economic pressure but stops short of protecting people in situations of emotional stress and coercion. Economic concerns, commonly associated with men, are better protected than emotional concerns, commonly associated with women. Duress law thus establishes a gendered hierarchy. Economic concerns are regarded as more valid than emotional ones. This Article does not claim that women do not face economic duress, nor that men do not face emotional pressure. Rather, it simply seeks to critique the economics-emotions dichotomy, which correlates to the societal dichotomy frequently drawn between men and women.

In a number of cases,[98] duress law was extended to include not only physical coercion but also economic coercion such as threatening to breach a contract. As one court explained the concept of duress, "Where the plaintiff is forced into a transaction as a result of unlawful threats or wrongful, oppressive, or unconscionable conduct on the part of the defendant which leaves the plaintiff no reasonable alternative but to acquiesce, the plaintiff may void the transaction and recover any economic loss."[99] One party threatening to breach the contract by not delivering the required goods unless the other party agrees to some further demand might be considered such a form of duress.[100]

However, emotional threats and pressure are not covered under duress law.[101] For example, in the case of *Mesiti v. Mongiello*, a wife claimed she signed a separation agreement under duress after the husband and his attorneys had threatened her prior to the court hearing without her counsel present, saying that, unless she signed the agreement and told the court that she did so of her own free will, her children would be taken from her.[102] Her claim was rejected. The court disregarded her fear of losing custody of her children and held that her emotional state was outside the scope of duress law.[103] As Hila Keren argued, "Courts tend to favor a narrow interpretation of the duress doctrine that fails to account for distressed voices. Within this

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[98] *See, e.g.*, Austin v. Loral, 29 N.Y.2d 124 (1971); Wurtz v. Fleischman, 89 Wis. 2d 291 (1979); Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983).

[99] Mach. Hauling, Inc. v. Steel of W. Va., 384 S.E.2d 139, 142 (W. Va. 1989).

[100] *See* Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533, 535 (N.Y. 1971).

[101] *See* Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 543 (1966) (Odorizzi, a homosexual man who resigned after his sexual orientation was discovered, claimed he was under such severe mental and emotional strain at the time he signed his resignation, having just completed the process of arrest, questioning by the police, booking, and release on bail, and having gone for forty hours without sleep, that he was incapable of rational thought or action. Though the court rejected the duress claim, it accepted the undue influence claim.). *See also* Lewis v. Lewis, 387 So. 2d 1206, 1210 (La. Ct. App. 1980); Askew v. Askew, 699 So. 2d 515, 518 (Miss. 1997).

[102] Mesiti v. Mongiello, 924 N.Y.S.2d 175, 178 (2011).

[103] *Id.* at 180.

narrow framework, courts too often dismiss stress arguments after classifying stress—without any reasoning or support—as nothing but a *subjective feeling*."[104]

Duress law maintains hierarchies (the freedom-duress hierarchy and the economic-emotional hierarchy) that disregard women's experiences.[105] As the *Mesiti* case demonstrates, duress law discounts the relevance of threats that are typically common in many women's lives, such as the threat of losing custody of children.[106] Another example of the way duress law ignores women's realities is the ruling in *Biliouris v. Biliouris*.[107] In that case, the wife claimed she was under duress when signing a prenuptial agreement with her husband.[108] She asserted that "the fact that she found herself, a pregnant single mother, presented with an agreement shortly before her scheduled wedding date and being told that if she did not sign the agreement there would be no wedding, is by its very nature coercive."[109] The court rejected the wife's duress claim, reasoning that the she was presented with the prenuptial agreement before the wedding and had sufficient time to review it.[110] She also consulted a lawyer before signing the agreement and told the notary that she signed the agreement freely.[111] The court concluded that, "[w]hile the wife's pregnancy coupled with the husband's insistence that there would be no marriage unless she signed the antenuptial agreement presented the wife with a difficult choice, those factors cannot be said . . . to have divested the wife of her free will and judgment."[112]

The court ultimately dismissed the wife's fears. According to the court, she faced a difficult choice, but one that did not amount to duress.[113] In order to arrive at this decision, the court disregarded the fact that in the meeting with the husband and his lawyer before signing the agreement, the wife was crying and stating she did not wish to sign the agreement.[114] The court also ignored other facts: the husband's lawyer drafted the agreement, there were no negotiations concerning the terms of the agreement, the wife's lawyer

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[104] Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679, 682 (2013) (emphasis omitted).

[105] For a similar hierarchy in tort law between physical and emotional (relational) harm and pecuniary and non-pecuniary losses that harm women, see Yifat Bitton, *Liability of Bias: A Comparative Study of Gender-Related Interests in Negligence Law*, 16 ANN. SURV. INT'L & COMP. L. 63, 66 (2010); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 467 (1998); Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 753 (2001); Martha Chamallas & Lind Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990).

[106] *Mesiti*, 924 N.Y.S.2d at 180.

[107] 852 N.E.2d 687 (Mass. App. Ct. 2006).

[108] *Id.* at 693.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 689.

advised her not to sign the agreement, and she signed it against his advice.[115] As a result, the court enforced a one-sided agreement, which included a waiver of alimony.[116] This, of course, had gendered distributive effects.

In both *Mesiti* and *Biliouris,* the court treated the plaintiffs as though they were male contract parties and ultimately enforced the contract. As in the case of Ann Hopkins discussed above, the women in these cases were punished for "acting like men." These three women faced the same catch-22: if they wanted to participate in the economic world of contract, then they must discard their "femininity," and if they wanted to act like women, they risked being excluded from the economic world. They were stereotypically judged rather than being judged on the merits. Similar to the "domestic men" who challenged gender stereotypes in the cases in Part I, these cases demonstrate how "economic women" who contract like men are hurt by stereotypes too.

E. Damages

Damages are aimed to compensate the aggrieved party for breach of contract. Damages for economic loss due to breach of contract are at the core of contract law, and damages for emotional or mental suffering are at its margins. Thus, while contract law protects commercial interests, non-pecuniary injuries are considered atypical and exceptional.

Take for example *Sullivan v. O'Connor*.[117] In that case, a patient (a professional entertainer) sued a surgeon for breach of contract with respect to an operation on her nose.[118] The result of the plastic surgery was a deformed nose causing her pain in body and mind, as well as other expenses.[119] The breach of contract claim was accepted, and the question at hand became the measure of damages resulting therein.[120] The court held that:

> We find expressions in the decisions that pain and suffering . . . are simply not compensable in actions for breach of contract. The defendant seemingly espouses this proposition in the present case. True, if the buyer under a contract for the purchase of a lot of merchandise, in suing for the seller's breach, should claim damages for mental anguish caused by his disappointment in the transaction, he would not succeed . . . . But there is no general rule barring such items of damage in actions for breach of contract. It is all a question of the subject matter and background of the contract, and when the contract calls for an operation on the person of the

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[115] *Id.*

[116] *Id.* at 695. For similar spousal guarantee cases where women sureties claimed undue influence, see Ertman, *supra* note 4, at 547.

[117] 296 N.E.2d 183 (1973).

[118] *Id.* at 184.

[119] *Id.*

[120] *Id.* at 188–89.

> plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances.[121]

The court awarded reliance damages rather than expectation damages, holding that the latter are usually awarded in breach of commercial contract cases, but are not suitable in cases of physician-patient contracts. According to the court:

> For breach of the patient-physician agreements under consideration, a recovery limited to restitution seems plainly too meager, if the agreements are to be enforced at all. On the other hand, an expectancy recovery may well be excessive. . . . Where, as in the case at bar and in a number of the reported cases, the doctor has been absolved of negligence by the trier, an expectancy measure may be thought harsh. We should recall here that the fee paid by the patient to the doctor for the alleged promise would usually be quite disproportionate to the putative expectancy recovery. To attempt, moreover, to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder. As a general consideration, Fuller and Perdue argue that the reasons for granting damages for broken promises to the extent of the expectancy are at their strongest when the promises are made in a business context, when they have to do with the production or distribution of goods or the allocation of functions in the market place; they become weaker as the context shifts from a commercial to a noncommercial field. . . . There is much to be said, then, for applying a reliance measure to the present facts.[122]

Though the court awarded the patient damages for her pain and suffering, it maintained a hierarchy when doing so. These injuries were held to be atypical and secondary, while economic losses are the usual result of a breach of contract. The court held that this non-commercial contract is atypical and thus did not follow the rule of expectation damages.[123] The court awarded reliance damages, which are usually lower than expectation damages, for the patient's suffering. However, the subject matter of the contract alone does not explain the court's decision. This differentiated treatment of pecuniary and non-pecuniary injuries is not gender neutral. In *Sullivan*, the aggrieved party was a woman wishing to improve her physical appearance, but this Article's analysis of this case has wider implications. While women often suffer commercial losses and men suffer emotional pain, this binary, too, is gendered. Women are commonly associated with emotions and the

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[121] *Id.*
[122] *Id.* at 187–88.
[123] *Id.* at 189–90.

economic world remains dominated by men. Although these stereotypes are not as rigid as they used to be, they remain prevalent and widespread. The hierarchy between economy loss and mental and physical suffering is gendered in that it is related to men-women and economic-domestic dichotomies. Tort scholars have criticized negligence law for protecting economic loss, which is an associatively male interest, more fervently than non-pecuniary loss, which is an associatively female interest.[124] Similarly, economic concerns are more well-respected and better protected than non-monetary injuries under contract law.[125] This has gendered distributive effects.

The rule according to which damages are the main remedy and specific performance is secondary reflects another hierarchy in remedies for breach of contract. Specific performance is an exceptional remedy ordered in cases where monetary damages do not adequately compensate the aggrieved party.[126] Specific performance protects non-economic interests, as it mandates that the breaching party fulfill his or her promise. It recognizes that, in some cases, money does not sufficiently address all of the aggrieved party's grievances and said party is not indifferent to receiving the performance of the contract or its monetary values.[127]

Thus, contract law puts monetary interests at its core and leaves emotional and other non-economic concerns at the margins. Specific performance alludes to the fact that economic interests do not always constitute the sum of the parties' interests under contract. Money does not always compensate for all injuries resulting from breach of contract. Specific performance shows that the parties' expectations can go further than monetary gains and that they value the relations with each other beyond the values exchanged. Nevertheless, specific performance is secondary and awarded in atypical cases. This is another example of the economic rule and domestic exception. Women are commonly associated with relations and higher valuation of such relations.[128] Thus, this is another way the preference of economic values over relational and other values is not gender neutral.[129]

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[124] For a similar binary in damages under tort law, see sources *supra* note 105. *See also* Ronen Avraham & Kim Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017) (tort law's remedial damage scheme perpetuates existing racial and gender inequalities).

[125] *See also* Allen v. Jones, 163 Cal. Rptr. 445, 450 (1980) (damages for mental distress awarded under tort not contract).

[126] Klein v. Pepsico, Inc., 845 F.2d 76, 80 (4th Cir. 1988) ("[S]pecific performance is inappropriate where damages are recoverable and adequate."); Centex Homes Corp. v. BOAG, 320 A.2d 194, 198 (N.J. 1974).

[127] For gender bias in specific performance doctrine, see VanderVelde, *supra* note 56, at 777.

[128] CAROL GILLIGAN, IN A DIFFERENT VOICE 8 (1982).

[129] For the gendered bias of damages under contract law, see FRUG, *supra* note 57, at 87.

F. Interpretation

There are various rules of interpretation of contracts and various sources which a judge may use for interpreting a contract. This Subpart analyzes one such rule of interpretation (the parol evidence rule) and one such source of interpretation (duty of good faith) as examples.

The parol evidence rule determines whether to allow oral evidence to explain the meaning of a written contract. As one court explained:

> When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms. . . . When only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.[130]

The parol evidence rule favors written agreements over oral ones. The rationale of this rule is that "[w]ritten evidence is more accurate than human memory."[131] Further, the parol evidence rule addresses "[t]he fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts."[132]

The parol evidence rule posits a hierarchy between written documents and oral understandings. This hierarchy is connected to the men-women binary. Many scholars have highlighted the association between women and the concept of "voice."[133] A major focus of women's advocacy has been giving voice to women and criticizing the silencing of women by taking away their voice.[134] Two canonical works of scholarship demonstrate the importance of voice in feminist literature. For *In a Different Voice*, Carol Gilligan interviewed women and girls about their moral decisions.[135] Throughout the book, the concept of voice is used both literally and metaphorically to describe women's methods of thinking, analyzing and making moral decisions. In *Only Words,* Catharine A. MacKinnon discusses the silencing of women as an integral part of their subordination under the patriarchy.[136] The concept of "giving voice" is used in feminist literature as an indicator for the empowerment of women; silencing is correlated with the oppressive domination of women.[137] Voice is a matter of freedom of speech, equality,

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[130] Masterson v. Sine, 436 P.2d 561, 563 (Cal. 1968); *see also* Mitchell v. Lath, 160 N.E. 646, 647 (N.Y. 1928).

[131] *Id.* at 571.

[132] Masterson, 436 P.2d at 564.

[133] GILLIGAN, *supra* note 128, at 1.

[134] *Id.* at 3.

[135] *Id.* at 3.

[136] CATHARINE A. MACKINNON, ONLY WORDS 3 (1993).

[137] *See also* WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND 17 (M.F. Belenky, B.M. Clinchy, N.R. Goldberger & J.M. Tarule eds., 1986); Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of*

and autonomy. Furthermore, literacy is a gendered issue as girls and women are more often illiterate than boys and men.[138] This illiteracy has led many women in the past and even today to rely primarily on oral communication. Thus, the preference of written documents over oral evidence is not gender neutral. As Hila Keren argues, "the parol evidence rule may serve as a silencing mechanism of more womanly voices."[139]

Interpretation is gendered in another sense. Conventional wisdom holds that interpretation is a multistage process wherein a judge considers various sources in order to bestow the contract with its proper meaning. Such a process is inherently hierarchal. According to Eyal Zamir:

> At the top of the hierarchical pyramid stands the parties' express agreement. In the absence of an express agreement, the parties' intentions are to be deduced from the totality of the contract's documents, and then from the circumstances surrounding its making. The next step is to examine whether an answer may be found in the parties' previous course of dealing. Should uncertainty as to the contract's meaning remain, the interpreter fills the gap in the contract by reference to trade usages. If these are not useful, statutory or judge-made default rules are applied to supplement the contract. Finally, if there is no definite answer even in the default rules, general principles of contract law, such as good faith or the realization of reasonable expectations, may be resorted to.[140]

Zamir goes on to critique this conventional wisdom and argue for an inverted hierarchy.[141] Indeed, the duty of good faith is an important tool in contract interpretation, as demonstrated in *Locke v. Warner Bros. Inc*.[142] The contract in *Locke* provided that Warner Bros. Inc. would pay Locke $250,000 per year for three years in exchange for Locke's submitting any picture she was interested in developing to Warner Bros. Inc. first.[143] Warner Bros. Inc. could then accept or reject Locke's submissions within 30 days.[144] The contract also provided that Warner Bros. Inc. would pay Locke $750,000 for a directing deal, whether or not her services were used.[145]

Legal Reasoning, *in* SOURCEBOOK ON FEMINIST JURISPRUDENCE 176, 178 (Hilaire Barnett ed., 1997).

[138] Anita Dinghe, *Women and Literacy*, *in* WOMEN IN THE THIRD WORLD: AN ENCYCLOPEDIA OF CONTEMPORARY ISSUES 418 (Nelly P. Stromquist ed., 2014) ("According to UNESCO (United Nations Education, Scientific, and Cultural Organization) estimates, there were 873.9 million illiterate adults in developing countries in 1990, of whom 567 million, or 64.9 percent, were women.").

[139] Hila Keren, *Textual Harassment: A New Historicist Reappraisal with Gender in Mind*, 13 AM. U. J. GENDER SOC. POL'Y & L. 251, 318 (2005).

[140] Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1712 (1997).

[141] *Id.* at 1714–15.

[142] Locke v. Warner Bros. Inc., 66 Cal. Rptr. 2d 921 (1997).

[143] *Id.* at 922.

[144] *Id.*

[145] *Id.*

Warner Bros. Inc. paid Locke $1.5 million according to the contract; however, Warner Bros. Inc. did not develop any of Locke's proposed projects or hire her to direct any film.[146] Locke sued Warner Brothers Inc. for breach of contract.[147] The court interpreted the contract in order to rule whether Warner Brothers Inc. breached the contract by refusing to consider Locke's projects. The court held that Locke presented evidence that "raises a triable issue of material fact as to whether Warner breached its contract with Locke by categorically refusing to work with her, irrespective of the merits of her proposals." The court reasoned that "[w]hile Warner was entitled to reject Locke's proposals based on its subjective dissatisfaction, the evidence calls into question whether Warner had an honest or good faith dissatisfaction with Locke's proposals, or whether it merely went through the motions of purporting to 'consider' her projects."[148]

As *Locke* demonstrates, the duty of good faith is instrumental in interpreting contract terms that give discretion to one of the parties. However, the duty of good faith lies at the bottom of the hierarchical pyramid. The interpretation process gives preference to written words over social values. The duty of good faith is about contractual morality;[149] however, it is given the least value on the interpretation hierarchy. Like the doctrine of unconscionability, good faith demonstrates the secondary place of ethical considerations under contract law. Placing the duty of good faith at the lower end of the hierarchy is not gender neutral. *Locke* demonstrates this gender bias, not only because Locke was a woman, but also, more generally, because a turn to ethics, morality, and values generally helps the weaker party. As women are more often the weaker party vis-à-vis men, the duty of good faith—like unconscionability—more often benefits women. Furthermore, women are commonly associated with relations and with valuing relationships more than men.[150] Thus, the duty of good faith, which aims at strengthening mutual bonds, trust, connection, and cooperation between the parties beyond the written obligations, is gendered. The hierarchal interpretational process is gendered and places men's economic interests first and women's values last. Thus, the law of interpretation reflects and maintains the economic men-domestic women binary.

IV. Anti-Stereotyping Theory and Contract Law–An Optimistic Reexamination: Contextual Contract Law

The analysis in the previous Part shows that contract law embraces the market-home dichotomy, which directly correlates to the economic man-do-

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[146] *Id.*
[147] *Id.* Locke also claimed sex discrimination and fraud.
[148] *Id.* at 926.
[149] Robert S. Summers, *The General Duty of Good Faith: Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 811 (1982).
[150] Gilligan, *supra* note 128, at 24.

mestic woman dichotomy.[151] In the past, contract law entirely excluded non-economic considerations and factors from its purview. While men's economic concerns were addressed by contract law, women's domestic interests were held to be outside the scope of contract law. Modern contract law formulates an economic rule and carves out a non-economic exception. A binary in modern contract law perpetuates stereotypes of economic men as contractual parties, while domestic women are relegated to the margins of contract law. Contract law treats women paternalistically, carving out special rules to protect them. Unlike the blatant exclusion of the past, today's contract law discriminates against women in a more sophisticated way, namely by applying doctrines differently to men and women.[152]

While this Article does not seek to detail a comprehensive revision of contract law doctrines, this Part does seek to suggest guidelines according to which contract law doctrines might be reshaped based on the analysis presented in the previous part. Anti-stereotyping theory is optimistic: it holds that just as the law reinforces stereotypes, so too can it uproot stereotypes. Just as the State can use contract law to maintain hierarchy, so too can it use contract law to promote equality. This Part looks at how contract law might become more inclusive and non-hierarchical, and indeed, how contract law might be used to fight stereotypical and binary thinking.

As a starting point, contract law should reject old-fashioned notions about women and men. As seen in the previous Part, many courts have historically ruled differently in old cases depending on the gender of the contracting party. By treating similarly situated women and men differently on the basis of stereotypical assumptions and beliefs, said cases reinforced a problematic distinction between women and men within the law. Contract law should repudiate traditional gender norms rather than reinforce them. Society has changed; such gendered stereotypes are archaic and outdated. Nonetheless, such cases are still present in contract law casebooks and are regularly taught in contract law classes. Their influence remains profound, and they shape the ways in which contract law is taught.[153] The solution

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[151] For the market-home dichotomy, see MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES xi (2015); SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 121 (1989); Hasday, *supra* note 78, at 493; Keren, *supra* note 78, at 20; Carol Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 296 (1992); Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 56 (1991); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 82 (1997); Katharine B. Silbaugh, *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 203, 205 (2001); Threedy, *supra* note 56, at 1250; Zvi H. Triger, *For the Love of Contract*, 51 TULSA L. REV. 407, 412 (2106).

[152] *But see* Hila Keren, *Women in the* Shark Tank*: Entrepreneurship and Feminism in the Neoliberal Age*, 34 COLUM. J. GENDER & L. 75, 92 (2016) (arguing that business continues to perpetuate traditional gender roles).

[153] *See* Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1065 (1985).

herein would not be to remove such cases from contract law curricula altogether; rather, these cases should be included in legal education and in class discussions in order to critically highlight and dispel old-fashioned stereotypes.[154] Scholars like Blake Morant have suggested:

> Those who teach, research, or practice contract law should broaden their perspective to ensure that the dynamics of human perception and disparity based upon race, gender, and class are explored in case analyses when these issues play a role in the analysis of legal rules. When relevant, issues of disparity should be considered and analyzed, not as exclusive determinants, but as possible contributing components to the thought processes that lead to the formation and breakdown of bargains. To ignore matters of race, gender, or any type of disparate treatment because of contract law's objective facade would be both myopic and misleading.[155]

A more demanding change needed in contract law is the meaningful inclusion of women's perspectives rather than the current exclusive reflection of men's experiences. Contract law doctrines should be broadened to attend to both men's and women's needs and to both economic and non-economic concerns. Women's needs and perspectives must not be left outside the realm of contract law.[156] An inclusive contract law would be rich and diverse, covering economic as well as non-economic concerns, women's interests as well as men's.[157]

An example of such efforts is the dissent in *Borelli*. Broadening the doctrine of consideration to include women's care-work, the dissent stated:

> According to the majority, Mrs. Borelli had nothing to bargain with so long as she remained in the marriage. This assumes that an intrinsic component of the marital relationship is the personal services of the spouse, an obligation that cannot be delegated or performed by others. The preceding discussion has attempted to demonstrate many ways in which what the majority terms 'nursing-type care' can be provided without either husband or wife being required to empty a single bedpan. It follows that, because Mrs. Borelli agreed to supply this personal involvement, she was

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[154] *See* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 896–99, 938–39 (1997). *See also* Spence, *supra* note 88, at 92; Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 24–25 (2013).

[155] Morant, *supra* note 154, at 896–97.

[156] For a similar inclusion of women's perspective in tort law, see Leslie Bender & Perette Lawrence, *Is Tort Law Male? Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313, 319–320, 337 (1993); Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389, 392 (1997).

[157] Tidwell & Linzer, *supra* note 56.

> providing something over and above what would fully satisfy her duty of support. That personal something—precisely because it was something she was not required to do—qualifies as valid consideration sufficient to make enforceable Mr. Borelli's reciprocal promise to convey certain of his separate property.[158]

The dissent in *Borelli* took women's realities into account and incorporated them into the doctrine of consideration. The dissent rejected the market-home dichotomy and incorporated the latter into the sphere of contract law. The dissent's broadening of consideration to include women's care-work constitutes a rejection of the notion that such work is not important enough to be regarded as consideration, and a recognition of the fact that contract law should encompass exchanges that are not solely economic in nature.

Justice Cardozo developed a similarly broad notion of consideration. Under his definition, consideration included non-economic exchanges that are typically seen as falling under the doctrine of promissory estoppel.[159] Rather than employing a main formation doctrine, consideration, and a secondary formation doctrine, promissory estoppel, Cardozo developed an expansive and inclusive doctrine of consideration.[160] In this formulation, promissory estoppel is subsumed by an expanded doctrine of consideration rather than being used as a substitute for consideration. Promises made in non-commercial settings should not be treated under a separate doctrine of promissory estoppel: consideration should include economic as well as non-economic promises.

The most challenging change needed in contract law is the rejection of the rule and exception model. Rather than employing dichotomies, contract law should adopt a non-binary analysis. Contract law should not categorize situations as belonging either to the rule or the exception, but rather should treat them contextually.[161] The push for a more contextual contract law is not new.[162] This Article uses contextualism as a method through which contract

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[158] Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 24 (Cal. Ct. App. 1993).

[159] *See, e.g.*, Allegheny Coll. v. Nat'l Chautauqua Cty. Bank of Jamestown, 159 N.E. 173, 175 (N.Y. 1927); De Cicco v. Schweizer, 117 N.E. 807, 810 (N.Y. 1917).

[160] *See, e.g.*, Curtis Bridgeman, Allegheny College *Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 172 (2005); Joshua P. Davis, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777, 780 (1993); Henry W. Humble, *Promissory Estoppel in the Law of Contracts*, 63 AM. L. REV. 33, 43 (1929); Mike Townsend, *Cardozo's* Allegheny College *Opinion: A Case Study in Law as an Art*, 33 HOUS. L. REV. 1103, 1142 (1996).

[161] Bartlett, *supra* note 53, at 851 ("Practical reasoning approaches problems not as dichotomized conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies. These dilemmas, ideally, do not call for the choice of one principle over another, but rather 'imaginative integrations and reconciliations,' which require attention to particular context.").

[162] Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 WAKE FOREST L. REV. 607, 607 (2010); Larry A. DiMatteo & Blake D. Morant, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549, 550–51 (2010); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63,

law might forgo the economic men-domestic women dichotomy. Such a step would make contract law more egalitarian.

The author of this Article has previously criticized the doctrine of duress for using a binary model.[163] According to duress law, there is either consent or duress. The author suggested that in reality, there is a spectrum of situations, ranging from consent to duress. There are situations which constitute neither of these two extremes, but rather fall somewhere in between. Consent is a complex concept, not an on/off switch. Contract law should acknowledge these middle grounds. Rather than categorize cases as belonging either to the rule or to the exception, duress law should be contextual. Taking this insight further in a recent article[164], the author of this Article suggested a more nuanced model of consent. This model rejects binary thinking, according to which there is either valid consent or there is no consent at all. This richer, more sophisticated model suggests that in examining consent, courts should take into account both intra-relational context and social context.[165]

In the same vein, Omri Ben-Shahar explored the principle of no-retraction as an alternative to the mutual assent principle.[166] According to the no-retraction principle:

> A party who manifests a willingness to enter into a contract at given terms should not be able to freely retract from her manifestation. The opposing party, even if he did not manifest assent, and unless he rejected the terms, acquires an option to bind his counterpart to her representation or charge her with some liability in case she retracts.[167]

Furthermore, liability under the no-retraction principle is assigned under an ascending scale of enforceability:

> Liability under the no-retraction regime is continuous, with the continuity achieved not by switching among damage measures, but by affecting the terms of the deal that the plaintiff can enforce. It provides an operative measure for scaling enforcement that tracks

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70 (1998). For legal context generally, see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1598 (1990). For scholarship discussing contextual tort law, see Martha Chamallas, *Who is the Reasonable Person? Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1353 (2010).

[163] Gan, *supra* note 44.

[164] Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615 (2017).

[165] *Id.* at 626. *See also* Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. 57 (2012) (suggesting a contextual totality of the circumstances test).

[166] Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1830 (2004).

[167] *Id.* at 1830 (emphasis omitted).

> the degree of consensus: the closer the parties' positions have come, the more severe the liability consequence.[168]

Rejecting binary thinking (mutual assent or no mutual assent, a contract was formed or no contract was formed, contract liability or no contract liability, etc.), the no-retraction rule is instead contextual.

An example of contextual analysis by the court is found in *Golding v. Golding*.[169] In this case, the husband threatened the wife that he would not accord her a *get*, a Jewish decree of divorce, unless she complied with his demands.[170] Terrified she would be unable to obtain a *get,* and thus would not be able to have a religiously valid Jewish divorce, the wife signed a separation agreement and was given a *get*.[171] The court was aware of the uneven power dynamics between men and women under Jewish divorce law and the consequences of being refused a *get* for religious Jewish women.[172] Based on this contextual analysis, the court accepted the wife's duress claim and found the agreement void.[173] According to the court, "By exploiting the power differential between the parties, so as to completely dominate a process which should have entailed honest negotiating, the defendant engaged in 'inequitable conduct' which 'vitiate[s]' the execution of the agreement. [The agreement] can be regarded as nothing other than a document 'born of and subsisting in inequity.'"[174] The court took into account the special circumstances of a Jewish couple and did not adhere to a strict free will-duress dichotomy. Rather than categorize the case as duress, the court engaged in contextual analysis, paying attention to the specificity of the situation at hand and to the relevant contexts of power disparity and religious Jewish law.

Hila Keren suggested that "[u]nconscionability can be used to review predatory loan agreements and establish a clearer norm against economic exploitation, thereby filling the void created by reverse redlining cases."[175] Moreover, Keren explained that "unconscionability is uniquely structured around a balancing test that allows careful and contextual legal analysis of multiple factors without committing to an overarching classification."[176] A contextual analysis under the doctrine of unconscionability may deter economic exploitation. Rather than being used only as a narrow exception, unconscionability in this framework could be used as the basis for a contextual analysis of predatory agreements.

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[168] *Id.* at 1832.
[169] 581 N.Y.S.2d 4 (N.Y. App. Div. 1992).
[170] *Id.* at 5.
[171] *Id.* at 6.
[172] *Id.* at 5.
[173] *Id.* at 6.
[174] *Id.*
[175] Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 320–21 (2015).
[176] *Id.*

Contextual contract law means taking social, economic, and cultural circumstances into account. Race, gender, and class are examples of such circumstances. Contextual contract law acknowledges that these factors are relevant to the application of contract law doctrines. Rather than categorizing the facts into abstract categories, i.e., either rule or exception, contextual contract law considers external facts and background circumstances. In other words, rather than employing binary and hierarchal thinking, contextual contract law includes a multitude of relevant factors and circumstances. Contextual contract law is broad and inclusive in that it takes social factors into account; it is egalitarian in that it does not preferentially treat certain facts while neglecting other facts. Contextual contract law is richer and more nuanced than classical contract law. In other words:

> This classical notion of contract law becomes a form of procedural justice, which applies rules objectively, without regard to societal or humanistic variances. True contractual justice, however, requires the use of all contextual factors and influences that question whether the bargain was the product of a free exercise of the right to contract.[177]

Social factors influence the application, interpretation, and usage of contract law. However, when considering context, there is a need to be careful and to avoid stereotypical assumptions about factors such as race, gender, and class. Contextual contract law must take into account how social and other factors shape contracts without relying on stereotypes about said factors. This is not a simple task. Opening contract law to context must not provide an imprimatur for paternalistic, unsubstantiated, and stereotypical presumptions. In order to promote justice in contract law, these factors' impact on contracts must be examined on a case-by-case basis rather than through a broad-sweeping set of assumptions about the impact of the identity of the parties. In other words, considering context must not mean automatically inferring weakness or dependency based on a party's identity, but rather must include a deep and rich analysis of all the factors impacting the contract. Misuse of context risks bolstering stereotypes rather than eradicating them. Indeed, taking context into account cannot be a binary process, differentiating between relevant facts and irrelevant facts, but rather must be an inclusive, nuanced assessment of the relevant facts. Contextual contract law is less rigid and more nuanced, less binary and more flexible. Examining the specifics of contextual contract law and how it operates is beyond the scope of this Article. This Article is focused, in a broad sense, on how contextual contract law provides an alternative to the current rule-exception structure, and in directing attention toward extant, rich scholarship on con-

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[177] DiMatto & Morant, *supra* note 162, at 576–77.

textual contract law[178] in hope of promoting egalitarian contract law not based on a rule-exception hierarchy.

Conclusion

Does contract law uphold modern standards of gender equality? Does contract law treat women and men equally? Is contract law applied equally to men and women? Does the application of contract law result in equal outcomes for men and women?[179] Though women long ago gained the right to contract, these questions are still relevant today in that they focus on the substance of contract law doctrines, their interpretation, and their application. There are many different theories that measure equality in an effort to answer these questions; this Article examines contract law using anti-stereotyping theory.

The argument that contract law is not neutral and objective but rather gendered and biased is not new.[180] However, the analysis in this Article, based on anti-stereotyping theory, provides a framework for exploring the gender dimensions, applications, and aspects of contract law. It demonstrates the ways in which contract law perpetuates gender stereotypes. It also offers guidelines for contract law to begin to rid itself of antiquated stereotypes and thereby to become more inclusive and egalitarian. It shows how contract law itself can be used to battle stereotypical thinking and gender bias. Contract law has the potential to be inclusive, non-binary, and contextual.[181]

This Article joins the existing scholarship in examining the intersection of the home and the market.[182] These two social institutions are not separate; there exists a web of complex relations between domesticity and economics. By applying an equal protection theory to contract law, this Article further explores the intersection of contract law and constitutional law.[183]

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[178] *See* sources, *supra* note 162.

[179] For equality under contract law, see Keren, *supra* note 41, at 281.

[180] *See* sources, *supra* note 56.

[181] Kellye Y. Testy, *An Unlikely Resurrection*, 90 Nw. U. L. Rev. 219, 220 (1995).

[182] *See generally* Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 Wash. U. J.L. & Pol'y 225, 228 (2011); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 Tex. L. Rev. 17, 19 (1998); Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. Pa. L. Rev. 1029, 1042 (1991); Gan, *supra* note 84, at 50; Virginia Held, *Non-contractual Society: A Feminist View*, Supp. 13 Can. J. Phil. 111, 114 (1987); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1498 (1983); Robert A. Pollak, *Comment on Mary Anne Case's* Enforcing Bargains in an Ongoing Marriage, 35 Wash. U. J.L. & Pol'y 261, 261 (2011); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225, 1229 (1998). Recently, Dagan and Heller argued that contract law is not limited to commercial transactions but should include contracts between family members, among others. Hanoch Dagan & Michael Heller, The Choice Theory of Contracts 8 (2017).

[183] *See, e.g.*, Eli Bukspan, *Extreme Makeover—Contract Law Edition: A New Home for Human Rights and Social Responsibility (Lesson from Israel)*, 7 Intercultural

As this Article has shown, including women in contract law means not only formally allowing women to enter into legal contracts but also changing the substance of contract law. Formal inclusion of women is not enough: contract law should actively battle the stereotypes found in contract law doctrines. Women are no longer excluded from contract law but are still relegated to its margins. Put differently, modern contract law includes women, but remains biased against them and must develop and change in order to genuinely include women in a truly egalitarian sense. Broadening the scope of contract law to include women will inevitably lead to substantive changes in the content of contract law.

Anita Bernstein argued that "stereotyping is wrong to the extent that it functions to deprive individuals of their freedom without good cause."[184] Though her work focused on racial stereotypes, her conclusion is applicable to the principal argument of this Article, namely, that by incorporating gender stereotypes, contract law doctrines deprive women of their freedom of contract.

This Article specifically analyzes gender stereotypes; however, it is important to attend to class[185] and racial stereotypes in contract law as well.[186] There is an urgent need for future work discussing how contract law doctrines reinforce both class-based binaries and race-based binaries. For, as demonstrated by this Article, contract law can either be exclusive or empowering, discriminatory or egalitarian, depending on how it is wielded and framed.

HUM. RTS. L. REV. 329, 329 (2012); Hila Keren, *"We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 138 (2005); Peter Linzer, *From the Gutenberg Bible to Net Neutrality—How Technology Makes Law and Why English Majors Need to Understand It*, 39 MCGEORGE L. REV. 1, 1 (2008); Joseph F. Morrissey, *A Contractarian Critique of* Citizens United, 15 U. Pa. J. Const. L. 765, 767 (2013); Donald J. Smythe, *The Illiberty of Contract*, 35 QUINNIPIAC L. REV. 461, 462 (2016). For the intersection of tort law and constitutional law, *see* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1436 (2005); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2118 (2007); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 62 FORDHAM L. REV. 73, 75 (1994); Martha Chamallas, *Shifting Sands of Federalism: Civil Rights and Tort Claims in the Employment Context*, 41 WAKE FOREST L. REV. 697, 697 (2006); Martha Chamallas & Sandra F. Sperino, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021, 1021 (2014).

[184] Bernstein, *supra* note 3233, at 659.

[185] *See generally* Barbara Ehrenreich, *Time to Wake Up: Stop Blaming Poverty on the Poor*, SHRIVER REP. (Jan. 13, 2014), http://shriverreport.org/time-to-wake-upstop-blaming-poverty-on-the-poor-barbara-ehrenreich/ [https://perma.cc/D2PJ-PHYH].

[186] For the way tort law is not gender and race neutral, see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW 183 (2010).