Class, Personality, Contract, and Unconscionability

Jeffrey L. Harrison
ARTICLES

CLASS, PERSONALITY, CONTRACT, AND UNCONSCIONABILITY

JEFFREY L. HARRISON*

As soon as you're born they make you feel small
By giving you no time instead of it all
Till the pain is so big you feel nothing at all
A working class hero is something to be.¹

I. INTRODUCTION

My thesis begins with the idea of "entitlement"—not a legal entitlement, but a "sense of entitlement."² That is, a sense of deserv-

* Professor of Law, University of Florida. I have dispensed with the long list of names that often appears at the beginning of an article. Where discussions with specific individuals have helped me develop certain ideas, I have indicated this in the footnotes. I would like, however, to thank Sarah Wilson and Joanna Lappman for their editorial help, and Richard Markovits for a number of useful comments.

1. JOHN LENNON, Working Class Hero, on PLASTIC ONO BAND (Apple Records, Ltd. 1970)
2. I do not mean to imply that everyone will have difficulty understanding what I mean by a "sense of entitlement." But much of what I say in the following pages is devoted to the
For most of us, it is important to feel that we have received that to which we are entitled. In the context of an exchange, it means that we want to feel we have been treated fairly or reached a state of "compensatory justice." Part of my thesis is that this sense of entitlement is not evenly distributed among us. As an example, suppose that two individuals are hired as entry-level law professors. Before moving to their new locations, both inquire about their employer's willingness to pay moving expenses. The response to each is, "It is our policy to pay up to $3,000." One professor responds, "But that is not enough! I cannot possibly move my family for that amount." An argument ensues. The second professor simply processes this information and uses it in arranging her move.

The difference in the responses reflects a difference in their expectations and their senses of entitlement. This difference may be explained by something quite concrete. For example, the first professor may have seen a memorandum indicating that the school traditionally had paid moving expenses for new members of the faculty. But one's sense of entitlement may also, and generally does, arise from less direct and more subtle influences. As a child the first professor may have heard repeatedly how smart, clever or attractive he was and, thus, began to feel as though he was somehow more worthy than others. Or, he may have attended a prestigious school where he was "taught" that graduates of that school are

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3. By "compensatory justice" I am referring to the fairness of the exchange between individuals. See Michel Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 Iowa L. Rev. 769, 780 (1985) (defining "compensatory justice" as the reward of "just deserts" resulting from the conference of a benefit upon another).

4. In this example, gender specification is intentional.
somehow special. In contrast, the second faculty member may have been treated quite differently, that is, never taught that she is somehow special and more deserving.

This sense of entitlement is the cornerstone of this Article, but there are two more components. The first is that social class is an important determinant of one's sense of entitlement. The second component is that individuals with a higher general sense of entitlement require more of whatever is at stake in an exchange, in order to achieve a state that they regard as compensatorily just, than those with a lower sense of entitlement. Together, these propositions produce the general thesis that social class and the resulting sense of entitlement have an impact on the terms of private orderings. Because individuals from higher social classes have a greater sense of entitlement, the terms of exchanges between different classes typically will favor those individuals. More generally, this means that the private orderings of people who belong to a class-oriented society will passively, though relentlessly, reinforce the existing class structure. In essence, the source of the continual

5. Interestingly, sometimes a sense of entitlement can be purchased.

6. I make no attempt here to define social class in a precise way that will satisfy every critic of what is to follow. To me it involves weighing education, job status, income, and wealth. Harold Hodges suggests that classes are "the blended product of shared and analogous occupational orientations, educational backgrounds, economic wherewithal, and like experiences." Harold M. Hodges, Jr., Social Stratification: Class in America 13 (1984). I believe this is generally consistent with the measures used in Paul Fussell, Class: A Guide Through the American Class System (1983). In the first chapter of his book, Fussell offers interesting insights into how touchy discussions of class can be. I am indebted to my friend Walter Weyrauch for helping me understand the significance and signifiers of class.

7. Of course, for this to work smoothly, both classes must accept the legitimacy of their positions. See Peter M. Blau, Exchange and Power in Social Life 143-67 (1986) (distinguishing the various expectations of individuals and their relation to contemporary values and social standards); Jon Elster, Sour Grapes: Studies in the Subversion of Rationality 145 (1983) (explaining the necessity for oppressed and exploited classes to believe and accept the very social order that accepts them); L. Richard Della Fave, The Meek Shall Not Inherit the Earth: Self-Evaluation and the Legitimacy of Stratification, 45 Am. Soc. Rev. 955 (1980) (identifying the diverse collection of social mechanisms that generate, maintain and legitimate the notion of unequal distribution of resources); Robert Gordon, New Developments in Legal Theory, in The Politics of Law: A Progressive Critique 281, 286-87 (David Kairys ed., 1982) (citing to Antonio Gramsci's theory of "hegemony" which suggests that class domination is most effective when both the dominant and dominated classes believe that there are no viable alternatives to the existing order).

An article that seems driven by the same concerns I have, but which takes a different perspective is Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the
societal imbalances that flow from "freedom of contract" are largely the results of the damage that class stratification has already inflicted.  

I want to state this in terms that are slightly different but that may be more familiar. The idea that people act in accordance with their senses of compensatory justice means, in effect, that they have a generalized preference for sensing that they have received fair treatment. When they find the terms of an exchange acceptable, this is an expression that this preference is satisfied. Much of my point is that this preference, or what it takes to satisfy it, is "taught" in large measure by one's social position and the laws that help preserve the social structure. In the terms economists use, this preference is determined endogenously—that is, it is not exogenous or simply a given.

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Limits of Legal Change, 9 LAW & SOC. REV. 95 (1974) (analyzing how the legal system operates by looking at the different kinds of parties involved and how their differences affect the rules and institutional facilities as opposed to looking at how the rules and facilities impact the parties).  


9. An obvious implication of equating this with a preference is to suggest that this sense of being treated fairly is just one of many sources of utility. I and many others do not believe, however, that all things that motivate us can be reduced to a single plane or class of utility. See, e.g., Amitai Etzioni, The Moral Dimension: Toward a New Economics 67-92 (1988) (suggesting that personal behavior is influenced by a vast array of pressures and obligations rather than the need to fulfill moral commitments instead of pleasure); Mark A. Lutz & Kenneth Lux, The Challenge of Humanistic Economics 9-22 (1979) (discussing the hierarchy of human needs, ranging from the basics, including food and shelter, to the less tangible, truth and justice); Nicholas Georgescu-Roegen, Choice, Expectations and Measurability, 68 Q.J. Econ. 503, 515 (1954) (summarizing the "Principle of the Irreducibility of Wants," which holds that the motives and feelings of individuals are so disproportionate in power and authority that human wants can not be reduced to a common basis); Jeffrey L. Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. Rev. 1309, 1328-34 (1986) (explaining the idea of "lexical ordering," which states that those values that are afforded priority are not interchangeable with others); Amartya K. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economics Theory, 6 PHIL. & PUB. AFF. 317 (1977) (examining the problems that have arisen from the traditional economic assumption that individuals are motivated only by self-interest).  

10. For a good discussion of the difficulties in dropping the assumption that tastes and preferences are given and an example of the interesting work to which dropping that assumption can lead to, see Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 DUKE L.J. 1, 14-22. See also Mark Kelman, Consumption Theory, Production Theory and Ideology in the Coase Theorem, 52 S. CAL. L. Rev. 669, 677, 695 (1979) (comparing the Coase Theorem's desire to defend the concept of
An important implication of this thesis is that Pareto superiority\textsuperscript{11} may be an especially poor moral basis for enforcing interclass contracts. This follows from the likelihood that whether an exchange will leave both parties feeling better off is contingent on disparities in class, self-esteem, or personal sense of entitlement. If the disparities were less, the terms—distributive consequences—of some contracts would vary and other contracts may not exist at all. Just as contracts that are the result of coercion are not enforced because one's consent is induced artificially, contracts that come about because of our class-contingent notions of what we "deserve" seem equally artificial.\textsuperscript{12}

The thrust of this argument is that "freedom" of contract is an illusion, in that we are taught from birth, by the fortuity of our class, that to which we should feel entitled. Furthermore, the conclusion that contract law principles are carefully designed to permit and facilitate inequality in exchanges seems accurate. For example, most questions in contract law are evaluated by objective standards, but the actual exchange itself, perhaps the only thing that really matters, is held to a subjective standard under the basic

\textit{state neutrality} against the specious claim of taste-neutrality which is inevitably undermined by existing liability rules); Robert A. Pollak, Endogenous Tastes in Demand and Welfare Analysis, 68 AM. ECON. REV. PAPERS & Proc. 374 (May 1978) (applying welfare analysis and economic analysis to the study of taste formation and change); Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. CHI. L. REV. 1129 (1986) (concluding that government action in the form of legal intervention is frequently justifiable regardless of the ancillary effects on private preferences).

For a typical example of the conventional approach in which law has no impact on preferences, see Alan Schwartz, A Reexamination of Nonsubstantive Unconscionability, 63 VA. L. REV. 1053 (1977).

\textsuperscript{11} In this context Pareto superiority is achieved when two individuals can enter into an exchange that makes them both feel better off while no one is made worse off than they were prior to the exchange. \textit{See} DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 11-12 (1992) (discussing the classification scheme devised by Vilfredo Pareto for making a neutral judgment as to wealth and utility maximization).

\textsuperscript{12} As the language in this sentence implies, there can be a number of ways in which an exchange can improve the position of the exchanging parties. Part of the argument to be developed later is that some exchanges that would tend to make both better off will not be acceptable because they offend the sense of compensatory justice of one of the parties.

Although he does not address this issue specifically, I think that the view of coercion in Mark Kelman, Choice and Utility, 1979 WIS. L. REV. 769, 792-95, can be interpreted in such a way that the process of adaptation I am writing about ultimately can be seen as a response to coercion.
rule that the law will not address "adequacy of consideration."\textsuperscript{13} Moreover, courts generally have avoided directly addressing questions of "substantive unconscionability," the one legal doctrine that would directly penetrate the fairness of the exchange.\textsuperscript{14} Yet, if subjective notions of fairness are class-contingent, it makes sense to employ an objective standard when examining the adequacy of consideration in contract cases, possibly through expanded reliance on substantive unconscionability.\textsuperscript{15}

My argument is not that courts should apply the theory of unconscionability for the sole purpose of promoting equality. A more important point is that law can have an educative or "therapeutic"\textsuperscript{16} function and that routine reliance on substantive unconscionability as a basis for not enforcing contracts can have the effect of elevating the sense of entitlement of the disadvantaged and decreasing the sense of entitlement of the privileged. Howard Lesnick captures the notion perfectly when he describes the possible libera-

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\textsuperscript{13} See RESTATEMENT (SECOND) OF CONTRACTS § 79 (1979) ("If the requirement of Consideration is met, there is no additional requirement of equivalence in the values exchanged.").
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\textsuperscript{15} Of course, courts respond to inequality in exchanges by using a variety of theories other than unconscionability. See E. Allan Farnsworth, CONTRACTS 255-344 (2d ed. 1990).
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\textsuperscript{16} By this I mean some version of the "reasonable person" standard. See James Gordley, Equality in Exchange, 69 Cal. L. Rev. 1587, 1637 n.200 (1981).
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\textsuperscript{16} The "therapeutic" effects of law in its various forms have been explored, primarily in the context of mental health law. See David B. Wexler & Bruce J. Winick, Essays in Therapeutic Jurisprudence (1991). It is from Wexler and Winick's work that I too became concerned with what might be termed "therapeutic effects," in the sense that I am interested in the healing potential of unconscionability. I am indebted to John Robertson who advised me of their work.
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tion of the downtrodden so that they change from defendants to potential "counter-claimant[s]."\textsuperscript{17}

In the pages that follow, I first explain in greater detail how one's sense of compensatory justice can affect his or her view of an exchange. Then, in Section III, I examine the two components of my thesis and indicate how they are supported by social science research in the areas of equity theory\textsuperscript{18} and relative deprivation theory\textsuperscript{19} In Section IV, I illustrate more formally the way in which equity theory and relative deprivation theory undermine Pareto superiority as a principled basis for the enforcement of contracts. In Section V, I address concerns that greater judicial intervention in private orderings would threaten personal autonomy, and review the suspicions and reservations that already have been voiced in the context of agreements resulting from efforts at informal dispute resolution. The questions raised in that much narrower context are based on concerns similar to those discussed in this Article. Finally, I defend a proposal to expand the concept and use of unconscionability The critical question in this context is whether law as a preference-shaping variable can alter expectations and

\textsuperscript{17} Howard Lesnick, \textit{The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives}, 1991 DUKE L.J. 413, 437. I am indebted to Jack Boger for telling me about this article.


one's sense of entitlement in order to assist the disadvantaged to "prefer" better treatment.

Underlying my thesis are two, primarily implicit, subthemes. The first subtheme is the recognition of the false separation of microeconomic from macroeconomic issues. Concepts like social class and income distribution seem to fit into macroeconomic categories, but invariably they are the results of innumerable smaller transactions. Thus, income distribution cannot be divorced from basic wage determination. Accumulations of wealth or debt are simply the results of series of smaller individual transactions. Indeed, much of the overall thesis of this Article depends on the interdependence between individual transactions and broad-based measures of social class.

The second subtheme is the general notion that courts should be engaged more actively in the pursuit of compensatory justice. In this sense, what I present here is at odds with the view that distributive concerns are addressed best through a system of tax and transfer payments. In fact, it seems likely that a system that renders disadvantaged people dependent on collective action, and allows individuals to rationalize their advantage-taking by reference to governmental efforts at redistribution, may actually undercut whatever potential exists for these problems to be addressed through private orderings.

I am not optimistic that my proposals will be adopted. After all, if it is true that "the ruling ideas of each age have ever been the ideas of the ruling class," there would appear to be little hope. On the other hand, instances in which people pass up free-riding opportunities, and the capacity of individuals to empathize and to conceive of justice as something other than what is always in


22. "Free-riding" occurs when individuals attempt to enjoy the benefits resulting from the efforts of others without making their own contribution. See infra text accompanying notes 163-68.

their personal self-interest, are all positive signs. Moreover, there will be no change unless we can continue to discuss the relationship between personality, economics, and justice.

II. VALUE AND FAIRNESS IN EXCHANGE

When I say that the terms of the exchange generally will favor individuals from higher social classes, I want my meaning to be clear. First, I am referring to an actual material concept of "terms of the exchange." In particular, I want to distinguish the subjective notion of sensing that one has been treated fairly and the actual material gain that one acquires from the exchange. Obviously, these two ideas are related in the sense that one's standard of "fair treatment" will affect the material outcome.

The difference between what a buyer might say an item is worth and what he or she is willing to pay another party for that item emphasizes the importance of this distinction. For example, suppose Tim shops for an automobile and, at one lot, spies a 1985 Ford. Tim decides the car is "worth" $5,200; therefore, if he buys...
the car for anything less than $5,200, economists would say that he has received consumer surplus.\textsuperscript{28} Furthermore, suppose the car salesperson is authorized to accept as little as $4,000 for the car. At this point, a possible exchange may leave both Tim and the car dealer feeling better off. In fact, so the economists' story goes, any price below $5,200 gives Tim consumer surplus and any price in excess of $4,000 gives the car dealer producer surplus. The entire gain from the exchange is $1,200.\textsuperscript{29}

But the story is far from over. As Paul Samuelson has written, "rational self-interest does not necessitate that there will emerge a Pareto-optimal solution that maximizes profits, \textit{in advance of and without regard to how that maximized profit is to be divided up}"\textsuperscript{30} What this suggests is that the formation of a contract consists of two steps. The first is the discovery of an exchange that potentially increases the profit or "surplus" of each party. From the buyer's standpoint, this means discovering an item that provides more utility than holding the money and spending it on a different item. The second step is a decision about how to divide that surplus.\textsuperscript{31} In other words, having found an exchange that could make them both feel better off, the parties must agree on a fair division of the surplus created by the exchange. At this point, the decisionmaking has a more interpersonal focus. Instead of considering how his money might best be spent, each trader be-

\textsuperscript{28} This is a dollar measure of Tim's benefit from the bargain.


\textsuperscript{30} Paul A. Samuelson, \textit{The Monopolistic Competition Revolution}, in \textit{3 The Collected Scientific Papers of Paul A. Samuelson} 18, 35 (Robert C. Merton ed., 1972). \textit{But see R.H. Coase, The Firm, the Market and the Law} 159-63 (1988) (arguing that the number of cases in which the potential for Pareto optimality exists but in which no agreement is reached is necessarily so small as to be negligible).

comes concerned with how “good” the deal is relative to how good it is for the other party. At this microeconomic level, the parties “test” possible prices against their senses of compensatory justice. If the desire to sense that they have been treated fairly has lexical priority or is sufficiently powerful, the transaction will not be consummated when either party believes that the division of the surplus is compensatorily unjust. I do not address that possibility here, although it does have important implications. Instead, my concern is with the actual division of the surplus and how it may vary from individual to individual in a systematic fashion.

For example, Tim and the salesperson must arrive at a price that both see as a fair division of the gain created by the exchange. For Tim, the price may not be one that he would quote if asked what the car is “worth.” The seemingly “objective” statement of the car’s worth may be quite different than the most Tim would be willing to pay and still feel that he has been dealt with justly in the context of an interpersonal exchange. Suppose Tim asks the price of the car and is told it is $5,000. After a few minutes of bargaining, Tim and the salesperson agree on a price of $4,500. I think it is safe to assume that the price of $4,500 is one that is in some sense fair to him. Put differently, Tim does not feel strongly entitled to a lower price. We do not know that Tim would have agreed to a higher price. In fact, it may be that $4,500 was the highest price Tim actually was willing to pay because it was the highest price that would have left him with the feeling of having received the share of the division of the surplus to which he was “entitled.”

Now suppose Thelma enters the picture and almost everything is the same. In response to a third party’s inquiry as to the worth of the car she replies, “$5,200.” This time the deal is struck at $4,900. At that price Thelma feels better off and as though she has received her fair share of the benefit created by the exchange.

Obviously Tim is better off than Thelma to the tune of $400. This is the case even though she may feel just as happy about the

32. I have shortened “lexicographical ordering” to “lexical.” See John Rawls, A Theory of Justice 42-43 (1971). Here it simply means that there are certain principles that cannot be reduced to conventional notions of utility. See supra note 9.

33. One might regard this search for fairness as entailing transaction costs. If the transaction costs are too high, or there is no point that both parties regard as fair, the exchange will not occur.
contract as Tim felt with his. The critical issue is what accounts for their ability to feel that they have both been treated justly even though the terms of the exchange are quite different. This can be traced to some personality difference that means Thelma's sense of compensatory justice either is satisfied more easily or is dependent on things other than the price of the automobile.

The temptation to suggest that the difference can be accounted for by differences in their negotiating skills or bargaining power is hard to avoid. Negotiating skills, however, are unlikely to determine one's feeling of entitlement. These skills are tools for achieving that to which one already feels entitled. Similarly, bargaining power suggests an imbalance in the market. If a good is scarce, sellers will have relatively greater bargaining power than buyers. But scarcity per se does not translate into the actual use of bargaining power.\(^4\) Although scarcity may influence what one believes to be a fair price, the primary importance of bargaining power is to enable one to confidently "back up" the threats she makes in the negotiation process. The choice of whether to use that power again is largely a function of an independently determined sense of personal justice.\(^5\)

The difference in the sense of entitlement or compensatory justice is far more pervasive than the bargains made in the preceding examples. Some students complain about low grades, others do not. Some people pay the auto repair bill without complaint, others are upset. Some people accept a wage without feeling resentment, others feel exploited.

Before attempting to pierce the matter of different expectations, two more points need to be made. The first is that the sense of

\(^4\) The reader should not infer from my use of a two party bargaining example that I am suggesting that the issue discussed here arises only in the context of bilateral monopoly. Although very competitive markets may make advantage-taking by those with a strong sense of entitlement difficult, hardly any markets are so competitive that a sense of entitlement would be excluded as a variable in the determination of the terms of an exchange. Similarly, the fact that Thelma and Tim are buyers should not lead one to infer that my analysis is confined to decisions by buyers. Obviously, the disadvantaged are often sellers, probably most crucially in labor markets.

what one is entitled to may be so ingrained that one can feel that she is entitled to less than someone else. For example, there is no guarantee that Thelma would become dissatisfied with her automobile deal if she heard about Tim's deal. She might, but she also may reason that Tim "earned a better deal" by bargaining for a longer period of time. Alternatively, she might believe that Tim, an important person in the community, was somehow simply more deserving. Certainly, the news of Tim's more favorable deal may change Thelma's view of her own deal, but not if Thelma sees herself as less deserving than Tim.

The second point that must be addressed is that people can, and frequently do, make deals that leave them feeling that they have not been treated fairly. Probably the best example of this kind of deal is an employment contract in which the employee feels underpaid but must take the job in order to make a living. Of course, as the next section explains, people in dissatisfying arrangements seem to have an infinite capacity to alter their perceptions of themselves or their expectations in order to preserve their dignity.

III. INTERPERSONAL JUSTICE

Keep you doped with religion and sex and TV
And you think you're so clever and classless and free
But you're still fucking peasants as far as I can see
A working class hero is something to be.

Two leading theories that seek to explain why people react differently to different distributive outcomes are equity theory and

36. See infra notes 64-84 and accompanying text.
37. This is different from feeling that Tim deserves a lower price because he is better at negotiating. Instead, this is accepting the legitimacy of a reward for the effort Tim has devoted to the negotiation.
38. "Status attribution" is one process through which Thelma may find the outcome just. See Della Fave, supra note 7, at 960-62 (discussing status attribution theory as the process by which an individual's overall class status is determined by examining that individual's known characteristics).
39. There are two explanations for this. First, at some price individuals are willing to be humiliated. Second, even though they may view the preservation of dignity through fairness in the exchange as lexically prior to most worldly sources of utility, they may, at the same time, regard survival and providing for their families as lexically prior to maintaining their own dignity.
40. LENNON, supra note 1.
relative deprivation theory Although these areas of study have been considered together and efforts made to integrate them, they are sufficiently different to warrant separate consideration.

A. Equity Theory

Equity theory has its roots in social psychology Its fundamental proposition is that individuals tend to feel that outcomes are just when the following equation holds:

\[
\frac{\text{outcomes of person A}}{\text{inputs of person A}} = \frac{\text{outcomes of person B}}{\text{inputs of person B}}
\]

In other words, a distribution is equitable when the ratios of outputs to inputs are perceived as being equal. Much of the work in equity theory is devoted to studying the responses of individuals when the ratios are not equal. For example, workers who feel underpaid—the ratio of their "investments" to their income is lower than that of others—may not work as hard or may take longer breaks. Conversely, someone who feels overpaid relative to another actually may increase productivity

The more important issue for the purpose of this Article is how individuals determine what factors they will count as relevant inputs and outputs. For example, if the disappointed new law professor in my initial example regards his inputs as higher because he attended an Ivy League school and his counterpart decides that her attendance at an Ivy League school is not an input of conse-


42. Crosby & Gonzalez-Intl, supra note 41, at 142.

43. Adams, supra note 18, at 276-88; Martin & Murray, supra note 41, at 171.

44. Reaction may be to increase or decrease inputs or to increase or decrease output. For an extensive bibliography, see J. Stacy Adams & Sara Freedman, Equity Theory Revisited: Comments and Annotated Bibliography, in 9 Advances in Experimental Social Psychology 43 (Leonard Berkowitz & Elaine Walster eds., 1976).

45. The response may be to alter inputs or to alter outputs. For an example of an input altering reaction, see research reported by Adams, supra note 18, at 286-87.

quence, a disagreement will occur as to the equity of the em-
ployer’s decision to give them equal moving allowances.

A good and especially accessible example of the implications of
equity theory for the terms of contractual exchanges is found in
the work of Elizabeth Hoffman and Matthew Spitzer in their ex-
periments testing the Coase Theorem. In a series of tests, Hoff-
man and Spitzer arranged for two individuals to divide the gains
created by an exchange. In the experiments, each group of two was
given a series of choices. Each choice resulted in a certain mon-
teary payout to the participants. One of the players was designated
the “controller” and was entitled to select any of the alternatives.

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ments, each group of two was given a series of choices. Each choice resulted in a certain monetary payout to the participants. One of the players was designated the “controller” and was entitled to select any of the alternatives.

One of the alternatives maximized the payout to the controller and
another maximized the total payout to both parties. The party who
was not designated the controller could attempt to influence the
choice of the controller by a side-payment. For purposes of testing
the Coase Theorem, the issue was whether the two parties would
bargain to reach the outcome that would result in the controller
selecting the joint income-maximizing alternative.

Hoffman and Spitzer discovered that the parties nearly invaria-
bly did select the joint profit-maximizing outcome. Perhaps more
interesting was the manner in which the parties divided the profit.
Initially one might hypothesize that the parties would settle on a
split that would leave the controller no worse off than if he had
selected his individual profit-maximizing outcome at the outset. As
it turned out, the division of the payoffs differed dramatically de-
pending upon the way in which the controller was selected. For
example, in their initial experiments, Hoffman and Spitzer’s ex-
perimental design called for the controller to be determined by the
flip of a coin. In those cases, the predominant method of dividing
the gain was in equal shares.

In a second set of experiments, the controller was determined by
playing a simple game. In these instances the researchers at-

47. See Hoffman & Spitzer, Experimental Tests, supra note 31; Hoffman & Spitzer, Fair-
ness, supra note 31.

48. In the most basic of the “games” there were seven payoff choices with the total payoff
ranging from $11.00 to $14.00. The $14.00 payoff possibility would result in a $10.00 to $4.00
split in the payoff. See Hoffman & Spitzer, Experimental Tests, supra note 31, at 86.

49. Id. at 92.

50. Id.
tempted to create in the winner a sense of moral authority suggesting that, by winning the game, the winner had "earned" the right to be controller.51 In this set of experiments the controller was far less likely to receive less than the amount available from selecting his or her joint maximizing outcome.52

The Hoffman and Spitzer experiments suggest that both parties adopted the same view of the relevant inputs. Thus, in the first experiments, when the controller was selected by a random event, the inputs of the parties were the same. In order to keep the equity formula in balance, the payoff to the parties would also have to be the same. In the second set of tests, winning the game was regarded by both parties as a valid input and, therefore, a higher payoff was necessary to the controller in order to balance the equity formula.53

While the Hoffman and Spitzer experiments are marvelous illustrations of how the implications of equity theory can play out, they leave open the question of precisely how the parties avoid conflict about what inputs count. Studies in equity theory suggest two principal ways of avoiding the issue. First, individuals tend to avoid making comparisons with cohorts who are dissimilar.54 Second, when such comparisons are made, individuals tend to find justifications for what would appear to be unequal results by including as their counterpart's inputs such things as education or skill. In essence, they appear to "manufacture" equity.55

B. Relative Deprivation

Relative deprivation theory has its roots in sociology and political science.56 It differs from equity theory in a number of respects, primarily its emphasis on social comparison. Rather than a tidy

52. Id. at 276.
53. Hoffman and Spitzer attribute a Lockean sense of distributive justice to the participants because they seemed to be guided by some notion of "desert" as opposed to strict self-interest in dividing the payoffs. See id. at 261.
54. See Martin & Murray, supra note 41, at 178, 181.
56. Crosby & Gonzalez-Intal, supra note 41, at 142.
formula comparing ratios of inputs and outputs, this theory is characterized by a general process of comparing one's well-being with the position of others.  

As a general matter, one's view of her own situation is based on whether or not she feels deprived. Deprivation is more likely to occur when one lacks an outcome, compares herself to someone who has that outcome, feels entitled to that outcome, feels the outcome was feasible, and does not blame herself for not achieving the desired outcome.

The critical feature of the theory is that it is capable of explaining why individuals or groups that are absolutely disadvantaged when compared with other groups actually may feel more content than members of those groups. The principal example offered to illustrate relative deprivation theory at work concerns studies of military personnel during the 1940's. The studies indicated that airmen were more dissatisfied than military police with the rate of promotion even though the airmen were promoted more rapidly. This phenomenon was explained by the fact that the airmen felt "relatively deprived." In another study, company presidents expressed greater dissatisfaction than first-line supervisors earning only one-fourth as much as the presidents. In essence, based on comparisons with their "reference group," the company presidents felt deprived even though they were far better off in an absolute sense than the line supervisors.

It is useful to note that relative deprivation can be seen as falling into one of two categories: egoistic deprivation and fraternal deprivation. In the case of egoistic deprivation, the individual compares his plight with that of a similar referent, with the emphasis on the individual's own well-being. With fraternal deprivation, the scope of the comparison changes; the focus is on the

61. See RUNCIMAN, supra note 19, at 96; Martin, supra note 55, at 60-67.
plight of the group of which the individual is a member, as compared to a better situated group. The implications of this distinction are important because the type of discomfort associated with fraternal relative deprivation could result in the sort of action that changes the status of the entire group.\textsuperscript{62} Individual transactions are more likely to raise issues of egoistic deprivation.\textsuperscript{63}

Although relative deprivation provides a useful structure in which to analyze why the individual sense of distributive justice of some individuals is satisfied with so much less than it would take to satisfy another, it really only begins the analysis. Simply stated, if the theory is that we do not sense deprivation as long as we get that to which we think we are entitled and our entitlement is determined by some reference group, two critical questions emerge. First, how are reference groups selected? Second, if we do not feel deprived when we sense we could have controlled the outcome, what are the factors that determine when we assume responsibility for the outcomes we experience?

C. Thinking About Fairness

It is useful at this point to revisit the two law professors introduced at the outset and analyze their reactions from the perspectives of equity theory and relative deprivation theory. The first law professor experienced a sense of inequity or deprivation. In equity theory terms, he made a rough judgment that the reward to his inputs was disproportionately low when compared to that experienced by others with whom he chose to compare himself. Or, in relative deprivation terms, the moving allowance was inconsistent with his expectation based on how he believed similarly situated people, perhaps with comparable educations and work experience, were treated. Alternatively, the second professor, if one applies equity theory, felt that individuals with inputs similar to her own would receive roughly the same moving allowance as she did. Or, in terms of relative deprivation theory, she felt that her peers would receive a similar moving allowance. The key point is that, for purposes of equity theory analysis, the law professors applied different standards to identify and evaluate their "inputs" and, for purposes

\textsuperscript{62} Martin, \textit{supra} note 55, at 67-69, 99.

\textsuperscript{63} Martin & Murray, \textit{supra} note 41, at 186.
of relative deprivation analysis, they selected different reference
groups.64

Equity theory and relative deprivation theory differ in a number
of respects. While equity theory emphasizes inputs and outputs,
relative deprivation theory provides a way of thinking about indi-
vidual concerns and a broader sense of social deprivation. In addi-
tion, equity theory, with its possible tendency toward legitimizing
the status quo, may contain a relatively conservative political
bias.65 Relative deprivation theory, with its emphasis on explaining
why the disadvantaged do not experience a sense of injustice, can
be seen as having a liberal bias in terms of its research agenda.66

For the purposes at hand, both equity theory and relative depriv-
ation theory provide useful frameworks for explaining differences
in the ways individuals respond to differences in the terms of ex-
changes. They do not, however, provide clear answers to the ques-
tion of how uneven outcomes are ultimately accepted as legitimate.
In other words, how is it determined "which inputs count" for pur-
poses of equity theory and how does one learn to accept one refer-
cence group over another for purposes of relative deprivation
theory?9

Another question that appears in both theories but in different
forms is that of individual responsibility. In relative deprivation
theory, one of the elements necessary for a sense of deprivation to
arise is that the deprived individual have no sense of self-blame for
the outcome.67 In other words, individuals do not feel deprived if
they sense they could have controlled the outcome, even in a vague
way, but did not. It is harder to find an analogous issue in equity
theory because equity theory seems to focus on actual inputs and

64. This might be readily explained if it were discovered that the dissatisfied law profes-
sor was born into a well-to-do family, attended Ivy League schools, served in a prestigious
judicial clerkship, and became friends with those possessing similar backgrounds. The sec-
ond law professor might have come from a working class family, attended state schools, and
worked in a small law firm. These different life experiences could account for their different
reference points when applying their individual senses of justice to the $3,000 moving allow-
ance. See generally Blau, supra note 7, at 143-67 (stating that past experience and refer-
ce standards influence expectations).
65. Martin & Murray, supra note 41, at 173-77.
66. Id. at 185.
67. See Crosby, supra note 58, at 90.
outputs. Seemingly, by implication, the inputs are the responsibility of the individual. One would think, however, that there are instances in which an individual would feel that the inability to contribute more inputs is not in his or her power and, therefore, a difference in outputs is unjust.

Whatever potential there is for developing a sense of injustice in equity theory due to a "blameless" inability to contribute more inputs can be avoided by focusing on the selection of the individuals to whom comparisons are made. One of the clear conclusions of equity theory is that individuals prefer to make comparisons to those who are similar. Thus, those who do experience a sense of personal responsibility and see themselves as controlling possible outcomes may tend to compare themselves with those who are also seen as similarly empowered. A second possibility lies in redefining what one believes to be just. In other words, individuals, especially from lower socioeconomic levels, may gradually learn to accept that their inability to contribute more inputs is in reality their fault.

When attempting to address the questions of reference group selection, "which inputs count," and the role of self-blame, a pattern of answers emerges that suggests that disadvantaged people tend to adapt in order to accept "what is," as opposed to aspiring to some greater share of material allocations. In the context of equity theory, they gravitate toward choosing as their referents individuals who are similar and they are careful to define inputs in such a

68. Cf. Helmut Lamm et al., An Attributional Analysis of Interpersonal Justice: Ability and Effort As Inputs in the Allocation of Gain and Loss, 119 J. Soc. Psychol. 269 (1983) (comparing the effects on outcome when ability and effort are used as inputs).

69. See Martin & Murray, supra note 41, at 178.


71. See Sennett & Cobb, supra note 8, at 20, 28, 249-50; Karen Cook, Expectations, Evaluations and Equity, 40 Am. Soc. Rev. 372 (1975) (discussing the impact of expectation on the equity process); Morton Deutsch, Awakening the Sense of Injustice, in THE QUEST FOR JUSTICE: MYTH, REALITY, IDEAL 19, 24-27 (Melvin J. Lerner & Michael Ross eds., 1974) (arguing that the victim, in an effort to control feelings of injustice, identifies with the victimizer and internalizes the victimizer's derogatory attitudes); Jance Steil, The Response to Injustice: Effects of Varying Levels of Social Support and Position of Advantage or Disadvantage, 19 J. EXPERIMENTAL Soc. Psychol. 239 (1983) (finding that social support reduced the tendency of disadvantaged individuals to assume responsibility for their lower outcomes).
way that returns the equity equation to a position of equality. Similarly, those who otherwise might experience a sense of relative deprivation seem largely destined to compare themselves to those who are "equally deprived" and thus avoid the feeling of relative deprivation. In the words of G.C. Homans, "what people say ought to be is determined in the long run by what they find in fact to be the case." In effect, people tend to aspire to distributive goals that reflect existing allocations as opposed to utopian outcomes.

Of course, much of this just begs the issue. What prevents the disadvantaged from redefining their inputs so that they experience a sense of inequity when they receive less than another? Why don't they choose to use as their point of comparison those who are better off? To rephrase the Homans' quotation: Why does "what is" turn into what is right?

Put differently, how does the process work through which social stratification is legitimized even in the eyes of those who are systematically disadvantaged? There are a number of factors that seem to interact. One is that we define ourselves as others define us and rely on their valuation to determine our own worth. Since the value of a person, by our cultural standards, is largely a function of his or her power, income, wealth, and education, individuals apply those standards in order to ascertain how deserving they are.

As already noted, in order to feel deprived, one must escape a sense of personal responsibility for his or her position. It makes sense that a social structure that leaves us in relatively poor condition will still be regarded as just or at least as legitimate if we sense our relatively small allocation is traceable to our own shortcomings. As it turns out, the disadvantaged tend to assume respon-

72. Homans, supra note 55, at 250.
73. See Joseph Berger et al., Structural Aspects of Distributive Justice: A Status Value Formulation, in 2 Sociological Theories in Progress 119 (Joseph Berger et al. eds., 1972) (detailing how normative expectations are violated when similar actors receive dissimilar rewards); Della Fave, supra note 7; Norma Sheplak & Duane Alwin, Beliefs About Inequality and Perceptions of Distributive Justice, 51 Am. Soc. Rev. 30 (1986).
74. See generally Della Fave, supra note 7 (arguing that social stratification is legitimized by social values).
sibility for the inferior outcomes they experience. And, interestingly, experiments suggest that even a supportive social structure cannot overcome this tendency. The precise mechanism for this tendency toward self-blame among the disadvantaged is not clear, but certainly both the pervasiveness of the American Dream myth which drives home the notion that everything is available if one just tries hard enough, and a desire to preserve one's psychological well-being by reducing the stress associated with perceiving injustice contribute to this tendency.

A key element playing into the mix is self-esteem. As already suggested, our self-perceptions are influenced heavily by the views of others. Indeed, as a statistical matter, self-esteem among adults is correlated with social class. The mechanism here is not hard to imagine. No one wants to live in a poor neighborhood; no one aspires to be poor. Being poor and relatively powerless contribute to feelings of shame. And being ashamed is synonymous with a lack of self-love or a sense of personal value.

While the lack of self-esteem, without more, can help to explain the infrequency with which the absolutely deprived experience a sense of relative deprivation, an even more insidious element is at work in this process. One of the primary characteristics of those with low self-esteem is that they are easily influenced. For exam-

75. See Sennett & Cobb, supra note 8, at 20, 28, 249-50; Della Fave, supra note 7, at 963; Steil, supra note 71, at 251. Ironically, they do not appear to take personal credit for good outcomes. See Lawrence Kutner, Parent and Child, N.Y. Times, Jan. 21, 1993, at C12. On the other hand, the privileged are likely to view those who are less well-off as responsible for their plight. See R.A. Steffenhagen & Jeff D. Burns, The Social Dynamics of Self-Esteem 135-36 (1987).

76. See Steil, supra note 71, at 239.

77. See Deutsch, supra note 71, at 29-30.

78. The effect is to reduce cognitive dissonance, see Leon Festinger, A Theory of Cognitive Dissonance 1-31 (1957), in order to avoid stress-related afflictions. See Martin, supra note 70, at 239-40.


ple, in experiments involving rewards and in which subjects were paired with others, low self-esteem subjects were more likely to begin to imitate the reward allocation patterns of their partners than were high self-esteem subjects.82 Similarly, subordinates with low self-esteem are more likely to adopt the values of their supervisors than those with high self-esteem.83

This influenceability or "plasticity" has clear implications for equity theory and relative deprivation theory, as well as for the cycle of social stratification legitimation. Low self-esteem typically is associated with uncertainty and a lack of confidence in one's own attitudes.84 Obviously, an important element in the perpetuation of a system of classes is the ability to convince those on the lowest rung that they are responsible for their position and that the values that those in power use to determine status are appropriate.

In summary, one's sense of whether she has been treated fairly is the product of comparisons to the input/output ratio of others or to the general welfare of some reference group. In equity theory, the central issue is which inputs are worthy of being counted. In terms of relative deprivation theory, the primary question is which group does the individual believe she has the "right" to be treated like. In equity theory, those in power determine which inputs count. In relative deprivation theory, those who are in worse positions than others accept comparisons with those who similarly are deprived because they believe that whatever position they hold in the social order is of their own making. Pervading, legitimizing, and sustaining both of these processes is the impact of social stratification on the sense that individuals have of their own worth or self-esteem. The unrelenting message is that those who receive less must have less to offer and are ultimately less worthy, and, having heard this message long enough, individuals become even more

84. See Hewitt, supra note 79, at 37-40; Brockner et al., supra note 82, at 846; Kutner, supra note 75; Weiss, supra note 83, at 712.
susceptible to it. Disadvantaged people tend not to question a world that tells them how little they have to offer, how little they are entitled to, and that they are ultimately to blame.

IV PIERCING PARETO OPTIMALITY

Equity theory and relative deprivation theory can be viewed as limiting the application of economics to law. Much of the contemporary criticism of law and economics asks whether private orderings ultimately result in efficient results. For example, both Pareto optimality and wealth maximization, the two leading measures of efficiency, depend on a variety of assumptions. The most important assumption is that the choices people make reveal their preferences. More generally, Pareto optimality and wealth maximization require that we assume away the problems created by the possibilities of counter-preferential choice, preference reversals, dual preferences, and the wealth effect, each of which suggests either that market choices may not reveal preferences or that the connection between preferences and utility maximization is not clear.

What I am addressing here, however, involves an entirely different matter. I am assuming that choices do reveal preferences and that the preferences revealed do increase the utility of the

85. Compare Paul A. Samuelson, Consumption Theory in Terms of Revealed Preference, 15 ECONOMICA 243 (1948) (arguing that a consumer's behavior is based upon revealed preferences) with Amartya Sen, Behavior and the Concept of Preference, 40 ECONOMICA 241 (1973) (arguing that choices made do not always reveal a person's real preferences).
86. See Sen, supra note 9, at 328.
89. See supra note 27.
90. See generally Kelman, supra note 10 (remarking that legal rules may change consumer demand behavior); Kelman, supra note 12 (arguing that choices may be made because of duress).
choosers. If both of these conditions are met, then it seems hard to argue against the legitimacy of Pareto superiority as a principled basis for enforcing contracts, but the point of the foregoing discussion is that there are additional questions to be raised. These questions come from peeling back the skin of Pareto optimality in order to reveal the effect of class-based personality differences on preferences and the substance of exchanges that individuals regard as utility-maximizing.

Equity theory and relative deprivation theory suggest that both the Paretian standard and wealth maximization are extremely "thin" concepts. For instance, in the automobile example, if we stop our analysis at the level of efficiency, we would determine that both Tim and Thelma have experienced increases in their utility and the world is a generally happier place. But if we peel back even a single layer of this efficient outcome, we begin to ask why Thelma would believe she received fair treatment when she paid a much higher price than Tim. We may find that this efficient outcome in Thelma's case could only come about because Thelma had a low sense of entitlement. Moreover, if this lack of a sense of entitlement was determined by some combination of Thelma's social class and self-esteem, it is reasonable to ask whether we should feel morally comfortable with the different outcomes.

To expand on this, it is necessary to review the basic notions underlying the view that Pareto optimality supports the enforcement of contracts. First, this analysis requires a digression into the basic economic explanation for why exchanges take place. One must start with what economists call indifference curves. In Figure I, the X axis indicates the quantities of good X an individual might have and the Y axis indicates the amounts of good Y. Each curve plots the possible combinations of X and Y that give the individual the same amount of satisfaction. For example, X could be apples and Y bicycles. Each point along a specific curve represents a different combination of bicycles and apples, but each combination would leave this individual feeling equally well off. As the

91. I know this is going to be boring but please hang in there. It will be short and I think it helps illustrate my point. I would like to thank Jules Theeuwes for helping work through the indifference curve analysis.
92. Most basic economics texts have a good discussion of indifference curves. See, e.g., Jack Hirshleifer, Price Theory and Applications 62-122 (2d ed. 1980).
curve suggests, as the individual has fewer apples, she must have more bicycles to maintain the same level of satisfaction. On the graph, each curve represents a different level of satisfaction with the curves farther away from the origin representing higher levels of utility. The indifference map of Thelma might look like Figure I. If Thelma had eighty apples and two bicycles, she would be located at point A on curve I.

FIGURE I

93. It is, perhaps, easier to understand what is happening as one moves to indifference curves that are farther from the origin if you realize that the graph actually has a third dimension coming off the page. On this third axis, one would be plotting utility. As the curves move out, one would be moving up the third axis. In a three dimensional depiction, the curves would gradually rise up off the page as they move farther from the origin.
Of course, an exchange requires another participant. Thus, Figure II depicts the possible indifference curves for Tim. Again, each curve represents a separate level of satisfaction and shows the combinations of bicycles and apples that result in the same level of satisfaction. And, as in Figure I, as the curves move out from the origin, they represent different and higher levels of satisfaction. If we suppose Tim has twenty apples and eight bicycles, he will be located at point A on curve I.

This seemingly lopsided allocation of bicycles and apples obviously creates an opportunity for exchange. The two indifference maps can be combined into what is called an "Edgeworth
In Figure III, the two sets of indifference curves are on the same graph with Thelma's origin located at the bottom left corner and Tim's origin at the upper right corner. Point A on the graph is on indifference curve I for both Thelma and Tim.

The question for contract purposes and for purposes of Pareto superiority is whether the parties can exchange bicycles for apples in such a way that they are both better off. In other words, can they both move to higher indifference curves while being restricted by the fact that there are a total of one hundred apples and ten

94. See HIRSHLEIFER, supra note 92, at 192-97 (discussing the "Edgeworth Box" as a tool to illustrate how exchange allows for mutually advantageous improvement in the allocation of consumption goods).
bicycles in the entire economy? There are, in fact, a number of possible points at which both parties would be better off.

To visualize this, consider point B where Thelma's indifference curve I is tangent to Tim's indifference curve III. The point represents thirty apples and three bicycles for Thelma and seventy apples and seven bicycles for Tim. At this point, Thelma is still on indifference curve I and is as happy as she was with eighty apples and two bicycles. Tim has moved up to indifference curve III and, therefore, is better off. In essence, Thelma has paid fifty apples for one bicycle. While this is actually an unlikely exchange because it leaves Thelma no better off, it forms the outside limit of a possible exchange. Similarly, point C, where Tim has five bicycles and fifty apples and Thelma has five bicycles and fifty apples, represents a point at which Thelma is better off and Tim stays on his original indifference curve. This point also represents a limit on their exchange because under no circumstances would Tim enter into an exchange that made him worse off.

Economists refer to the area between indifference curve I for Thelma and curve I for Tim as a lens. All movements from the original allocation that will leave both parties better off are located within this lens. Only within this lens exist potential exchanges that move both parties to higher indifference curves.

Because both parties presumably desire to move to the highest possible indifference curve (i.e., that which is farthest from their respective origins), and because these moves must be consistent with moving to higher indifference curves of their partners, it is possible to narrow the focus even more. The critical points are those at which the indifference curves are tangent to each other. For each indifference curve of Thelma, there is an indifference curve for Tim that is tangent to Thelma's curve at some point. A line drawn through these points of tangency is called the contract curve. The contract curve shows a series of possible exchanges or "prices" of apples in terms of bicycles, or vice versa, that will im-

95. Id. at 195.

96. All of the points on the contract curve are Pareto superior to the original allocation. They are also Pareto optimal in that it is impossible to move from one point to another without leaving one of the parties worse off.
prove the positions of both parties. The actual price the parties will establish will be determined by their negotiations.

The full contract curve, as illustrated in Figure III, shows the points which are acceptable to both parties, assuming the parties are compensatorily insensitive.\(^9\) Possibly, however, parties may view many of these points as involving exchanges that are so uneven that they would be unacceptable to at least one of the parties on the grounds of being compensatorily unfair. In short, there are two curves: a contract curve, consisting of points that would involve Pareto superior exchanges and another curve that introduces and accounts for the interpersonal component of the exchange. The latter curve, as depicted by the bold portion of the full contract curve in Figure IV, is shorter than the original, “compensatorily insensitive” curve, and consists of the portions of the original curve that are acceptable to both parties. Equity and relative deprivation theory strongly suggest that, if a portion of the curve is not in play, that part will lie near the axis of the trading partner with the greater sense of entitlement. Thus, in Figure IV, the relevant portion of the curve excludes the segment closest to Tim’s axis.\(^8\)

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97. One might take the position that the sense of justice or injustice from an exchange of bicycles for apples is built into the curves. This would not be a correct interpretation of the curves. The curves do not “anticipate” exchange and the fairness of proposed exchanges. Instead, they represent different combinations of apples and bicycles that result in different levels of utility—a purely detached functional analysis. Certainly, when apples are reduced the person must receive bicycles in order to experience the same level of utility. The “fairness” of this substitution of apples for bicycles, or vice versa, is not a relevant factor as there is no interpersonal interaction.

98. I fully understand that some will reject the notion that a Pareto superior position would ultimately be unacceptable to a party. They might reason that an exchange that is not acceptable must not increase utility and, therefore, could not have been Pareto superior. As I have already noted, this does not worry me as I do not accept the view that all desired outcomes are reducible to a single “class” of utility. See supra note 9. For those wedded to the traditional notion of utility, however, I suggest adopting the view that the “cost” of an exchange is not just what one gives up in a material sense but any loss in status or pride that would go along with accepting the proposed terms. Under this interpretation, what I am saying here is that these psychic costs increase relatively rapidly for those with an elevated sense of entitlement as the material terms of the exchange become less favorable. By the same token, increasing the self-esteem and sense of entitlement of someone who was previously disadvantaged, also has the effect of making them require more of what is being traded for in order to give up what they have to trade. In short, the conclusions suggested here will not vary even if one feels compelled to go by the more conventional methodology.
At this point a variety of points remain that leave both parties feeling better off. Assume that Tim has the greater sense of entitlement and that the two parties agree on an exchange at point D which happens to require Thelma to give up forty apples for two bicycles. Both Tim and Thelma feel better off—i.e., are on higher indifference curves—and, assuming no ill effects on third parties, overall welfare is increased.

But now suppose everything stays the same except that Thelma’s consciousness is raised and she reevaluates her personal sense of desert. As a consequence of this new higher self-esteem and sense of entitlement, the deal of two bicycles for forty apples just does not seem fair and is rejected by Thelma. Indeed, Thelma may now find that most of the terms of the exchange, as shown by
the contract curve, no longer seem fair. Thus, as shown in Figure V, Thelma finds acceptable only those exchanges that are close to Tim's axis and Tim only finds acceptable those exchanges that are near the axis of Thelma. In effect, we have a contract curve that includes no points upon which the parties can agree.

![Figure V](image)

Another, and perhaps more likely, possibility is that the newfound sense of entitlement for Thelma does not eliminate all the possible exchange prices that could result in Pareto superior moves. Instead, as shown in Figure VI, the range of exchange possibilities has been substantially narrowed, thereby decreasing the likelihood of finding a mutually agreeable exchange term. After all, even along the full contract curve in Figure III, the parties may
negotiate long and hard and still walk away without an agreement. In Figure VI, however, the opportunities are few, increasing the likelihood that no mutually agreeable point will be found. This may be tantamount to raising transaction costs and higher transaction costs decrease the likelihood of striking a bargain.

In general terms, the curves illustrate that by changing the personality of one of the participants so that that person has a higher sense of entitlement, we may decrease the likelihood that a once mutually beneficial exchange will take place. Increasing a person’s sense of self-worth may decrease his opportunities for arriving at Pareto superior positions. Conversely, by depriving him of self-esteem we can create an interpersonal environment consisting of many more opportunities for increases in efficiency through Pareto
superior moves. In its barest form, this means that the more demeaning an environment, the more likely it is that “efficient” exchanges will take place. But “efficient” exchanges that are only possible because of the deprivations that exist in society should make us think twice about whether they have the moral legitimacy necessary to be enforced by contract law.

More importantly, from the standpoint of this Article, a change in the parties’ relative senses of compensatory justice affects the division of the surplus created by the exchange. When the division consistently is lopsided in favor of the more privileged party, questions of moral legitimacy also arise.

Let me put this latter point in more vivid terms. Suppose a black child grows up in a racist community and knows nothing other than being treated with suspicion and disdain. When he grows up, he is perfectly happy with a job similar to that occupied by whites but for which he is paid a salary equal to only two-thirds that paid to whites. Moreover, the employer would not pay a salary as high as that paid to a white person. Presumably, we have increased efficiency due to the fact that the employer and employee have moved to higher indifference curves. But the division of the surplus from the trade, and perhaps the existence of the contract itself, can be explained by the fact that the black employee has been taught to be satisfied with less than his white counterpart. In terms of equity theory, he has been taught that his inputs are, in a literal sense, less worthy. In terms of relative deprivation theory, he does not feel as though the wage is unfair because it is equal to that received by those to whom he compares himself.

We are faced, however, with the possibility that through years of consciousness-raising the black person is able to overcome his sense of inferiority. By viewing his inputs as being as valuable as those contributed by whites or by broadening the range of those

99. This consciousness-raising has the effect of “delegitimizing the stratification.” See Della Fave, supra note 7, at 966-68 (arguing that delegitimization comes when incongruence develops between distribution of primary resources and self-evaluations); Deutsch, supra note 71, at 33-34 (arguing that raising a sense of injustice to people’s consciousness creates a source of social organization and cohesion); Martin, supra note 55, at 66-67 (noting studies that demonstrate that Northern blacks had a greater sense of entitlement than Southern blacks because Northern blacks compared their economic status with that of whites while Southern blacks restricted such comparison to other blacks).
included in his social comparison process and thus experiencing a sense of relative deprivation, he now finds the lower salary unacceptable. The loss of dignity would be too great to offset the financial gain. One possibility is that a higher wage will be received. On the other hand, if the employer sticks to his race-based wage structure, the employment contract will not be made, and arguably, a possible Pareto superior exchange will be foregone because of the employee's new self-valuation.

The same sort of analysis can be applied to the situation found in *Williams v. Walker-Thomas Furniture Co.* Suppose that the exchange in that case, even if Williams fully understood the add-on clause in her contract with Walker-Thomas, fell squarely on the contract curve. In that instance, both parties would have experienced increases in utility Again, the possibility looms that the bargain was only possible because of Williams' low self-image—"it's not a great deal," she realizes, "but that's what those of us in the inner city must be happy with and it is what we deserve."

Suppose Williams begins to spend time around people who help her to develop a greater sense of personal dignity or that because the terms offered to her have been labelled "unconscionable" by a court, exchanges that once seemed fair to her no longer seem fair. The terms offered by Walker-Thomas seem unacceptable because she now feels relatively deprived. It is important to note that she rejects the Walker-Thomas offer not simply because she

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100. 350 F.2d 445 (D.C. Cir. 1965). Mrs. Williams made a series of credit purchases from the Walker-Thomas store totalling over $1,800. Id. at 447 n.1. The collateral for each purchase was not just the item purchased but all items on which she had an outstanding balance. Id. at 447. Each payment was credited to each item on a proportionate basis. Id. Thus, under the terms of the agreement, "the amount of each periodical installment payment shall be inclusive of and not in addition to the amount of each installment payment under prior accounts; and all payments made shall be credited pro rata on all outstanding accounts." Id. (quoting the contract) (alterations in original). In effect, Williams could not pay off any one item until all the items were paid off. Id. At a point when her balance was $164, Williams purchased another item. Id. at 447 n.1. Upon her default, the Walker-Thomas store attempted to repossess all of the items she had purchased under the "add-on" terms. Id. at 447.


101. See infra notes 170-82 and accompanying text.
thinks there are better deals elsewhere, but because she now feels deserving of those exchanges.

In both the employment example and the Walker-Thomas possibility, the question is whether the terms of the exchange or the exchange itself are possible only because of the respective classes, and resultant self-images, of the parties. Whatever the philosophical basis, I think that at some level, exchanges and terms that exist as consequences of the difference in senses of entitlement make us uncomfortable. Indeed, it is a very shallow notion of fairness that is based on a concept of efficiency that is, at least in some part, dependent on the deprivation and devaluation of individuals.

V Preferences, Personal Autonomy, and Distributive Outcomes

A. Adaptations to Class

The preceding section spells out in technical economic terms why relative deprivation theory and equity theory provide strong foundations for excusing individuals from their contracts. A line of reasoning opposing such action could be based on the view that people, in terms of preference, are as we find them and interference with their private orderings impinges on their liberty by substituting their preferences and personalities with those we wish they had. In addition, any response that excuses them from their choices might be regarded as unduly paternalistic. More specifically, one might argue that I simply am saying that my preference is that disadvantaged people act more assertively in bargaining contexts. At a different and more troublesome level, though, the intervention may reflect a desire that individuals have a sense of compensatory justice that mirrors our own.

102. See George J. Stigler & Gary S. Becker, De Gustibus non Est Disputandum, 67 Am. Econ. Rev. 76 (1977) (asserting that tastes are stable over time and do not vary widely between different people).

103. See Harrison, supra note 9, at 1361-62 (questioning how much weight one's own preferences should be given when making policy decisions regarding the preferences of others). See generally C. Dyke, The Vices of Altruism, 81 Ethics 241 (1971) (positing that when one has fewer alternatives, self-interest is more motivating than the common good).

104. In a sense, we want them to feel they deserve a greater share of the gains from the exchange.
An easy response to these objections may be that we really are not interfering with preferences at all. Arguably, every self-interested and rational person wants as much of the surplus created by the exchange as possible. In addition, it is hardly paternalistic to help someone achieve a goal—greater wealth—which we know they desire but which they do not believe they deserve. Indeed, as a general rule, it does not seem to be paternalistic to intervene if the subject of our intervention would immediately defend our actions, as seems likely in this context. Even if they do not want more, it seems safe to predict that they would prefer to have a greater sense of desert. That is, they might say, “Yes, I would like to feel more deserving.”

But all of this makes it too easy to avoid the issues of autonomy when interfering with the joint decisions individuals have made about distributive outcomes. First of all, we may be dealing with a preference that transcends day-to-day preferences, such as wine rather than soft drinks or Mozart rather than the Rolling Stones. Arguably, people accept less because they honestly have their own standards for distributive outcomes and strive to achieve “fairness” as they see it. In other words, they may adhere to their own belief as to what constitutes compensatory justice as a matter of principle or lexical ordering. If this is the case, intervening on the basis of what we would like them to prefer as a matter of compensatory justice is not much different than attempting a religious conversion.

Another possibility is that individuals are comfortable with less because they desire to avoid the risk of humiliation if they ask for more and are refused. Indeed, embedded in the analysis of equity theory and relative deprivation theory is a preference-like notion that has to do with how much of the surplus from the exchange is enough to make these individuals feel they have been treated fairly. In essence, some individuals “prefer,” or are comfortable with, less of the surplus. In utilitarian terms, one might argue that there is safety in asking for less and in “staying in one’s place.” A related but slightly different possibility is that one may derive some perverse pleasure from being what outsiders may regard as deprived. This would also have a utilitarian basis with the individ-

105. See Kennedy, supra note 20, at 572.
ual preferring to think of herself or to have others think of her as a "victim." In all of these cases, interfering with the compensatory preference is far more fundamental than helping someone to overcome her preference for smoking or television or even for contracts with disclaimers.

A 1986 article by Cass Sunstein is helpful in questioning the legitimacy of interfering with preferences. Sunstein meticulously lays out the reasons we are sometimes able to overcome our hesitancy to interfere with expressed preferences. His "catalogue," includes four categories. First is the possibility that a majority will choose to "bind itself against the satisfaction of its own misguided choices." In effect, the majority may choose to eliminate some choices in order to channel behavior toward choices that they would prefer to have. The second category involves preferences that are themselves the product of legal rules. The third category concerns efforts to curb choices that depend on "addictions, habits, or myopic behavior." Finally, preferences that stem from "cognitive distortions" may also be fair game for interference. The simplest example of a cognitive distortion is a choice that results from a lack of information.

I am tempted to say that interfering with contracts purely on the basis of the questionable legitimacy of the compensatory outcomes can be justified entirely by reference to Sunstein's fourth category. In effect, the personal sense of compensatory justice that drives one to reveal a preference for a lopsided distribution is a function of the lack of accurate information the individual has about his own moral worth or the value of his own inputs as compared to the value of the inputs of others. For example, a belief that individuals are of equal moral worth may lead one to believe that he need not take a smaller share of the surplus created by exchanges. In essence, the "choice" to take less may be a result of class-driven feelings of self-esteem. Low self-esteem is then the result of a faulty self-valuation process. In other words, the choice to take less may be the result of inaccurate information about one's value vis-à-vis that of others.

107. Id. at 1138.
108. Id. at 1138-39; see also Elster, supra note 7, at 141-48.
110. Id.
111. In essence, the "choice" to take less may be a result of class-driven feelings of self-esteem. Low self-esteem is then the result of a faulty self-valuation process. In other words, the choice to take less may be the result of inaccurate information about one's value vis-à-vis that of others.
larly, knowledge that the definition of "valued inputs" is a function of inequities in class and power may reduce the tendency to accept subordinate status. In effect, preferences based on inadequate or inaccurate information are fair game for judicial interference. Although this argument is appealing in some sense, it does not really seem to match the sorts of cognitive errors that Sunstem sees as fitting into category four. This lack of information is not of the same ilk as smoking when one has not heard of the health risks associated with smoking.

This category, however, can blend with category two, which deals with the adaptations that individuals make to existing laws or power imbalances that themselves result from the legal system. Before addressing this blending possibility, I will focus on the two types of adaptations that could account for the tendency of disadvantaged individuals to prefer to accept without protest the preferences others have for what the disadvantaged person should feel about compensatory fairness.

Adaptation in this context means that the preferences expressed by individuals are not their own, in a true sense, but are dependent on law. The first type of adaptation is fairly straightforward. Despite what most contract law professors teach their students, the common person generally believes that a "contract is a contract." In fact, the doctrine that the law will not refuse to enforce a contract simply because of the lack of adequate consideration seems well known, at least at an intuitive level, to virtually everyone. For example, if contract law fails to directly address issues of adequacy of consideration, and bargains like those in Williams v. Walker-Thomas Furniture Co. are enforced routinely, one begins to accept those bargains as "just." After all, laws are designed to promote justice, aren't they? Furthermore, the inequality of the divi-

112. They are fair game in the sense that the "preference" revealed is based on inaccurate information. They are also fair game due to the possible therapeutic value of having courts routinely vindicate those who have undervalued themselves. See infra notes 175-82 and accompanying text.

113. See Sunstein, supra note 106, at 1166-69 (stating that intervention in decisionmaking is less objectionable when one does not know all the relevant information).

114. One might view the distinction as being between "pure preferences" and "dependent preferences" with the latter reflecting adaptations to law and ideology.

115. 350 F.2d 445 (D.C. Cir. 1965).
sion of the surplus also will be viewed as having the moral authority of the law. In short, people's views of what is "just" are to some extent dependent on what the law implicitly labels as "just." Moreover, if they have been on the short end of a deal, are from a low social class and, consequently, have low self-esteem, they will be quick to accept the views of others that they have only themselves to blame.

This general response to an intuitive sense of the law is probably not enough to explain why some individuals seem to prefer, or feel comfortable with, consistently being on the short end of bargains, whether in employment contracts, housing contracts, automobile sales contracts, or insurance contracts. A broader adaptation that accounts for this "willingness" routinely to be the contract victim can be explained by reference to "ideology." Sunstein describes these preferences as "desires and beliefs that derive from relations of power." In this context, the "preference" is really a psychological adjustment or resignation to power imbalances that cannot be overcome. It is, in fact, a way of avoiding the dissonance and stress that would occur if one began to question the legitimacy of his status.

The manifestation of this adaptation can be found in the responses individuals express when asked about apparent inequities. For example, Professor Joanne Martin offers a variety of ways in which individuals learn to adapt to injustice. Two of the more powerful descriptions are as follows:

(He), youngest of three children, lived with his mother in an 8-story apartment in the South Bronx, a mostly black and Puerto Rican neighborhood. "I didn't know any different. I didn't

116. Cf. Hoffman & Spitzer, Fairness, supra note 31 (using a laboratory test to ascertain the source of generally held notions of fairness or morality and discussing the implications of the test results for the legal system).
117. See supra notes 75-84 and accompanying text.
118. Sunstein, supra note 106, at 1152; see also Elster, supra note 7, at 145 (positing that the oppressed have a tendency to regard their oppressive social order as being just, and that this tendency may be due to an illusion among the oppressed that they owe their livelihood to their oppressors).
119. Cf. Kelman, supra note 12 (arguing that consumers will attempt to evade the duress of market powers when possible).
120. See Martin, supra note 70.
have anything to compare it to. I didn’t see it as tough. It was my home.”

An Appalachian woman was hired by the Office of Economic Opportunity to work as a community organizer in her own impoverished black neighborhood. She spent her time making fruit pies for her poorer neighbors. When asked by a friend how she felt about the amount of money she was earning in this job (her income was slightly above the poverty line), she replied, “I am very content; I have more than my neighbors.” Her friend continued, “What about the people on ‘the hill’?” (This was a wealthy residential area, clearly visible from the organizer’s front yard.) She answered, “My life is here. I don’t think about them.”

At this point, the matter of preference determination merges with relative deprivation theory and equity theory. The valuations either of the relative inputs and outputs in the context of equity theory or of the lack of a sense of deprivation among those who objectively are deprived in the case of relative deprivation theory are hard to equate with the true or “pure” preferences of the individuals. They are preferences influenced by, perhaps even created by, outside factors.

As I mentioned, the adaptation rationale for not taking observed indications of preferences at face value blends with Sunstein’s category four which deals with problems stemming from inadequate information. This blending is important because the problem of adaptive preferences would be far less troublesome if individuals had the information to assess their own preferences, to evaluate how they are formed, and to at least consider the possibility of having preferences other than the ones they have. Not only are the preferences not independent of law, but, as a cognitive matter, individuals are without the type of information or introspection that would permit them to alter their expectations for themselves.

121. Id. at 217.
122. See supra note 110 and accompanying text.
123. For one description of the difficulties involved in overcoming one’s adaptive preferences, see KAUFMAN & RAPHAEL, supra note 80, at 30-52 (discussing the development of inner security and self-esteem).
Seen in this light, there is no powerful autonomy-based moral objection to intruding on individuals' choices to consistently undervalue themselves and their contributions as compared to the contributions of others. To view the process as one of interfering with liberty is simply to legitimize the system that has distorted the self-valuations and senses of entitlement that individuals have.

B. A Comparison to Informal Dispute Resolution

An analogy can be drawn here to the arguments that have been made in the context of informal dispute resolution. Informal dispute resolution can injure the powerless at both a macro level and a micro level. At the macro level, it may siphon off disputes that, if resolved in a formal setting, could begin a general movement toward reform. It also can dampen the festering social discontent that otherwise might lead to collective action for change.

The micro level dangers are more interesting for the purpose of this discussion because informal dispute resolution typically involves the negotiation of a contract. Although the contracts entered into as a means of settling disputes, where the pressures to contract are great, may be seen as different from those made in a more voluntary context, the concerns raised carry over to day-to-day private orderings. Indeed, contracts about the necessities of life and employment are even less voluntary than those designed to settle disputes.

Increasingly, legal scholars have expressed concerns that informal dispute resolution is dangerous to those groups who, in terms of this Article, have a relatively low sense of entitlement. These


scholars claim that weaker parties are actually better off when disputes are resolved in a formal, as opposed to an informal, setting.\textsuperscript{127} To be specific, the case has been made that the formal setting encourages the parties, including the stronger parties, to aspire to higher values.\textsuperscript{128} In addition, the formal setting insulates the parties and avoids the intimate contact that allows the stronger party to dominate.\textsuperscript{129}

Mediation is a good example of a method of informal dispute resolution that gives rise to these concerns.\textsuperscript{130} Ideally, mediation allows the parties to define what they consider to be a "just" outcome. In effect, the parties come together with the goal of achieving an outcome that is consistent with each party's sense of justice as influenced by ideology.\textsuperscript{131} Their sense of justice in this context, however, is largely a function of their personal sense of entitlement. The "preferences" and, therefore, the outcome, of the informal process can be less equal than that resulting from a more formal setting in which the ritual may elevate the integrity of the

\textit{Process Dangers for Women}, 100 \textit{Yale L.J.} 1545, 1564-67 (1991) (discussing how certain groups tolerate injustice because they do not feel entitled to assert their rights); Frances Olsen, \textit{The Family and the Market: A Study of Ideology and Legal Reform}, 96 \textit{Harv. L. Rev.} 1497, 1541-42 (1983) (asserting that "deformalized" procedure, e.g., family court, may have adverse effects on women in that attempts at conciliation often subject women to more injury and welfare of the weaker parties often depends on "the uncontrolled discretion of state agencies").


128. \textit{See} Delgado et al., \textit{supra} note 127, at 1387-88; John Thibaut et al., \textit{Procedural Justice as Fairness}, 26 \textit{Stan. L. Rev.} 1271, 1288-89 (1974) (suggesting that the adversary system is perceived as more just and encourages more diligent representation of parties by their attorneys).

129. \textit{See} Abel, \textit{supra} note 127, at 257; Delgado et al., \textit{supra} note 127, at 1388; Grillo, \textit{supra} note 126, at 1550, 1597-600; Olsen, \textit{supra} note 126, at 1542.

130. \textit{See}, e.g., Hoffrichter, \textit{supra} note 126, at 82; Grillo, \textit{supra} note 126 (challenging the notion that mediation is fairer or more humane); Lisa G. Lerman, \textit{Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women}, 7 \textit{Harv. Women's L.J.} 57, 71-97 (1984) (discussing the various criticisms of mediation in the wife-abuse context, and arguing that prosecution is the only appropriate remedy); Laure Woods, \textit{Mediation: A Backlash to Women's Progress on Family Law Issues}, 19 \textit{Clearinghouse Rev.} 431 (1985) (arguing that mediation in family law disputes denies women the opportunity to develop and enforce new rights).

weaker party. As Richard Abel, the leading critic of informal dispute resolution, posits: "compromise produces unbiased results only when opponents are equal; compromise between unequals inevitably reproduces inequality."\(^{132}\) Moreover, the outcome is more dangerous in that the sense of being treated in an arbitrary fashion, which might provide the basis for reform, is lost.\(^{133}\)

Writers have noted especially the dangers of informal dispute resolution for women.\(^{134}\) For example, if in fact women are more altruistic than men, in that they are more nurturing and interested in preserving relationships, the informal setting in which they negotiate with men who do not share the same values can result in material disadvantages for women. In essence, if the cost of individual material gain is the destruction of the relational interest, some women do not feel entitled to pay the price.\(^{135}\) This sense of the proper role, "place," or even behavior of women in informal dispute resolution can be generalized to the sense of "place" or entitlement of any person engaged in a negotiation.\(^{136}\)

The day-to-day private orderings of individuals embody all of the dangers of informal dispute resolution and then some. The absence of formality liberates the parties to respond to their baser motivations. The close interpersonal contact forces the weaker party, typically the party with greater plasticity,\(^ {137}\) to listen to the stronger party's view on what is fair. An important distinction exists between day-to-day private orderings and informal dispute resolution that means the former is even more likely to be damaging to weaker parties. In informal dispute resolution there is at least a quasi-formality in the sense that even the weaker party rec-

\(^{132}\) Abel, supra note 126, at 257.

\(^{133}\) Id. at 259.

\(^{134}\) Sources discussing the problems resulting from mediation or general lack of formality in the context of family and gender-related disputes include: Grillo, supra note 126; Lerman, supra note 130; Olsen, supra note 126; Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 Law & Ineq. J. 21 (1984) (examining mediation in the separation and divorce context and the sexual harassment context and discussing a variety of criticisms of mediation); and Woods, supra note 130.

\(^{135}\) See, e.g., Grillo, supra note 126, at 1601-05 (arguing that women have a relational sense of self, focusing on connections with others rather than on individualism).

\(^{136}\) See Hofrichter, supra note 125, at 73; Abel, supra note 126, at 257; Delgado et al., supra note 127, at 1360.

\(^{137}\) See supra notes 78-79 and accompanying text.
recognizes the existence of a dispute and the need to defend her own interests, however those interests might be defined. In the day-to-day context, though, even those guards are down.

VI. UNCONSCIONABILITY AND ENTITLEMENT

Although courts can adopt a variety of contract doctrines in order to respond indirectly to advantage-taking, the most direct response to contracts resulting in uneven exchanges would be an expanded notion of unconscionability. I do not intend here to go into great detail about how this might be done. In the first section below, I sketch how my version of unconscionability would differ from the way in which it currently is applied. In the second section, I will discuss in more general terms the potential of an expansion of substantive unconscionability as a means of educating individuals and shaping their senses of entitlement. I respond to the typical “law and economics” concerns about expanding unconscionability by illustrating how the perspective changes when unconscionability is used as a preference-shaping tool.

A. Revising Unconscionability

As every first year law student knows, a consideration of unconscionability begins with Arthur Leff’s analysis. Professor Leff divides the topic into two categories: problems in the bargaining process, procedural unconscionability, and pure unfairness in the exchange, substantive unconscionability. Although his two-
pronged analysis is an interesting way to approach the issue, it is not terribly useful.\(^\text{142}\) If there is procedural unfairness, but not unfairness in the exchange, there is no issue to address. In all likelihood, however, when there is substantive unfairness, procedural unfairness of some form is also nearby\(^\text{148}\) If so, there seems to be little need to fit it into an appropriate procedural pigeonhole.

To a great extent, Melvin Eisenberg takes this view in his important and thorough article, *The Bargain Principle and Its Limits*.\(^\text{144}\) Professor Eisenberg identifies a trend toward reacting to unfairness without regard to some sign of a procedural defect, but there remains a great deal of ambivalence toward responding solely to unfairness in the bargain.\(^\text{146}\) Thus, although the *Restatement (Second) of Contracts* discusses the "theoretical" possibility of such a response, it notes that "[o]rdinarily, an unconscionable contract involves other factors as well as overall imbalance."\(^\text{146}\) The *Restatement* suggests that unequal bargaining power accompanied by terms that are favorable to the stronger party may mean that "the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms."\(^\text{147}\)

This discomfort with responding directly to simple unfairness in the exchange ironically is exhibited in Professor Eisenberg's article itself. Although his thesis seems to state that courts are more ready than ever to dispense with the need for a procedural element of unconscionability, much of the article is devoted to the discussion of unconscionability categories that look remarkably like different versions of procedural unfairness.\(^\text{148}\) In this context he discusses four categories of cases in which the enforcement of bargains might be limited on the basis of unconscionability. The first category involves bargains made when one of the parties was

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142. See Eisenberg, *supra* note 14, at 754 (stating that "[t]he distinction between procedural and substantive unconscionability is too rigid to provide significant help").
143. See Richard J. Hunter, Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. Rev. 145, 169 (1992) ("[T]here will be few instances where a contract is so one-sided as to [be substantively unconscionable] absent some strong evidence of [procedural unconscionability].").
145. Id. at 752-54.
147. Id. § 208 cmt. d.
in distress and had little choice but to accept the offer made by the other party. Professor Eisenberg's second category involves "transactional incapacity" which seems to include those instances in which even people of average intelligence may not be capable of understanding the implications of complex bargains. The third category, "unfair persuasion," involves the "use of bargaining methods that seriously impair the free and competent exercise of judgment." The final category envisions "price ignorance" in which the price offered is taken as a kind of warranty that it is representative of the "prevailing price."

While I probably could squeeze any exchange that I would regard as unconscionable into one of Professor Eisenberg's categories, that exercise would be unnecessary, because even Professor Eisenberg does not view his list of categories as being all-inclusive. Instead, he states that "unconscionability is a paradigmatic concept that can never be exhaustively described." In addition, the critical element of Professor Eisenberg's methodology was to identify cases in which neither "fairness nor efficiency support the bargain principle's application." This, in large measure, is consistent with the analysis in the preceding two sections. If one's consent to the terms of a contract is the function of class-based injuries, it is hard to defend the bargain on either fairness or efficiency grounds.

I would deviate from the Eisenberg model in one important way—the classification of unconscionability cases is not only unnecessary but counterproductive. I am concerned about an approach in which the disadvantaged party is seen as a victim that

149. Id. at 754-63.
150. Id. at 763-73.
151. Id. at 773-74.
152. Id. at 778-85.
153. For example, although Professor Eisenberg's "unfair persuasion" category seems to involve methods used by advantage-taking parties, much of the problem discussed in this paper has to do with the possibility that some classes of people are more easily persuaded than others. This could be regarded as "unfair persuasion."
154. Eisenberg, supra note 14, at 754.
155. Id.
156. Both the fairness and efficiency elements of Pareto superiority are grounded in the idea that the parties have consented. When that consent is contingent on class-based injuries it is hard to defend the exchange from the standpoint of fairness or efficiency.
the law has more or less rescued. This suggests some element of subordination which, in a subtle way, cuts against the elevating and vindicating effects that are more productive. In order for routine use of unconscionability to have the effect I am suggesting, it is important to avoid the taxonomy of victims. More specifically, I think the therapeutic effects of more routine use of unconscionability would be undercut terribly if the party wishing to avoid the contract were required to prove that he truly was poor, passive, helpless, or lacked self-esteem.

I envision three basic distinctions between the use that I see for unconscionability and the way it is currently applied. First, the focus would be strictly on substantive fairness without any requirement that unconscionability have a procedural element. Thus, the sole question would be whether the exchange was fair. In the

157. Professor Lesnick states that the “radical” approach to greater use of unconscionability would involve recognition that the party “see himself as a victim of abuse, rather than as someone who has made a mess of things.” Lesnick, supra note 17, at 437. Certainly this is consistent with the view here that class stratification is maintained in part because those who are worse off believe they are responsible for their position. While I agree with Professor Lesnick, my point here is that an affirmative showing of one’s weakness in a judicial setting seems inconsistent with the proper type of consciousness-raising.

I realize that not requiring a party to prove his or her weakness would mean that the proposal would not limit the use of unconscionability to those who are from lower classes who have dealt with higher class advantage-takers. The fact that bargains between disadvantaged parties, between advantaged parties, and between parties from different classes in which the party from the lower class has somehow received the larger share of the gain from the exchange may be affected, does not seem to me to be very important. The bargains between individuals from the same class will have no distributive impact. Thus, it becomes an empirical question of whether the advantaged or disadvantaged segments of society will benefit more from an expanded application of unconscionability. My sense is that members of the class that is more often on the short end of the bargain will more often wish to avoid the contract.

158. I am sure the comparison is not entirely accurate and I have been unable to track down its origins, but I am reminded by Tomi Massaro of the shift from the phrase “rape victim” to “rape survivor.” See Massaro, supra note 23, at 2112.

terms of Professor Gordley’s article, *Equality in Exchange*, I would look to whether one party has been “enriched at the other’s expense.” No real investigation into procedural niceties is required here. The second variation would be that the “fairness of the exchange” be a question of fact. This cuts against the origins of unconscionability as an equitable doctrine, but should not prevent the adoption of a jury question approach. The objective is to evaluate the issue of fairness from a more general social norm, rather than from a judge’s possibly privileged perspective. Finally, any finding of substantive unconscionability should be accompanied by a form of public notice. In essence, the community should be notified of those individuals or firms that have been found to have acted “unconscionably” I will discuss the importance of this latter element when I return to the educative value of unconscionability in the following section.

B. The Educative Effect of Unconscionability

As I noted in the Introduction, my principal point is to suggest that the routine use of unconscionability may have the effect of altering the expectations that individuals have about the bargains they make and what they deserve in those bargains. This is not meant to imply that I personally do not favor the use of unconscionability strictly as a means of achieving equality My point is that if routine use of unconscionability had the desired effect of teaching the traditionally disadvantaged that they are as deserving as the relatively privileged, then the need for judicial intervention at all levels, which has as its goal the equalization of individuals in a material sense, could be greatly lessened. In effect, there is an immediate and short-run equalizing effect and, perhaps more important, a longer run “therapeutic” effect.


161. *Id.* at 1637.

162. Competitive market price and the seller’s cost would be evidence of the fairness of the exchange. *See* Eisenberg, *supra* note 14, at 749-50 (arguing that “[i]f the price was not set by a mechanism that is regarded as fair, such as a competitive market, it may not be unfair to revise it judicially”); Gordley, *supra* note 15, at 1613-14 (arguing that “a price that covers costs is both an ideal minimum and an ideal maximum because at that price the wealth of the parties remains constant”).
To some extent—and I cannot say exactly to what extent—my admittedly slight optimism that a generalized sense of equal self-esteem and entitlement could be achieved is fueled by the numerous examples of behavior indicating that individuals have, at some level, a consciousness about standards of fairness that exists apart from narrowly defined notions of self-interest. Whether leaving a tip at a restaurant on an interstate highway, donating to public television or a blood bank, or increasing one’s efforts to adjust for what would otherwise be excessive payment, the strong implication is that individuals, for whatever reason, seem to free-ride in far fewer instances than there are opportunities available. The implication is that even members of advantage-taking classes have the capacity to act altruistically and define their interests more broadly than those that are narrowly self-serving. It is even possible that this willingness not to always take advantage of the weakness of others is a trait that can be reinforced.

In its full-blown version, the possibility exists that individuals take advantage of their power vis-à-vis others as a defensive strategy because the assumption is that others are likely to be acting with the same selfish motives. If so, one could view a sense of compensatory justice requiring roughly equal exchanges as a type of public good—something that individuals desire but that few will act on, because unless everyone acts similarly, the objective cannot be met.

165. See Richard M. Titmuss, The Gift Relationship (1971) (studying the scientific, social, economic, and ethical implications of the procurement, processing, and distribution of human blood).
166. On the rationality of voting from the standpoint of individual self-interest, see Anthony Downs, An Economics Theory of Democracy (1957) (approaching the problem of democratic government from an economic standpoint); Margolis, supra note 164, at 92-95; Stephen G. Salkover, Who Knows Whether It’s Rational to Vote?, 90 ETHICS 203 (1980) (arguing that voting cannot be explained by either an economic (cost-benefit) analysis or a political (duty-bound) analysis, but can only be explained on a situational, case-by-case basis).
167. See Adams, supra note 18, at 284-85.
168. See Harrison, supra note 9, at 1338-51 (arguing that a person who makes a donation with the hope of receiving something has not performed an altruistic act).
169. This, of course, raises the familiar problem of the “prisoner’s dilemma.” See generally Robert Axelrod, The Evolution of Cooperation (1984) (utilizing a computer study of
Aside from these possibly fanciful hopes about human nature, there is substantial support for the belief that law can have the sort of preference-shaping effect that I am discussing. For example, in a recent article, Professor Kenneth Dau-Schmidt makes the crucial distinction, primarily in the context of criminal law, between "(1) shaping the individual's opportunities to give incentive for desired behavior, or (2) shaping the individual's preferences by increasing her taste for desired behavior." From the perspective of mental health law, Professors David Wexler and Bruce Winick have done path-breaking work dealing with "therapeutic jurisprudence." By therapeutic jurisprudence, they mean "the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences." More directly, to what extent can law have a healing effect?

It may seem odd to draw on scholarship from criminal law and mental health law in an argument for expanded use of unconscionability, but the matters discussed in this Article skirt the edges of both these fields. "Unconscionability" has a distinctly moral connotation. Furthermore, by suggesting that routine reliance on unconscionability may reshape the preferences of both the ad-

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the prisoner's dilemma as the point of departure for a discussion of the problem of cooperation given an underlying pursuit of self-interest); R. Duncan Luce & Howard Raiffa, Games and Decisions 88-113 (1957) (providing a discussion of two-person, non-zero-sum, non-cooperative games such as the prisoner's dilemma).

170. Dau-Schmidt, supra note 10.
171. Id. at 1. See generally John R. McKean & Robert R. Keller, The Shaping of Tastes, Pareto Efficiency and Economic Policy, 12 J. Behav. Econ. 23 (1983) (analyzing the treatment of tastes and attempts to incorporate tastes and preferences into welfare theory); Carl C. von Weizsäcker, Notes on Endogenous Change of Tastes, 3 J. Econ. Theory 345 (1971) (arguing that the variables about which economists are usually concerned are not flexible enough to cope with endogenously changing tastes).

172. Wexler & Winick, supra note 16.
173. Id. at ix.
174. See id. at 8 (citing Parham v. J.R., 442 U.S. 584 (1979), to illustrate implicit Supreme Court recognition of "therapeutic jurisprudence").
175. Even Professor Leff, who found little clarity in § 2-302 of the Uniform Commercial Code, which addresses unconscionability, noted that, "[i]f reading [§ 2-302] makes anything clear it is that reading [the] section alone makes nothing clear about 'unconscionability' except perhaps that it is pejorative." Leff, supra note 140, at 487 (citation omitted).
vantaged and disadvantaged, I am arguing that law can be used to repair some of the psychic harm caused by rigid class stratification.

In a transaction that a court determines to be unconscionable, especially if the identity of the unconscionable party is publicized, the unconscionable party is likely to feel shame and "a negative, downward change in self-concept" is likely to be triggered. Perhaps more important are the affirming and educative effects on the person who has not acted unconscionably. According to Professors Wexler and Winick, "the intensity and durability of a stigmatizing label can have major consequences for the labeled person." But they also note the importance of studying the reaction of "others" to the labeling. It is important to note that the affirming effects on individuals are quite different from finding that they were indeed victimized by the advantage-taker. The sense, especially in a transactional setting, is that one party "played by the rules," while the other party did not. This affirmation can have the generalized impact of affirming the total person and his personal sense of self-worth. Moreover, as far as the disadvantaged are concerned, to the extent that their diminished sense of entitlement is a function of low self-esteem and personality plasticity, the effect is in a very real sense a therapeutic or healing one. Here the wounds are what Sennett and Cobb, in their seminal work, call the "hidden injuries of class."

My proposals, especially for those who think in traditional economic ways, are not without some risk. There are two risks to con-

177. See Joshua Dressler, Understanding Criminal Law 8 (1987) (stating that the act of denouncing crime serves several important societal functions, including expression of anger and stigmatization of the offender); see also Johs Andenaes, General Prevention—Illusion or Reality?, 43 J. Crim. L. Criminology & Police Sci. 176, 179-80 (1952) (suggesting that a concrete expression of society's disapproval of an act creates conscious and unconscious inhibitions within the public against committing the act).
179. Id., cf. Laurence R. Iannaccone, Sacrifice and Stigma: Reducing Free-Riding in Cults, of Communes, and Other Collectives, 100 J. Pol. Econ. 271, 289-90 (1992) (discussing the use of nonproductive costs, such as painful initiation rites, to weed out potential free-riders in collective communities).
180. See supra notes 79-80 and accompanying text.
181. See supra notes 81-84 and accompanying text.
182. Sennett & Cobb, supra note 8.
sider. First, broader application of substantive unconscionability may dampen the incentives to improve for those who have made what turn out to be unfavorable exchanges. Second, the routine use of unconscionability is comparable to the use of price ceilings and may affect the poor disproportionately. In both cases, allowing individuals to escape lopsided bargains ultimately can make them worse off. To some extent, my points about the use of unconscionability as a preference-shaping tool can be illustrated by contrasting that view with the conventional economic objections to the use of unconscionability.

The first argument is that only by forcing those who are disadvantaged to live with their bargains can we provide them with the motivation to read the small print, to become better educated, and to assert themselves. If one subscribes to this argument, then he or she disagrees with the core elements of this Article. A person taking this view would have to believe that finding against those who have been disadvantaged actually has a motivating and uplifting effect. The counterargument, as suggested in the previous section, is that law teaches people about their value and what is regarded by society as just, and that people adapt their own beliefs to these teachings. Thus, the real impact of decisions that refuse to respond to advantage-taking is to make advantage-taking seem more legitimate to all affected. Empirical evidence strongly sug-

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183. See Epstein, supra note 100, at 305-15 (arguing that when substantive unconscionability is used it has the effect of undercutting the private contract which ends up causing more social harm than good); Schwartz, supra note 10, at 1057-63 (stating the proposition that when a contract provision that might be considered oppressive, such as a warranty disclaimer, is invalidated by the court, this produces an undesirable result because the poor may not be able to afford the required warranty).

184. One could view the matter as a unilateral mistake. In these instances, the general rule is that one is not excused from the contract unless enforcement would be unconscionable or the other party had reason to know of the mistake. Restatement (Second) of Contracts § 153 (1979). The basic law and economics view on unilateral mistake, as I understand it, is that excusing parties too frequently when they have made a "mistake" may reduce incentives to produce or acquire information. See Richard A. Posner, Economic Analysis of Law § 4.6 (4th ed. 1992) (arguing that rules requiring disclosure of information are inefficient and result in lessened incentives to acquire and use information). In the context of this Article, the argument would be that routine application of unconscionability would reduce the incentive to read small print and search for better terms. I am indebted to Dan Yeager for making the suggestion that this is an argument against the position I have taken in this Article.

185. See supra notes 118-25 and accompanying text.
gests that this would be especially true of the lower class and higher plasticity individuals. 186

For example, contrast a very narrow standard under which all bargains are enforced, no matter how uneven the division of the surplus, with a policy that routinely refuses to enforce bargains involving undue advantage-taking. Certainly the second policy would be more likely to teach both parties that they are of equal moral worth and that the law does not countenance advantage-taking. As the advantage-takers are delegitimized, the self-esteem and assertiveness of the less advantaged seems likely to grow. As it grows, they are less in need of judicial intervention.

The second line of argument, based on unconscionability as the imposition of price ceilings, fits nicely into the Williams v. Walker-Thomas Furniture Co. 187 fact pattern, but can be applied more generally. Those making the price ceiling argument foresee alternate scenarios. The first scenario is that the merchants are making money hand-over-fist and that this is good, because competing merchants will soon see the opportunities for profits by operating in that market and will enter the market, thereby forcing prices down.

The price ceiling will retard this entry. This scenario has a number of responses. First, it requires one to have tremendous faith in the market and believe that the firm will not engage in conduct that would delay or prevent entry of competitors. 188 In addition, one has to ignore the fact that monopolies, when faced with price ceilings, may find it profitable to increase output. Putting this possibility aside, is it necessary for some buyers to pay supracompetitive prices in order that others will have lower prices in the future? If an expansive definition of unconscionability is a form of price regulation and constitutes the setting of a price ceiling, then shortages will result, translating into long lines of consumers at the stores forced to charge prices that permit only a normal profit. According to economic theory, as long as new entrants can be assured of at least earning a normal profit, they will enter the market. In

186. See supra notes 81-84 and accompanying text.
187. 350 F.2d 445 (D.C. Cir. 1965). See supra note 100 (providing a description of this case).
188. Efforts to preserve monopoly power have been identified as one of the social costs of monopoly. Posner, supra note 184, at 279-80.
essence, waiting in line would provide the rationing that higher prices would provide under the typical regime. The point is that limiting the prices will not mean that there will not be new entrants and increases in sales.

In the second scenario the merchants in the high crime, high insurance rate, high credit risk neighborhoods are barely making a profit. If they are not permitted to charge prices for appliances that are greatly in excess of those charged at suburban discount stores or cannot routinely use add-on clauses on credit sales, they will be unable to operate and earn a normal profit. Eventually, they will leave the neighborhood and reduce the choices available to the consumers in the area. There are two responses to this scenario. The first is to ask whether the risks of default and even the risks of crime in the neighborhood are not themselves responses to the high prices and onerous credit terms of the sellers. Certainly, the lower one's payments the more likely he or she is to make them. And the type of resentment that can build when prices are high and the buyers have no choice can lead to frustration that results in a violent reaction. The point is that the impact of “price ceilings” on the risks faced by merchants is at least an empirical question.

The second, and more important, response requires one to recall that the willingness to pay the prices offered or accept certain credit terms can be a function of the buyers’ sense of entitlement. If this is true, and it is true that that sense of entitlement is shaped by the law’s persistence in enforcing these exchanges and its general tendency to reinforce class distinctions, is there really any harm if the law shifts and the store does leave the neighborhood?190

To see this in a different light, suppose a series of judicial opinions finding several bargains unconscionable forced merchants to adopt new policies that meant that they could not operate profitably in the neighborhood. Suppose further that the people who shopped at the stores understood that the prices and credit terms

189. A “normal” profit would be a return to investors sufficient to justify continued investment in the enterprise.
190. Admittedly, there will be short-run harm if consumers are denied access to necessities that are unavailable elsewhere. Presumably, prices that reflect the costs of supplying necessities would not be routinely regarded as unconscionable.
were regarded as exploitative and unenforceable. Critics of the expansion of unconscionability would suggest, because the customers are now denied a choice that once existed, that the stores' customers would be up in arms.\textsuperscript{191} The reasoning, in economic terms, would be that there were Pareto superior moves available to both buyers and sellers and the unconscionability rulings have now removed those opportunities. The problem with this argument is that it assumes that the preferences of the buyers with respect to their sense of compensatory justice is independent of the repeated findings that the prior exchanges were unconscionable.

Once the information is available that the merchants' departure was a result of what the public generally regarded as unfair dealings, it seems quite unlikely that the former customers would experience a sense of loss. In effect, the law would inform them that they deserved better and that their preferences with respect to the terms of exchanges would reflect that knowledge. Please note that the argument is not that the broader use of unconscionability has made people better off,\textsuperscript{192} but rather that whether they would feel worse off when these opportunities are eliminated is, at least, an empirical question. If they do not, it is foolish to say the use of unconscionability has actually made them worse off.

One final note may be in order on this last point. Some may say that the sort of "engineering" that I am proposing in order to convince the buyers that they really did not want those lopsided bargains in the first place, is unacceptable interference with their autonomy. This may be true. On the other hand, it is important to recall that their initial acceptance of bargains that would violate the sense of compensatory justice of those from higher classes is no less a product of "engineering." Consequently, the autonomy exercised in accepting those bargains cannot be defended as more legitimate or as a more accurate indicator of their true preferences.

\textsuperscript{191} See Schwartz, \textit{supra} note 10, at 1057-63 (providing an example of this type of thinking).

\textsuperscript{192} I do believe, however, that the long-term effects will be to improve the position of those who are worse off because they will value themselves more and will bring this valuation to their private orderings.
VII. Conclusion

In this Article, I have attempted to explore the mechanism through which inequality and class stratification are perpetuated. At one level, the stratification continues because individuals in their private orderings permit it to continue. Those who have less tend to agree to continue to take less. At this simplistic level, however, terms like “agree” and “consent” have only the thinnest of meanings.

Individuals who “consent” to uneven bargains are responding to a system in which they have been taught that they deserve less than others. Whether it is in the way the privileged have defined which inputs count in determining the rewards to which individuals are entitled or the tendency for individuals to assess their well-being by comparing themselves to those who are similarly deprived, those from the lower class sense that they have been treated justly even when they receive unequal treatment. They tend to blame themselves for their plight and they are easily convinced that it is a consequence of personal shortcomings instead of systemic bias.

The fact that individuals have adjusted their sense of compensatory justice so that it reflects the needs of class preservation raises two issues. First, if the terms, and to some extent the existence, of interclass contracts are contingent on class-based differences, is Pareto superiority a morally sound basis for enforcing contracts? Here the argument is made that, if lopsided exchanges only seem acceptable because individuals are accustomed to being deprived, there seems little moral basis for holding them to their contracts.

The second issue is whether contract law can be adapted as a preference-shaping and therapeutic tool in order to heal the “hidden injuries of class” that account for the apparent willingness of the disadvantaged to play their role in the cycle of exploitation. I have suggested that fuller development of substantive unconscionability with public notice of when parties have acted unconscionably may serve this end. The goal would be to educate and vindicate those who are traditionally disadvantaged so that they may adjust their sense of entitlement. Such an approach seems preferable to efforts to help those who are deprived in ways that only make them more dependent.