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ABSTRACT

Our economic system counts on markets to allocate most of our societal resources. The law often treats markets as discrete entities, with a native intelligence and structure that provides clear answers to questions about prices and terms. In reality, of course, markets are much messier—they are agglomerations of negotiations by individual parties. Despite theoretical and empirical work on markets and on negotiation, legal scholars have largely overlooked the connection between the two areas in considering how markets are constructed and regulated.

This Article brings together scholarship in law, economics, sociology, and psychology to better understand the role that negotiation plays in different types of marketplaces. Establishing the concept of negotiation variance, we create a preliminary taxonomy of factors that shape such variance and examine the differences between markets in the effects that negotiation can have on transactions. In markets with high negotiation variance, parties can use their negotiation effectiveness to get much better deals. Although the law has not generally recognized negotiation's role in markets explicitly, judges and policymakers have at times taken negotiation variance into account implicitly, making exceptions to standard doctrines to accommodate unbalanced outcomes. The Article examines the doctrines of common-law contract that reflect an understanding of negotiation's impact, as well as exploring three particular markets where high variance negotiation has a significant role: lawsuit settlements, corporate control, and employment. These examples show how the law takes negotiation variance into account and illustrates the challenges in developing a response to individual negotiation differences across markets.

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INTRODUCTION

Negotiation—the essence of capitalism. There's nothing like it.[1]

Markets are the engine of our economy. Rather than distributing goods through a command-and-control system, we rely on markets to direct property, goods, and services to their most efficient use. Although the superiority of markets as distribution devices was at one time the subject of intellectual debate,[2] today markets are so ingrained in our system that they are almost invisible. And their domain continues to grow—more and more items that were thought as personal, private, or not fit for markets are now coming under their aegis.[3]

The market is also ubiquitous in legal scholarship. The basic law and economics models are premised on the notion that markets are the best way of facilitating the exchange of goods and services to achieve the highest level of societal efficiency. However, the idea of "the market" is often discussed as a monolithic entity—something of a black box. As long as certain assumptions hold, such as perfect information, rational actors, and zero transaction costs, the parties will put their potential transaction into the "market," and the market will in turn determine the appropriate price and terms for the exchange.[4] But the market is not an entity in and of itself; it is instead a set of transactions between different parties with respect to particular goods or services. The market price is simply the average of the prices—or even the latest price that one party has decided to pay the other.[5] And that price is arrived at through negotiation.

This Article interrogates the idea of the market as a "black box" by thinking more deeply about markets as negotiations. It examines how markets are structured and how negotiations play the central role in the working of the market. It also examines how law plays a role in shaping those negotiations, for better or worse.[6] Along with common-law contract law's treatment of negotiation, we also look at specific examples of market

1 *30 Rock: Hard Ball* (NBC television broadcast Feb. 22, 2007) (Jack Donaghy).

2 *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526, 529 n.1 (1945).

3 *See* Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (May 11–12, 1998), *in* 21 THE TANNER LECTURES ON HUMAN VALUES 89, 93 (Grethe B. Peterson ed., 2000), https://tannerlectures.utah.edu/_documents/a-to-z/s/sandel00.pdf; Kim Krawiec, *Kidneys Without Money*, 175 J. INST. & THEORETICAL ECON. 4, 5 (2019).

4 PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 160 (19th ed. 2010).

5 *Cf.* Comm'r of Corps. & Tax'n v. Worcester Cnty. Tr. Co., 26 N.E.2d 305, 307 (Mass. 1940) (defining market price as "the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market").

6 *See, e.g.*, Saul Levmore & Frank Fagan, *The End of Bargaining in the Digital Age*, 103 CORNELL L. REV. 1469, 1470 (2018) ("Bargaining can be inefficient as well as costly, and it is outdated. Law can improve efficiency and lower costs by reducing the bargaining power of professional, well-informed parties.").

construction through negotiation rules: the market for legal settlements, the market for corporate control, and the market for labor. In these examples, we discuss the effects of negotiation variance in these markets and whether the law has taken this variance into account.

Part I explores the structure of markets within our economy, and the legal system's role in constructing markets. Part II highlights the ways in which some markets are merely amalgamations of individual negotiations, and then explores more deeply the factors that impact negotiation, focusing largely but not exclusively on negotiation effectiveness. This section examines the contours of negotiation skill and its distinct nature as compared to the law and economics model of the market, such as rationality and information asymmetry. Part III provides an initial taxonomy of negotiation variance within markets to determine which types of markets allow for significant negotiation effects. Finally, Part IV discusses the role of negotiation in contract law generally, as well as three particular markets: the market for legal settlements, the market for corporate control, and the labor market. It teases out the importance of negotiation to each of these markets and discusses how negotiation variance may play a role in shaping transactions. Ultimately, we must acknowledge and understand the role of negotiation in order to manage its effects and redress the imbalances it can cause.

I. MARKETS AND THE LAW

Our economic system of distribution and exchange is based primarily on the concept of markets. This section explores what markets do, how they work, and how law shapes their structure and processes.

A. What Markets Do

Markets have a variety of definitions, depending on the purpose of the characterization and the methodology used in developing it. The earliest conception of a market was a physical place where commercial exchange took place.[7] But over time the "marketplace" evolved from a location to an understanding of the transactions that took place within that space.[8] A

7 Richard Swedberg, *Max Weber's Central Text in Economic Sociology*, in THE SOCIOLOGY OF ECONOMIC LIFE 62, 70 (Mark Granovetter & Richard Swedberg eds., 3d ed. 2011) ("In describing the market, [Max] Weber says that the most obvious type of market is the one that can be found in one specific place."); Rudolph J.R. Peritz, *Some Realism About Economic Power in a Time of Sectorial Change*, 66 ANTITRUST L.J. 247, 252 (1997) ("There was a time when market identified a physical location—a place for exchange in relative safety from violent forms of acquisition, such as plunder.").

8 Peritz, *supra* note 7, at 252 ("Later, market came to represent a functional logic, a form of exchange, regardless of physical location. Most recently, market has reflected an abstract idea, an institutional framework whose shifting elements emerge from a series of normative judgments.").

market could be described simply as a set of transactions that can be coherently aggregated together.[9] In the abstract, the concept has intuitive meaning, at least for those who have participated in a variety of markets.[10] But the concept can be used to describe the basic phenomena from multiple different angles. A market is both a set of buyers and sellers for a particular good, service, or property right, as well as the series of exchanges between these buyers and sellers involving these goods, services, or rights.[11] The term also describes the legal, social, and economic structures that facilitate those exchanges.[12] A particular market can be defined by the types of goods or services it covers, or in terms of geography, time, or kinds of participants. It may encompass an entire economy, or be limited to one specific good.

The key to a market is the transaction: the exchange of one thing for another. Markets allow for the exchange of goods, services, and other things of value between parties.[13] Because the nature of trade is to exchange nonsimilar items, there is a commensurability problem: the parties must judge whether the one item (or set of items) should be traded for the other. For this reason, most markets operate not on a barter system, but on a sales system in which money is exchanged for a good or service.[14] Money addresses the commensurability problem by creating a common unit of

9 More abstractly, a market is the potential for those transactions. JOHN MCMILLAN, REINVENTING THE BAZAAR: A NATURAL HISTORY OF MARKETS 5 (2002) (proposing that a market for an item exists if there are people interested in buying and others interested in selling it).

10 *But see* Pierre Schlag, *Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 216 (2013) (decrying "the lack of any robust theoretical conception of the market in neoclassical economics").

11 RICHARD G. LIPSEY, PETER O. STEINER & DOUGLAS D. PURVIS, ECONOMICS 216 (7th ed. 1984) ("From the point of view of a household, the market consists of those firms from which it can buy a well-defined product; from the point of view of a firm, the market consists of those buyers to whom it can sell a well-defined product."); Carol Sanger, *Developing Markets in Baby-Making*: In the Matter of Baby M, 30 HARV. J.L. & GENDER 67, 71 (2007) (noting that markets require a "mix of background conditions" including buyers and sellers).

12 Christian Turner, *The Segregation of Markets*, 7 TEX. A&M L. REV. 299, 300–01 (2020) ("Indeed, when we casually use the word 'market,' we do so to describe not the totality of the attributes and activities of its participants but the mechanisms for their cooperation regarding these decisions.").

13 R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 7 (1988) ("Markets are institutions that exist to facilitate exchange, that is, they exist in order to reduce the cost of carrying out exchange transactions.").

14 Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 VAND. L. REV. 1747, 1759 (1998) ("[M]arket choices are mediated through money, making commensurability much easier. We do not have problems of 'comparing apples and oranges' in many market transactions because the choices almost always involve the purchaser's surrendering money. Because the purchaser knows or could learn the market price of other goods and services or can compute an opportunity cost, he can make a fairly accurate estimate of the comparative worth of very different courses of action . . . .").

exchange that can be applied in a variety of contexts.[15] This common unit of exchange also allows for the development of a common numerical value—a price—that indicates the amount of commensurable value necessary for the exchange to take place. To the extent that comparable things of value have been sold within a certain period of time, there may be said to be a "market price" for hypothetical sales of similar things.[16]

Markets are thus a way of distributing the resources of a society to various participants in that society.[17] They are contrasted with other systems of distribution, such as economic firms, government fiat, or tribal partitioning.[18] As Friedrich Hayek argued in *The Use of Knowledge in Society*, "[I]n a system where the knowledge of the relevant facts is dispersed among many people, prices can act to coördinate the separate actions of different people in the same way as subjective values help the individual to coördinate the parts of his plan."[19] Because each individual buyer and seller in the market will look to match price against their expected utility, transactions will only take place if both parties think they will be better off for it. In this way exchanges are guaranteed, in theory, to be Pareto efficient; both sides expect to increase their utility as a result of the transaction.[20] Because individuals would not contract otherwise, the price will aggregate Pareto-efficient transactions and will facilitate the appropriate distribution of precious resources.[21]

This system of voluntary exchange forms the cornerstone of modern economic theory. The ever-familiar graph of supply and demand curves illustrates the equilibrium point at which a buyer's demand for a particular

15 *Id.* Money does not have to be commensurable across all values in order for markets to work; it only needs to be commensurable within the market. Incommensurability may mean, however, that the particular item of value should not be distributed via a market. *See* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 70 (1997) (arguing that "human goods are not commensurable" across the board).

16 *Cf.* James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1609–12 (1981) (discussing the role of "just price" in contractual formation).

17 *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962) (stating that there are "two ways of co-ordinating the economic activities of millions"—"central direction involving the use of coercion" and "voluntary co-operation of individuals—the technique of the market place").

18 *See* Eckehard F. Rosenbaum, *What Is a Market? On the Methodology of a Contested Concept*, 58 REV. SOC. ECON. 455, 458 (2000) (developing "a definition that makes it possible to identify markets empirically against the background of rival social forms such as firms, central planning or occasional exchange transactions").

19 Hayek, *supra* note 2, at 526.

20 *See* Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265, 265 (1954) (offering an economic proof of this idea). However, certain conditions—to be discussed in Part I.B—must be met for the market to reach this result.

21 *See* Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 540 (2007) ("In our society, we generally answer 'how much' questions through the free market. According to standard neoclassical economic theory, by aggregating individual preferences through innumerable voluntary exchanges, the 'invisible hand' of the free market produces economically 'efficient' levels of consumer goods and services.").

good will intersect with the seller's supply.[22] The maximizing behavior of both sellers and buyers will result in a stable equilibrium, if conditions hold.[23] And this equilibrium results in a maximization of social utility.[24] Market equilibrium ensures not only that the appropriate amount of a particular resource is produced,[25] but also that the good is optimally distributed to individuals within that society.[26] Under mainstream economic principles, markets provide the best method for engaging the productive capacity of the nation and distributing the nation's resources to its inhabitants.[27]

Of course, this is economic theory. In real life, almost every market fails to meet these required conditions for the efficient market hypothesis to hold true; these conditions are idealized and are never met in totality. Concern over the failure of reality to meet theoretical specifications has driven much of the law and economics scholarship of the last half century. The Coase Theorem, which initially may seem to counsel that parties will always bargain for an efficient result no matter the existing legal rule, is actually an explanation of why transaction costs will prevent this from happening.[28] Even if parties would bargain to reach the best result in a frictionless world, the world has a lot of friction. Coase set out this description of transaction costs:

> In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.[29]

These costs can be so significant, thought Coase, that certain transactions are removed from the market. Instead of allocating labor within a firm through a market, the firm's organizational hierarchy assigns the employee to a

22 ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 11 (3d ed. 2000) ("[T]here is no habit of thought so deeply ingrained among economists as the urge to characterize each social phenomenon as an *equilibrium* in the interaction of maximizing actors.").

23 *Id.*; *see also* Sinden, *supra* note 21, at 541 ("[U]nder perfect conditions, the market will reach an equilibrium point of Pareto efficiency—that is, a point at which there is no alternative state of affairs that would be a Pareto improvement.").

24 SAMUELSON & NORDHAUS, *supra* note 4, at 160-62.

25 Sinden, *supra* note 21, at 542 (discussing productive efficiency).

26 *Id.* at 542–43 (discussing allocative efficiency); *see also* Darren Bush, *The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1113 (2000) ("[T]he perfectly competitive market is said to be allocatively efficient.").

27 *See* Bush, *supra* note 26, at 1114 ("The result of this rational, self-interested behavior is a situation in which resources are allocated to their best possible use, goods are produced at their lowest possible cost, and innovations diffuse at their fastest possible rate.").

28 R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–17 (1960).

29 *Id.* at 15.

particular set of tasks. As Coase wrote: "If a workman moves from department *Y* to department *X*, he does not go because of a change in relative prices, but because he is ordered to do so."[30] The choice to manage economic choices through a firm or through a market was, for Coase, dependent on which choice made more sense when transaction costs were taken into account.

Even putting aside these perfect-market assumptions, however, market economies have been famously criticized on their own terms. Basing a system of distribution on willingness and ability to pay raises significant problem of commensurability, as markets commodify their resources into a system of monetary exchange.[31] All market systems have some transactions which are deemed off-limits—the resources are considered too dangerous (as in drugs), too intimate (as in sex), or too valuable to individual life (as in organ transplants) to be bought and sold. Distribution through markets also raises concerns about the distribution of wealth, as the rich can pay much more for an item than can the poor, regardless of underlying utility, resulting in dramatic distortions in distribution.[32] Additional critiques include the potential for individuals to be mistaken about their actual welfare,[33] as well as the Marxist view on the inherent class struggle in any capitalist system.[34]

Whether markets are appropriate mechanisms to distribute resources within a society is not a question that this Article intends to address. Rather, assuming an economic system premised to a significant extent on markets, we ask: what is the role that negotiation plays within markets? To do this, we look more closely at how markets generally operate to distribute goods, services, and other things of value.

B. How Markets Work

The purpose of markets is to distribute things of value among members of a society. Markets are mechanisms to insure the "best" allocation of

30 R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 387 (1937); *see also* Coase, *supra* note 28, at 16 ("As I explained many years ago, the firm represents such an alternative to organising production through market transactions.").

31 SUNSTEIN, *supra* note 15, at 80 ("Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized."); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1987) ("[T]he characteristic rhetoric of economic analysis is morally wrong when it is put forward as the sole discourse of human life.").

32 *See* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 425–30 (1981).

33 *See* Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105, 1105, 1116 (2000); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 575 (1982).

34 Karl Marx & Friedrich Engels, MANIFESTO OF THE COMMUNIST PARTY (1848), *reprinted in* THE MARX-ENGELS READER 473, 473 (Robert C. Tucker ed., 2d ed. 1978).

resources when those resources are scarce and must be divided in some way. The most famous metaphor for the market's work is Adam Smith's "invisible hand."[35] Smith argued that the force behind the hand is individual self-interest, and that self-interest will lead to market transactions that will make society better off.[36] The power of Smith's metaphor is that it conjures a benevolent guide for individuals within the economy while at the same time providing for individual freedom.

How, exactly, does this invisible hand work? The genius of markets—the big, messy, crazy genius—is the myriad of individual, uncoordinated transactions that create it. Even if there seems to be a coherent intelligence leading the market to a specific result, markets only truly work if there is the absence of such a force. Each transaction must be made by the individual parties on the merits, based on their judgment and circumstances, in order for the market to function.[37] As Smith acknowledged, the messiness was a critical feature: "It is adjusted, however, not by any accurate measure, but by the higgling and bargaining of the market, according to that sort of rough equality which, though not exact, is sufficient for carrying on the business of common life."[38]

For this vast gaggle of transactions to agglomerate into a market, we need more than simply the transactions themselves. Looking more fundamentally, there must generally be a system of property which allows one person or entity to "own" a good or service that can then be sold to another.[39] If the person has no ownership rights over the thing in question—say, for example, a private sale of the Brooklyn Bridge—then there could be no market distribution of that item. Relatedly, a market requires that the things being exchanged are alienable—transferable from one to another. If an item is inalienable—either through physical impossibility, or the law, or overriding social norms—then any purported market will ultimately not

35 ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 304 (1759) (Liberty Classics 1976) ("The rich . . . are led by an invisible hand to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants; and thus, without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.").

36 *See, e.g.*, James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 RUTGERS L. REV. 1085, 1093 n.15 (1995) ("Adam Smith's hypothesis was that the *laissez-faire* approach was the best way of allowing capitalism to prosper and that the theoretical 'invisible hand,' or rather the forces of competition, would guide the marketplace, allowing for efficient allocation of resources.").

37 E. ALLAN FARNSWORTH, CONTRACTS § 1.2, at 6 (4th ed. 2004) ("Each party to an exchange seeks to maximize its own economic advantage on terms tolerable to the other party.").

38 ADAM SMITH, THE WEALTH OF NATIONS 77 (P.F. Collier & Son, 1902) (1776).

39 *But see* NATHAN B. OMAN, THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW16 (2016) (arguing that "markets can exist in the absence of formal legal rules").

result in lasting transfers.[40] If these basics are in place such that one entity can provide one thing to another, in exchange for something else of value, then a market can be said to exist.

Ownership rights in alienable goods are necessary but not sufficient for a functional market. When we think of markets in our economy, we imagine a more robust set of exchanges between a variety of parties in all manner of goods, services, property rights, and other things of value.[41] In order to facilitate those exchanges, markets generally have additional characteristics. Markets usually rely on a medium of exchange such as currency to facilitate the transaction through the creation of a price. Market rules are enforced through law, social practices, and/or the threat of violence.[42] And there is some avenue for redress if those rules are broken, either through law or private dispute resolution.[43]

In economic theory, markets operate to provide maximal efficiency in the distribution of goods, services, and property rights. The suppliers in the market will meet up and trade with the buyers on the market at the price which works best for both parties—the equilibrium price. This price will reflect the value that best matches buyers and sellers for that particular good at that particular time. For this equilibrium to occur dependably for every transaction, a number of conditions must be met. Those conditions are generally characterized within economics as: both parties are rational actors; both parties have perfect information; neither party has significant market power; there are no significant and unaccounted-for externalities imposed on third parties; and there are no transaction costs.[44] If these conditions are met, this perfectly competitive market will reach an equilibrium point of Pareto efficiency—that is, a point at which there is no alternative state of affairs that would make both parties better off. This, in turn, will lead to overall societal efficiency.

No market meets these exacting and theoretical specifications; moreover, each specification has spawned a rich academic literature on the difficulties caused by the failure of the condition. Behavioral economics and social psychology have challenged the premise that individuals transact on a purely rational basis.[45] The problem of faulty information flows has been

40 *See* Radin, *supra* note 31, at 1850.

41 FARNSWORTH, *supra* note 37, § 1.2, at 6 ("In a market economy, the terms of such direct bilateral exchanges are arrived at voluntarily by the parties themselves through this process of bargaining.").

42 *See* OMAN, *supra* note 39, at 16 (arguing that "markets can exist in the absence of formal legal rules"). *But see* SUNSTEIN, *supra* note 15, at 5.

43 OMAN, *supra* note 39, at 34–35 (noting that extra-legal markets have some mechanism for enforcing agreements, even if an extended period of time is necessary).

44 SAMUELSON & NORDHAUS, *supra* note 4, at 160.

45 *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979).

well-documented and studied in a variety of contexts and markets, along with potential remedies such as disclosure regimes.[46] The field of antitrust is centered around the problem of overbearing market power.[47] The economic literature recognizes negative externalities such as pollution as well as positive externalities such as education.[48] And transaction costs have been central in organizational economics and corporate law, particularly in the form of agency costs.[49] These imperfections have been fairly well-chronicled by important scholars in economics, law, and the wider social sciences. While academics have intensively studied various market challenges like monopoly power and disparate information, however, negotiation has been relatively neglected.

This neglect stems from the underappreciated nature of markets as transactions—markets as negotiations.[50] Individual transactions form the basis for markets. The relationships between these transactions are what move a collection of individual bargains into a market. One aspect of the relationship is competition, which is an integral aspect of markets. Sellers compete with each other for sales, as do buyers; each individual is trying to get the best deal while ensuring that the transaction takes place. The resulting jockeying for position leads the market to equilibrium. Max Weber, for example, said: "A market may be said to exist wherever there is competition, even if only unilateral, for opportunities of exchange among a plurality of potential parties."[51] Weber noted that markets facilitated exchange, which required a "compromise of interests [between] the parties," but also highlighted the role that competition—namely, a struggle or "haggling" between the parties—plays as well.[52]

Our paper unearths the role of individual negotiating style, skills, and method—what we will label "negotiation effectiveness"—for the law and economics literature on transactions. Just as some markets suffer from higher information barriers than others, and other markets are more prone to

46 George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970). On the potential remedy of mandated disclosure, see, for example, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 1, 10 (2014).

47 *See* FRIEDMAN, *supra* note 17, at 14 (noting that monopoly "inhibits effective freedom by denying individuals alternatives to the particular exchange").

48 A.C. PIGOU, THE ECONOMICS OF WELFARE 779–81 (1920); Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL'Y 303, 303 (1973).

49 ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 68 (1933); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976).

50 *See* OMAN, *supra* note 39, at 76 ("The economic analysis of law conceptualizes the cost of bargaining as a waste of resources to be eliminated whenever possible. Taken to its logical extreme, such a stance is deeply hostile to market processes.").

51 MAX WEBER, ECONOMY AND SOCIETY 635 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Bedminster Press 1968).

52 *Id.* at 38, 72.

concentrated power, some markets are more susceptible to the ways in which the parties negotiate. Negotiated transactions are how markets work, and the parties' approaches to negotiation thereby play a role in the market.

Up to this point, only a few scholars have identified this gap in the literature. Saul Levmore and Frank Fagan have noted the absence of negotiation analysis in the legal regulation of markets and have proposed efforts to reduce its role in most transactions.[53] Albert Choi and George Triantis consider the role of bargaining power on contract design, offering a perspective on how bargaining power intersects with market theory to impact contract terms.[54] In their analysis, they suggest that bargaining power comprises five factors: demand and supply conditions, market concentration, private information, patience and risk aversion, and finally, negotiating skills and strategy.[55] Yet with respect to the negotiation skills, they simply conclude that "skills are the subject of many books on negotiation and we do not attempt to summarize them here."[56]

Structural features of power in negotiation can be undermined and frustrated by effective negotiation strategy and tactics, as well as lack thereof; features of a negotiation related to skill and ability are distinctly different and should be taken seriously by scholars outside the field of negotiation. Before moving more directly into our examination of negotiation in markets, we first turn to the role of law in constructing markets.

C. The Construction and Regulation of Markets Through Law

There is a debate among scholars about the role of law in creating markets. In theory, a market can spring up in the absence of law. Trading has taken place in the absence of legal systems for millennia, as there is even evidence of the earliest species of humans engaging in exchange.[57] However, markets have always depended on some system of understandings,

53 Levmore & Fagan, *supra* note 6, at 1471 n.1 ("Economists recognize the waste in search costs by consumers, but no one has come to grips with what this means for law.").

54 Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1667 (2012).

55 *Id.* at 1675.

56 *Id.* at 1677.

57 *See* OMAN, *supra* note 39, at 24.

protections, and methods of enforcement.[58] Those rules—in our modern age—are best characterized as law.[59]

Law has several constitutive roles in the creation of markets. Property rights endow rights holders with the ability to transact over particular items, whether they be goods, services, real estate, or ideas. The monetary system provides a uniform currency for the conduct of trade and for the establishment of a common price. Criminal law and tort law protect property rights by outlawing theft, trespass, nuisance, and destruction of property. And the law of the transaction is contract law.

Contracts are defined by the process of exchange. As defined by the *Restatement (Second) of Contracts*, "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."[60] There is a robust debate within the literature of contract law over whether contract theory is rooted in the idea of promise or the idea of exchange.[61] But the law has not followed the enforcement of promises based on moral obligation.[62] Instead, contract law remains rooted in exchange.[63]

Contractual bargains are covered by a vast array of cases, statutes, regulations, ordinances, and other instantiations of law categorized under the broad heading of "contract law." The foundational premises for exchange are set forth by the common law of contract, carried over from England.[64] Common-law contract establishes the legal definition of a contract, which

58 To take one example from Oman's book, ancient Carthaginian traders would sail down the coast of Africa and lay their goods on beaches for locals to examine. They would then withdraw to their ships. The Africans would lay ivory and gold next to the items, and then withdraw themselves. If the trade was suitable to the Carthaginians, they would take the offered items and leave; if not, they would take back their own items and leave. Although this trading happened in the absence of law, there were obvious methods of enforcement by both parties if one side tried to steal the other side's goods without making a payment. *Id.* at 34–35.

59 SUNSTEIN, *supra* note 15, at 5 (stating that "[f]ree markets depend for their existence on law" because law creates private property rights and the rules of contracting).

60 RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. L. INST. 1981).

61 *Compare* CHARLES FRIED, CONTRACT AS PROMISE 1–2 (2d ed. 2015) (rooting contractual obligation in the rights of individuals to bind themselves to future courses of action), *with* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (describing the concept of efficient breach).

62 *See* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709–10 (2007) ("For instance, the moral rules of promise typically require that one keep a unilateral promise, even if nothing is received in exchange. By contrast, contract law only regards as enforceable promises that are exchanged for something or on which the promisee has reasonably relied to her detriment.").

63 O.W. HOLMES, JR., THE COMMON LAW 293–94 (1881) ("The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.").

64 *See* RICHARD E. SPEIDEL & IAN AYRES, STUDIES IN CONTRACT LAW 5 (6th ed. 2003) ("The mainstream of our law is that which evolved within the English common law tradition, encompassing mainly the decisions of common law courts . . . .").

requires a bargained-for exchange in which both sides exchange something of value.[65] The common law also establishes the other rules for contracting: the interpretation of agreements,[66] the defenses to contractual enforcement,[67] and the remedies provided for contractual breach.[68] This body of contractual common law—specific to every state, but shared as a matter of intellectual enterprise—governs transactions from beginning to end.

Along with the common law, innumerable other federal, state, and local provisions make up the rules of exchange. Statutory and regulatory provisions place additional requirements on market transactions specific to certain industries, types of transactions, or characteristics of the parties. Just to provide a few examples: securities regulations have very specific provisions regarding the sale of corporate stock;[69] drug laws require testing, disclosures, and physician prescriptions for medicines and medical devices;[70] and state and federal licensing prohibits the sales of certain services, such as hair cutting and lawyering, without certification of the seller's competency.[71] Every possible market, it would seem, has a set of legal standards that apply specifically to that market and develop additional expectations for the parties that participate in that market.

The role of law can vary significantly between markets: some are tightly regulated, while others have a fairly loose set of legal specifications. The lowest common denominator of law will be the common law of contract, unless statutorily erased; the highest common denominator depends on overlapping statutory, regulatory, and international regimes. Obviously, a comprehensive canvass across all markets would be impossible. But as we will develop further, the law generally touches on but does not specifically address or circumscribe the role of negotiation within most markets.

65 RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (AM. L. INST. 1981) ("To constitute consideration, a performance or a return promise must be bargained for.").

66 *See* FARNSWORTH, *supra* note 37, § 7.1, at 413–14 (noting that contract interpretation represents a substantial portion of contractual disputes and a significant body of law).

67 *See* MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 67 (4th ed. 2001) ("[T]he law has traditionally regarded contracts as void or voidable if made by persons lacking legal capacity, including 'infants' (generally, persons under [eighteen]), drunks and the mentally ill, or if entered into under conditions of duress, or if induced by fraud or misrepresentation.").

68 RESTATEMENT (SECOND) OF CONTRACTS §§ 344–77 (AM. L. INST. 1981).

69 *See* RICHARD W. JENNINGS, HAROLD MARSH, JR., JOHN C. COFFEE, JR. & JOEL SELIGMAN, SECURITIES REGULATION 99–110 (8th ed. 1998) (providing overview).

70 *See, e.g.*, PHILIP J. HILTS, PROTECTING AMERICA'S HEALTH: THE FDA, BUSINESS, AND ONE HUNDRED YEARS OF REGULATION 239, 270–71 (2003); *The History of FDA's Fight for Consumer Protection and Public Health*, FDA, https://www.fda.gov/about-fda/history-fdas-fight-consumer-protection-and-public-health (last visited Oct. 1, 2020).

71 For a critique of occupational and business licensing, see DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & JOHN K. ROSS, INST. FOR JUST., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 6 (2012).

II. THE THEORY OF NEGOTIATION IN MARKETS

A. Negotiation and the Market

Many commonplace sales of goods and services rely on negotiation: most retail car sales and home sales happen after some degree of negotiation between the seller and the buyer,[72] and many employment contracts are negotiated as well.[73] Similarly, the individual terms of legal settlements are negotiated between lawyers.[74] Yet for all of these settings, one can (and people often do) speak of market prices. There is undeniably a housing market, a car market, a job market, and even a market for legal claims. These markets are neither monolithic fortresses nor sets of outcomes produced by cold, passionless algorithm. Rather, they are markets that are made up of an aggregation of individual, negotiated transactions. Each of these markets has unique features that help to illuminate the chimerical nature of "market price," which may be nothing more than the outcome of the most recent or prominent negotiated transaction between similarly situated parties.

Consider the market price for a house. If a neighbor recently sold her house, and was a terrifically skilled negotiator, should her fantastic outcome serve as a benchmark for the next house on the street? If a neighbor was relocated suddenly, should a quick sale at a loss stand as the market price for the rest of the block? Market price in this context may be conceptualized as the latest relevant sale, or it might be wiser to consider, as many real estate agents do, an average of all recent transactions so that one could arrive at a price-per-square-foot figure.[75] Nonetheless, even in the latter case, one can see that the "market price" is merely an amalgamation of negotiated

72 Stephen R. Barley, *Why the Internet Makes Buying a Car Less Loathsome: How Technologies Change Role Relation*s, 1 ACAD. OF MGMT. DISCOVERIES 5, 10 (2015) ("Whereas Americans readily pay the asking price for most goods, they expect to negotiate when purchasing a car."); Yuen Leng Chow, Isa E. Hafalir & Abdullah Yavas, *Auction Versus Negotiated Sale: Evidence from Real Estate Sales*, 43 REAL EST. ECON. 432, 432 (2015) ("[T]he dominant selling mechanism for real estate is through brokered or negotiated sales.").

73 Popular books touting skills for job negotiations abound. *See, e.g.*, PETER J. GOODMAN, WIN-WIN CAREER NEGOTIATIONS: ALL YOU NEED TO KNOW ABOUT NEGOTIATING YOUR EMPLOYMENT AGREEMENT (2001); TERRI R KURTZBERG & CHARLES E. NAQUIN, THE ESSENTIALS OF JOB NEGOTIATIONS: PROVEN STRATEGIES FOR GETTING WHAT YOU WANT (2011).

74 *See, e.g.*, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994). Certainly, not all transactions in the marketplace rely on explicit negotiation. For example, when customers buy products such as groceries or gasoline, they are rarely engaged in negotiation. While there may be negotiation at the outside edges of some of these basic consumer transactions, by and large the critical negotiations that yield the relevant prices are conducted outside the influence of the everyday customer.

75 Margaret Heidenry, *What Is the Average Price per Square Foot for a Home—and Why Does It Matter?*, REALTOR.COM (Aug. 21, 2019), https://www.realtor.com/advice/buy/average-price-per-square-foot-for-a-home/.

transactions in the market. The averaging of the outcomes ought theoretically to flatten the effects of any one terrifically skilled or unskilled negotiator on either side, unless there is systematic disparity in negotiation behavior or expertise by one side or the other.[76]

Given the interconnections between negotiated outcomes and market prices, how do the two groups of scholars consider each other and their connection? Interestingly, the answer is that the groups rarely intersect with one another beyond the superficial. From the negotiation side, markets come into play mostly to provide a set of benchmarks for a particular transaction. Roger Fisher and William Ury specifically highlight market price as one of the suggested possible "objective criteria" in the seminal negotiation book *Getting to Yes*.[77] Fisher and Ury suggest that market price can be an important tool in being an effective negotiator; one powerful tactic can be to rely on market price to provide an external benchmark supporting one's demands.[78] Yet when one considers more closely what the idea of a market price is, the picture becomes more complex. If market price dictates outcome, but past outcome dictates market price, where does that leave the current negotiator but at the whim of the past negotiators' behavior?

Negotiation theorists often connect in this instrumental way to the idea of the market—how market price or market features can impact the negotiation and an individual's negotiation strategy—but rarely seem to consider the broader implications of negotiations that rely on market pricing. Perhaps this is because using market price as an objective criterion is the sole way that most negotiation scholars think about markets. Similarly disengaged, in turn, it is the rare market theorist who pauses to consider the express role of negotiation behavior on market pricing.[79]

This is notable because negotiation theory and market theory in some ways consider the same situation: what will the end price for a good or service be? In thinking about a particular transaction, market theory suggests that rational economic actors will reach some type of equilibrium in pricing. This equilibrium will be the market price and it in turn will eliminate much of the struggle between both these and future parties over the division of surplus. In contrast, negotiation literature often conceptualizes the negotiation process as a struggle over competing reservation prices, which are in turn set by potentially vastly different "best alternatives to a negotiated

76 Some markets are likely to exhibit exactly such a disparity, of course. Consider the dread that many individuals feel when they are faced with a negotiation to buy a car. This is often because of a perception that car salesmen are excellent at employing effective negotiation tactics, while car buyers are rarely, on average, as skilled in that area. The market price for a given car, then, is determined by an aggregation of negotiated outcomes where the typical car dealer is more negotiation savvy than his buying counterpart.

77 ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 85, 88–89 (Bruce Patton ed., 1981).

78 Id.

79 *See* Choi & Triantis, *supra* note 54, at 1687–88.

agreement" (BATNAs) of the negotiating parties.[80] Thus, the parties' alternatives dictate reservation prices, which create a zone of possible agreement; like two football teams, each negotiator attempts to drive the ball down the field towards the other party's end zone. The zone of possible agreement is a field of surplus, which each party hopes to claim as much of as possible. The BATNAs themselves may depend upon market prices for alternative solutions, but the BATNAs typically hold some degree of uncertainty involving other factors, such as personal relationship effects and considerations of other values that are important to a negotiator, including but not limited to fairness, happiness, satisfaction, and effects on others.

Considering negotiation and market theory together paints a dynamic, but also somewhat circular process: indeed, it begins to look like a dog chasing its own tail. The aggregation of individual negotiations drives the market price; the market price, in turn, plays a critical role in guiding individual negotiation outcomes. These individual negotiation outcomes—back to square one—are critical in defining market price.

B. Key Differences between Market Theory Predictions and Negotiated Reality

The predominant vision of market exchange, grafted on to the negotiation context, suggests that any one bargain between individuals or entities will look much like any other bargain between similarly situated parties. That is, the structural components of the situation, being roughly equal, will produce similar outcomes across different parties' interactions.

Negotiation scholars know that this is simply wrong. Giving the same negotiation problem to a variety of different individuals produces an array of vastly different results. These vastly different results cannot be explained by information asymmetries. These differences in result mean that to the extent that there is a "market," one might speak more accurately of a market "array" than a market price.[81]

In real world settings, differences in outcome can be explained by a wide range of variables, including information, knowledge, expertise, and custom. Culture, personality, and risk preferences are but a few of the potential factors that may change the outcome of similarly situated negotiations. Economic models self-consciously simplify bargaining: as John Nash explained, "In general terms, we idealize the bargaining problem by assuming that the two individuals are highly rational, that each can accurately compare his desires for various things, that they are equal in bargaining skill, and that each has full knowledge of the tastes and preferences of the other."[82]

80 *See* FISHER & URY, *supra* note 77, at 97.

81 *See supra* Part II.A.

82 John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155, 155 (1950).

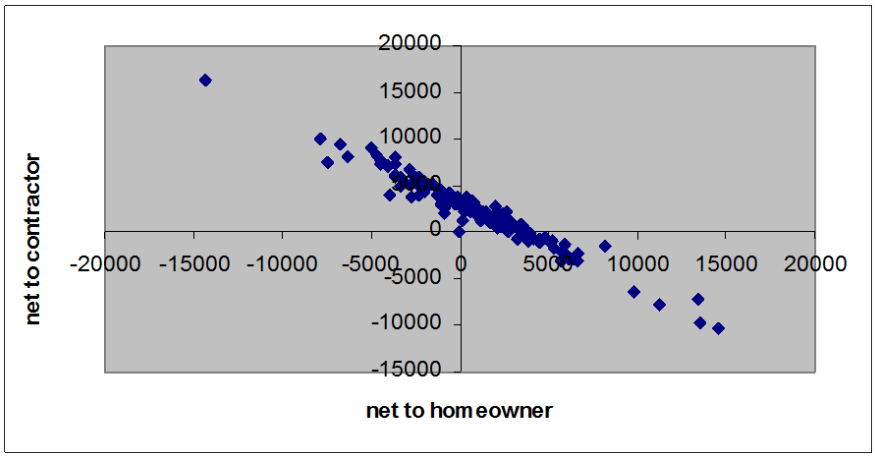
Economics has moved away from the classic assumption of perfect information and is open to the inclusion of information asymmetry as an important component of bargaining theory.[83] Yet this factor does not include negotiating skill, or other factors that systematically affect negotiation outcomes, as explicit elements of bargaining theory. The time is ripe to do so now. Because the market per se is in many cases likely to be an amalgamation of innumerable smaller negotiated exchanges, whose outcome, each individually, is guided in part if not in whole by negotiation behavior and skill, faith in market pricing may be misguided with respect to both item or service valuation and applicability to new parties.

Perhaps a key element of this analysis is that market price could refer either to a particular previously negotiated outcome or the aggregate of a set of all similar negotiations. Any one individual negotiator who gets a uniquely "good" or "bad" deal should not set the market, per se; that outcome ought to be only one data point in any definition of the market, taking "the market" on its own theoretical terms.[84] Anecdotally and empirically, there is ample support for the notion that negotiated outcomes will span a wide range across the zone of possible agreement. In data collected by Tyler & Hollander-Blumoff (2008),[85] for example, outcomes from the same largely zero-sum negotiation conducted by over 200 dyads yielded a distribution that could largely be plotted in a straight line as follows:

83 *See, e.g.*, Rochelle Cooper Dreyfuss, *Games Economists Play*, 53 VAND. L. REV. 1821, 1827 (2000) (noting that "economists have done an excellent job analyzing prisoners' dilemmas--situations involving information asymmetries, where the models (correctly) predict that it will be difficult for participants to coordinate their efforts for mutual benefit").

84 Individual negotiators face the challenge of demonstrating that their own situation is similar to, or distinguishable from, any given prior market negotiation; in this way, the negotiator is similar to a litigator evaluating case precedent for its degree of relevance to the case at hand.

85 Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 478–79 (2008).



In this negotiation, randomly paired dyads were given the same information, by side, and were disputing how much more work a contractor would perform on a home project and how much more money the homeowner would pay the contractor. As one can see from the graph, some homeowners received a net benefit of approximately $15,000, while at least one homeowner suffered a net loss of $15,000 in the same circumstances. Similarly, at least one contractor received a net benefit of over $15,000, while other contractors suffered a loss of over $10,000. Again, these outcomes all occurred in the face of the same factual and legal setting, with the information known by both parties held constant. The "market" for settlement in this case is really a range of possible settlements, all of which represent a mutual agreement between parties.

What this data also helps to illustrate is that similarly situated parties will negotiate the same problem very differently, and that outcomes *must* reflect differences in negotiation dynamics, including effectiveness and skills, because no other variables are systematically different across dyads. That is, an application of economic and legal principles to the negotiation problem at hand did not produce a unitary outcome; rather, the wide range of outcomes present here are not explicable by changes in legal endowments or asymmetries of information. Nor can the range of outcomes be attributed purely to chance. Instead, it is clear that some individuals are simply able to negotiate a stronger agreement on behalf of their client, for a variety of reasons that will be explored more fully below.

C. Negotiation Effectiveness

There is no one definition of a successful negotiator. Some law and economics-based scholars point to information[86] and/or bargaining power[87] as the driving force in negotiation success, but other factors play a critical role in guiding negotiation outcome. Information and power are appealing factors to highlight because they appear, at least on their face, to be quantifiable or discernable, while factors around negotiation skill, talent, and ability remain frustratingly opaque.

Although there is rarely any question as to whether information is useful during negotiation,[88] there is an important distinction between having information and having negotiation ability. The relationship is dynamic; it is true that very good negotiators often have a great deal of information. However, individuals who *are* good negotiators may engage in preparation that includes the actual gathering of information prior to negotiation: that is, good negotiators make it their business to seek out relevant information before entering into negotiation.[89] Part of what makes them effective is that they build up information, perhaps even to the point of information asymmetry. This asymmetry is not inherent or inevitable to the role. During the negotiation process, good negotiators will use information strategically, as well as continuing to gather information throughout the negotiation. But again, information itself, per se, cannot fully account for the observed differences in negotiation outcomes among parties that are similarly situated, a result often found in negotiation studies where parties are given the same consistent information by side.[90]

Another potential source of negotiation effectiveness is bargaining power. As noted above, Choi and Triantis, considering the role of such power in the design of contracts, suggest that bargaining power can be

86 *See* Choi & Triantis, *supra* note 54, at 1701–12.

87 *See* Russell Korobkin, *On Bargaining Power*, *in* THE NEGOTIATOR'S FIELDBOOK 251–56 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

88 There are, of course, unique circumstances in which ignorance can be helpful to one's side. For example, in an anecdote described by Schelling, one downed airman can gain the upper hand over another downed airman in negotiations over which man should attempt to traverse dangerous terrain to find the other, simply by transmitting his own location and then destroying his radio. His ignorance of the other airman's position, coupled with the other airman's awareness of such ignorance, actually helps him to achieve his aim of forcing the other man to come to him. Similarly, complete ignorance about a particular topic may allow a negotiator to ask for something in apparent good faith that is completely outside the bounds of reason or possibility, and she may gain an advantage through doing so. Just as easily, however, she may signal a lack of credibility or suggest that there is no potential zone of possible agreement between the parties and this may prevent any negotiated outcome. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 58–59 (1980).

89 *See* Clifford Geertz, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68 AM. ECON. REV. 28, 29–30 (1978).

90 *See supra* text accompanying notes 84–85.

broken down into five factors: demand and supply conditions, market concentration, private information, patience and risk aversion, and finally, negotiating skills and strategy.[91] Note that here, Choi and Triantis subsume the possession of useful information into a broader category of power.[92] And Choi and Triantis do suggest that bargaining power contains at least one element that depends upon the unique behavior of the individual negotiator.[93] Without good negotiation skills and strategy, they imply, structural power on paper might go begging.[94]

Russell Korobkin has posited, more simply, that one's BATNA is what dictates who has power during a negotiation.[95] However, Korobkin quickly clarifies that what is really meaningful in such a setting is *perceptions* of one's own and others' BATNAs, and a key feature of such perception is one's ability to persuade and influence another party into believing that your BATNA is what you say it is. Thus, it is not "absolute" power that is meaningful; it is perceptions of power that are critical in determining how negotiation unfolds.[96] Thus, Korobkin concludes, power is derived from persuasive behavior: in other words, negotiation skill.[97] What both Korobkin and Choi and Triantis note, but in varying degrees of foregrounding, is that so-called structural features of negotiation such as information and power are only useful to the degree that the negotiator makes them useful. That is, an individual's negotiation behavior—their negotiation acumen and talent—is a significant driver of both information acquisition and negotiation power and, therefore, of negotiation outcome.

One consideration as we contemplate what factors make individuals successful negotiators is how to define success in negotiation at all. There are many critical components to a successful negotiation. Economic outcome is, of course, one of the paramount goals, but other important goals may include durability of an agreement, satisfaction with nonmonetary terms, a belief in the distributive justice (outcome fairness) of the agreement, and subjective versus objective value.[98] Research has also suggested that people care about being treated fairly during the negotiation process.[99] The task of defining a good outcome is not an easy one, but for our purposes here

91 *See* Choi & Triantis, *supra* note 54, at 1675.

92 *Id.*

93 *See id.* at 1676–77.

94 *See* Choi & Triantis, *supra* note 54.

95 *See* Korobkin, *supra* note 87, at 252–53.

96 *Id*. at 253–54.

97 *See id.* at 251–52.

98 Jared R. Curhan, Hillary Anger Elfenbein & Gavin J. Kilduff, *Getting Off on the Right Foot: Subjective Value Versus Economic Value in Predicting Longitudinal Job Outcomes from Job Offer Negotiations*, 94 J. APPLIED PSYCH. 524, 529 (2009); Jared R. Curhan, Hillary Anger Elfenbein & Noah Eisenkraft, *The Objective Value of Subjective Value: A Multi-Round Negotiation Study*, 40 J. APPLIED SOC. PSYCH. 690, 703–05 (2010).

99 *See* Hollander-Blumoff & Tyler, *supra* note 85, at 473.

we too will necessarily simplify: we largely interpret good outcome to mean the highest economic benefit.

What factors might be included in negotiation ability? Our purpose here is not to offer a dispositive portrait of the skilled negotiator, but rather to gather in one place, briefly, some of the potential factors that can lead a negotiator to better outcomes than others. The factors that form the array of effective negotiation behavior are wide-ranging and complex. Beyond simply considering information and power, negotiation scholars and teachers use analytical frameworks that include styles, strategy, tactics, and skills. Subsumed within these frameworks are considerations that include but are not limited to: deception, communication, awareness and use of one's own and others' cognitive biases, awareness of integrative versus distributive potential, an understanding of relationships, listening skills, awareness and navigation of cultural issues, emotional intelligence, perspective-taking, and dealing with difficult people or tactics.

The question of what makes a negotiator effective is complicated, beginning with the most fundamental question of conceptualization of the process. The negotiation literature is divided between those who believe the most successful negotiators are sharp, tough, competitive, and often without scruples, and those who believe in a collaborative, "principled," or problem-solving approach to negotiation. The debate between these camps is more theoretical than empirical, with legions of "how-to" books, articles, and courses advocating for variants of these approaches.[100] Often, assertions about negotiation effectiveness have grounding in the anecdotal or the "common-sensical" voice of the author, without reference to data or research.[101]

Ironically, negotiation processes are also simultaneously among the most studied of psychological interactions, so no shortage of data exists about negotiation behavior and its effects.[102] However, because the scope of negotiation behavior is so very broad—a field that can include nuclear disarmament, small claims settlement, salary determination, and where to eat dinner is by definition highly variegated—the mixed signals and vast scope of the data can be daunting to distill into simple messages. A review of the literature suggests that effective negotiation behavior's antecedents can be tied to at least four large clusters: strategy and tactics, individual differences, training, and external bias.

100 Books Received, 34 SANTA CLARA L. REV. 1099, 1099 (reviewing ROGER FISHER, ELIZABETH KOPELMAN & ANDREA KUPFER SCHNEIDER, BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT (1994)).

101 *See e.g.*, Barbara L. Rosenfeld, *Negotiating Tips from a Master*, L.A. LAW., May 2007, at 52, 52; Donald C. Farber, *Common-Sense Negotiation*, 73 A.B.A. J. 92, 92–93 (August 1987).

102 *See generally* Leigh L. Thompson, Jiunwen Wang & Brian C. Gunia, *Negotiation*, 61 ANN. REV. PSYCH. 491 (2010).

1. Strategy and Tactics

In the broadest terms, negotiation strategy is often conceptualized as either competitive or cooperative, distributive or integrative, positional or principled, and so on, with the former of each of these viewing negotiation as a more hostile battle for resources in which a gain for one party yields a loss for the other, and the latter of each of these focusing more on shared interests and expansion of the so-called negotiation "pie."[103] Of course, strategies may also be a mix between these approaches. Because negotiation is a dynamic and highly contextual process, choosing which approach to employ in any particular engagement is important to negotiation success.

Tactics include the specific behaviors that one chooses to use to implement one's strategies. Tactics can include processes and decisions as diverse as truth telling versus falsity, social value orientation, perspective taking and empathy, opening offers, the use of psychological heuristics and biases, particular use of communication, and nonverbal behaviors, just to name a few.

A host of particular tactics and behaviors has been tested in the negotiation context to determine whether certain behaviors are more or less effective in yielding better negotiation outcomes. Studies have used experimental manipulations to determine how inducing certain mindsets or behaviors affect negotiation outcome.[104] Findings are varied and provide an almost kaleidoscopic perspective on what makes a negotiator effective. For example, individuals may be more or less skilled at revealing or concealing information, or at eliciting accurate information from the other side, as discussed earlier.[105] But individuals may also begin with different opening positions or offers that are more or less beneficial to their side. They may be better or worse communicators, or more skilled in the art of persuading others to see their side.[106] They may engage in nonverbal or verbal behavior that promotes liking by the other side, which can be beneficial to the ultimate outcome.[107] They may be particularly skilled in persuading others to use an integrative rather than a distributive bargaining structure, or vice versa. In addition, some negotiators may be able to employ lessons from social

103 *See generally* Willem F.G. Mastenbrook, *Negotiation: A Conceptual Model*, 5 GRP. & ORG. STUDS. 324 (1980).

104 *See* discussion *infra* Section C.4.

105 *See* discussion *infra* Section C.

106 For example, one study found that negotiators do better when they use language that is less extreme in making requests. *See generally* Yossi Maaravi, Orly Idan & Guy Hochman, *And Sympathy is What We Need My Friend—Polite Requests Improve Negotiation Results*, 14 PLOS ONE 1 (2019).

107 Jennifer S. Mueller & Jared R.Curhan, *Emotional Intelligence and Counterpart Mood Induction in a Negotiation*, 17 INT'L J. CONFLICT MGMT. 110, 122 (2006); Daniel Druckman & Benjamin J. Broome, *Value Differences and Conflict Resolution: Familiarity or Liking?*, 35 J. CONFLICT RESOL. 571, 591 (1991).

psychology on decision-making heuristics and biases to benefit from exploiting phenomena including anchoring, framing, overconfidence, and more, while other negotiators may suffer pitfalls from these same features of negotiation.[108]

2. Individual Differences

The role of individual differences, rather than specific behavior, has been controversial in the negotiation field. Some believe that individual differences are not systematically related to outcome differences in negotiation, and others have long repeated this conclusion.[109] And, as with all negotiation processes, the dynamic nature of the interaction adds a layer of complexity on top of what individual difference factors will or will not lead to effective negotiation, because at least two people's individual differences are involved.

Nonetheless, more recent research has begun to challenge the paradigm that individual differences don't matter. One meta-analysis, for example, found that individual level variables including cognitive and emotional intelligence had significant effects on negotiation outcome, and all of the "Big Five" personality variables with the exception of conscientiousness had a significant effect on noneconomic negotiation variables.[110] The extent to which these characteristics are immutable across situations versus subject to variation with a particular situation may also affect the way that these differences play out in particular negotiations; negotiation counterparts who can manipulate certain personality dimensions to their own ends may be more successful than others who are relatively uninterested in those dimensions or less adept at navigating or shaping them.

Another individual-level difference variable that may influence negotiation outcome is social value orientation (SVO). Social value orientation describes the baseline orientation of an individual towards the allocation of resources.[111] Social value orientation may be proself or prosocial, with social science meta-analyses suggesting that the population

108 Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 797–98 (2004).

109 Hillary Anger Elfenbein, Jared R. Curhan, Noah Eisenkraft, Aiwa Shirako & Lucio Baccaro, *Are Some Negotiators Better than Others? Individual Differences in Bargaining Outcomes*, 42 J. RSCH. IN PERSONALITY 1463, 1463–64 (2008).

110 *See* Sudeep Sharma, William P. Bottom & Hillary Anger Elfenbein, *On the Role of Personality, Cognitive Ability, and Emotional Intelligence in Predicting Negotiation Outcomes: A Meta-Analysis*, 3 ORG. PSYCH. REV. 293, 293 (2013). For additional empirical results, see generally Sudeep Sharma, Hillary Anger Elfenbein, Jeff Foster & William P. Bottom, *Predicting Negotiation Performance from Personality Traits: A Field Study across Multiple Occupations*, 31 HUM. PERFORMANCE 145 (2018).

111 For a more detailed overview of research on social value orientation, see Rebecca Hollander-Blumoff, *Social Value Orientation and the Law*, 59 WM. & MARY L. REV. 475, 475 (2017).

is roughly split between preference for outcomes that are proself (either competitive, meaning that individuals want to "win" in their interactions with others, or individualistic, meaning that they have a desire for the highest outcome possible for themselves, without reference to the other party's results) or prosocial (with a strong desire to divide resources equally, and also perhaps to expand the "pie" as much as possible).[112] Although psychologists sometimes refer to SVO as a personality variable, it is a personality variable that is highly affected by social cues.[113] Thus, context can lead individuals to act more in accordance with one SVO than another, depending on the message sent by that context.[114] A good negotiator, then, may be able to shape the other party's SVO through cues and messaging in a way that benefits her own outcome. A good negotiator may also be able to choose her own most beneficial SVO and resist external efforts to change it.[115]

Yet another individual-level difference relates to consideration of distributive fairness in negotiation. As decades of research on the ultimatum game has shown, some individuals will routinely reject outcomes that are economically favorable to them if those outcomes do not comport with fairness norms, while other individuals will not.[116] This is particularly important for two reasons. First, it suggests that good negotiators should learn about the other side's fairness preferences, because if you are negotiating with someone who is willing to take any economically beneficial outcome regardless of fairness, you can set your sights much higher (or lower, as the case may be) than you might otherwise be able to.[117] Second,

112 *Id.* at 589, 491.

113 *Id.* at 494.

114 For example, in one study, individuals playing a prisoner's dilemma game were more cooperative when told that the game was called the Community Game, and more competitive when told that the game was called the Wall Street Game, even though the actual rules of the game were identical. Varda Liberman, Steven M. Samuels & Lee Ross, *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY SOC. PSYCHOL. BULL. 1175, 1178, 1182 (2004).

115 For example, a negotiator who can persuade her opponent to be prosocial—to believe that an even distribution of resources is appropriate—may be effective in gaining more than she might otherwise, but a negotiator who chooses to be individualistic in the face of efforts to change frame may be able to claim more of the surplus for herself. Of course, these scenarios are highly context dependent.

116 Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 383–84 (1982); Martin A. Nowak, Karen M. Page & Karl Sigmund, *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000) (noting that the ultimatum game "has inspired dozens of theoretical and experimental investigations"); Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSPS. 195, 205 (1988).

117 Interestingly, this kind of negotiation effectiveness relates to information acquisition—but it is a different kind of information acquisition than contemplated by economists and legal scholars, relating not to substantive information about the subject matter of the negotiation but instead to the specific characteristics of the other parties to the negotiation.

negotiators who can shape other people's perceptions of fairness, and persuade others that their proposed outcome provides the level of fairness that is desired, will be able to enjoy more success at the negotiation table.

In addition, procedural fairness (procedural justice) has also been found to influence perceptions about negotiation outcome, with individuals who believe they have received a negotiated outcome through a fair process perceiving those outcomes as more likely to lead to a durable agreement.[118] Thus, individuals differences in sensitivity to process fairness may also play a role in providing individual-level variation in willingness to agree to certain outcomes. In addition, negotiators who can master the art of ensuring that their negotiation counterparts feel that the process is fair may have an advantage in negotiating successfully.

Some research has found that negotiators receive better results when they have a choice mindset—that is, they focus more on the idea that individuals face choices rather than constraints.[119] Although this study manipulated individuals' frame of mind, in the real world of negotiation, whether someone approaches a negotiation with the belief that they are constrained or not may rest on underlying individual differences as well.

Finally, although it is not an individual-level difference, cultural differences in negotiation style may play a role in guiding the outcome of negotiations.[120] Although documenting the vast effects of cultural differences is outside the scope of this project, it is worth noting that those who are better able to navigate their own and others' cultural identity at the negotiation table will gain a benefit.

3. Training

While some more essential individual differences are related to negotiation performance, evidence also suggests that negotiation is a skill that can be taught. Indeed, some negotiation training specifically targets for growth and development particular individual differences that have been linked to good outcomes. For example, emotional intelligence can, to some degree, be improved through effort.[121] Other negotiation training focuses on teaching the kinds of strategies and tactics that have been found effective in

118 Hollander-Blumoff & Tyler, *supra* note 85, at 493–94.

119 Anyi Ma, Yu Yang & Krishna Savani, *"Take It or Leave It!" A Choice Mindset Leads to Greater Persistence and Better Outcomes in Negotiations*, 153 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 11 (2019) (individuals who were induced to focus on choices rather than constraints perceived greater room to negotiate, demonstrated more persistence in the face of ultimatums, and received better outcomes in negotiation).

120 *See, e.g.*, Michael W. Morris & Michele J. Gelfand, *Cultural Differences and Cognitive Dynamics*, *in* THE HANDBOOK OF NEGOTIATION AND CULTURE 45–54 (Michele J. Gelfand & Jeanne M. Brett eds. 2004).

121 JAMIL ZAKI, THE WAR FOR KINDNESS: BUILDING EMPATHY IN A FRACTURED WORLD 15, 27–32 (2019).

social science research, or focuses on sharing the insights about human behavior, especially decision-making behavior, to individuals who could use that information to their benefit in negotiation.[122]

There is significant debate over what best practices in negotiation training are, with respect to both content and pedagogy. For example, some negotiation teachers focus on teaching a more win-lose style of negotiation.[123] Others adopt a stance geared towards more collaborative or principled type of negotiation.[124] A debate has long existed between these negotiation teaching "camps."[125]

Different kinds of learning processes have also been studied. Individuals can improve negotiation performance through a variety of types of training, including analogy and observation.[126] Of particular interest, those who believe that negotiation is a skill that can be deepened are more likely to do better in negotiation than those who believe negotiation is an innate ability.[127] In any event, negotiation effectiveness can be bolstered by access to and participation in training programs.

4. External bias

In addition, perhaps critically relevant to law, research suggests that beyond the issue of individual negotiation "skill," negotiations may unfold differently depending on the identity of the parties. That is to say, issues of systemic or individual bias may play a significant role in shaping outcomes, regardless of skill or ability of the negotiator, thereby affecting and inhibiting or amplifying some negotiators' capacity for effectiveness. For example, when women and minorities systematically receive lower initial offers from

122 *See supra* note 110.

123 *See, e.g.*, James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RSCH. J. 926, 926–27 (describing negotiation as a mostly zero-sum proposition in which lying and manipulation are the order of the day).

124 FISHER & URY., *supra* note 77, at 86–88; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 784–85 (1984).

125 Although the principled, collaborative, problem-solving approach promulgated by Fisher, Ury, Menkel-Meadow, and others, see *supra* notes 77, 123–24, has come to be dominant in academic settings, that ascendancy has been rattled and challenged by the popularity and recent victories by Donald Trump. *See* G. Richard Shell, *Transactional Man: Teaching Negotiation Strategy in the Age of Trump*, 35 NEGOT. J. 31, 32–33 (2019) (reviewing MARTIN E. LATZ, THE REAL TRUMP DEAL: AN EYE-OPENING LOOK AT HOW HE *REALLY* NEGOTIATES (2018)).

126 Janice Nadler, Leigh Thompson & Leaf Van Boven, *Learning Negotiation Skills: Four Models of Knowledge Creation and Transfer*, 49 MGMT SCI. 529, 530 (2003); Jeffrey Loewenstein & Leigh L. Thompson, *Learning to Negotiate: Novice and Experienced Negotiators*, *in* *NEGOTIATION THEORY AND RESEARCH* 77, 77 (Leigh L. Thompson ed., 2006); Elizabeth Chapman, Edward W. Miles & Todd Maurer, *A Proposed Model for Effective Negotiation Skill Development*, 36 J. MGMT. DEV. 940, 941 (2017).

127 Laura J. Kray & Michael P. Haselhuhn, *Implicit Negotiation Beliefs and Performance: Experimental and Longitudinal Evidence*, 93 J. PERSONALITY & SOC. PSYCH. 49, 50 (2007).

their negotiation counterparts, when women face negative consequences after negotiating, and when some individuals choose not to negotiate in order to maintain positive relationships, it becomes clear that systematic biases may creep (or march) into the market system by way of negotiated transactions.

Research from Pew found a significant wage gap in 2015 among college graduates with different demographic identities.[128] For example, college-educated African American and Hispanic men, as well as white and Asian college-educated women, earned roughly 80% of what their white male counterparts earned.[129] African American and Hispanic women earned about 70% of the white male wage.[130] While not all of the gaps may be attributed to negotiation behavior, the gaps do point out an immediate concern with market price—there appears to be a different "market price" for different groups. This differential outcome may, though, also stem from significant differences in negotiation behavior on the part of negotiating pairs.

For example, in 1995, Ian Ayres and Peter Siegelman sent individuals into car dealerships to assess whether men and women and white and African American individuals would be presented with different opening offers for their purchase of the same car.[131] For the initial offers, the range of profit that would accrue to the dealer varied widely depending on the sex and race of the purported purchaser.[132] The salesmen gave white men an offer that, on average, would provide $1,019 in profit to the dealer, while white women received an offer that provided $1,127 in profit to the dealer.[133] In contrast, offers to African American purchasers provided $1,337 (women) and $1,954 (men) profit to the dealer.[134] Thus, the range of the opening offer for this car, representing the range of opening offers on the market, varied by $935—a not inconsiderable amount that represents a 92% increase in profit for dealers.[135]

Of course, these are just opening offers, and represent only one side of the negotiation. However, not only does literature suggest the power of opening offers during negotiation,[136] but the Ayres and Siegelman study itself explores this question. Even though all participants in the study

128 Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RSCH. CTR. (July 1, 2016), https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/.

129 *Id.*

130 Asian men earned slightly more than white men. *Id.*

131 *See* Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 305–07 (1995).

132 *See id.* at 308

133 *Id.*

134 *Id.*

135 *See id.*

136 Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCH. 657, 657–58 (2001).

followed a common script, the final offers by the dealer span an even greater range: final offers received by white men (profit to dealer of $564) were far lower than final offers received by African American men ($1,665).[137] African American men's offers represented a profit for dealers 200 percent higher than for the offers those dealers gave to white men. While these findings do not address negotiation skill per se, because the study participants were sent in with identical scripts, they do suggest that certain groups may have a more difficult hurdle to overcome in negotiation, regardless of their negotiation abilities.

In another notable study, Linda Babcock and Sara Laschever traced a large part of the disparities in salaries between men and women to the markedly higher tendency among men to negotiate starting salary offers.[138] This is yet another way that negotiable transactions may have vastly different results; part of the skill set of a talented negotiator is knowing when there is a potential for increasing the value of a transaction through negotiating. Babcock and others'[139] work suggests that there is a threshold question about outcomes to consider when thinking about market pricing: has the transaction been negotiated, or not? The nonnegotiated market price and the negotiated market price may differ meaningfully.

When a so-called negotiation skill—knowing when there is a possibility of increasing one's outcome through negotiation—is distributed unevenly and systematically across populations, this may suggest a problematic feature of market pricing. But even more troubling, some empirical research has suggested that women's "failure to negotiate" may not reflect a lack of negotiation skill at all. Instead, this research has suggested that women who do negotiate may face a backlash effect, rendering a decision *not* to negotiate more explicable and perhaps more economically understandable in the long-term. Some research has found that women who engaged in a salary negotiation were rated as be more unlikable than nonnegotiators, and that their negotiation counterparts were more likely to say that they would not want to work with them in the future.[140] Thus, the "failure to negotiate" may actually reflect a rational and considered decision by women in some situations; nonetheless, lack of negotiation results in a lower market price for women in the workplace. This provides women in salary negotiations with a set of lose-lose options in terms of "skill" in negotiation.

137 Ayres & Siegelman, *supra* note 131, at 308.

138 LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1–3 (2003).

139 *See id.*; *see also* Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large-Scale Natural Field Experiment*, 61 MGMT. SCI. 2016, 2017 (2015); Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 89–91 (2007).

140 *See* Bowles et al., *supra* note 139, at 89–91.

In addition, the dynamic nature of negotiation means that even skilled negotiators' outcomes may differ because of the behavior of their negotiation counterpart. Recent research indicated that women who negotiated with men holding stronger stereotype beliefs regarding gender did worse in negotiation than women who negotiated with men who did not hold, or held less strongly, such beliefs.[141]

Another recent study considered the role of race in salary negotiation, seeking to explore reasons for the racial wage gap.[142] The study posits that stereotypes about African Americans help to create a backlash effect for job seekers who do engage in negotiation. The researchers specifically invoke "the market," hypothesizing that job evaluators who are more racially biased "will hold expectancies consistent with racial stereotypes that consign Black job seekers to lower estimations of market value (i.e., starting salary) and therefore, perceive them as less likely to negotiate."[143] The researchers further hypothesize that when African Americans do negotiate, they will encounter negative results because, "[a]lthough there is generally nothing negative about negotiating one's salary, the application of a prescriptive stereotype to Black negotiators (i.e., they do not deserve to negotiate for higher salaries) can produce negative salary outcomes when these individuals do not conform."[144] Participants who had less explicit bias believed that the white and African American negotiators negotiated about the same amount.[145] In addition, the study found that an increase in negotiation behavior by an African American negotiator corresponded to a decrease in ultimate salary: African Americans were penalized for negotiating.[146]

Research including the studies discussed above, taken together, suggest several important features of the market. First, the market is not fully dictated by legal endowments, a paradigm that has been popular among law and economics scholars for decades.[147] Additionally, markets are not fully dictated by limits on information or available information; in these settings described above, all parties were privy to the same information. Finally, markets are not fully dictated by structural elements of power, such as the inherent power of being a seller or a buyer, or employee or employer, in a

141 Vaani Pardal, Madeliene Alger & Ioana Latu, *Implicit and Explicit Gender Stereotypes at the Bargaining Table: Male Counterparts' Stereotypes Predict Women's Lower Performance in Dyadic Face-to-Face Negotiations*, 83 SEX ROLES: 289, 289, 301 (2020).

142 Morela Hernandez, Derek R. Avery, Sabrina D. Volpone & Cheryl R. Kaiser, *Bargaining While Black: The Role of Race in Salary Negotiations*, 104 J. APPLIED PSYCH. 581, 581 (2019).

143 *Id.* at 582.

144 *Id.* at 583.

145 *Id.* at 585.

146 *Id.* at 587.

147 The idea that legal endowments are critical in dictating the course of a negotiation is highlighted in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979), and in numerous articles that followed.

given setting. Because this range of outcomes represents what happens in a given setting, this highlights, again, that "market price" must be conceptualized as a range or set of outcomes that may vary widely on the individual level.

These differences in market price even within conceptually unified markets suggest that including negotiating effectiveness in market parameters will help to capture some of this variation. In considering how much weight to place on the role of negotiation effectiveness, it would be useful to understand what markets have high and what markets have low negotiation variability; as noted above, the market for buying bread at the grocery store is likely to have low variability, but the market for cars appears to have fairly high variability. An examination of the role that negotiating skill and effectiveness may occupy in determining outcomes suggests that the law may play a critical role in addressing inequalities, going beyond simply information deficits and traditional conceptions of structural power.

III. NEGOTIATION VARIANCE WITHIN MARKETS

Now that we have identified the "variable" of negotiation skill and ability, how should we apply this variable in our study and regulation of markets? Markets are not uniformly sensitive to negotiation. Some markets will have little to no negotiation within them, while others will be very sensitive to fluctuations based on negotiating ability.[148] The importance of negotiation to a particular market varies based on many factors. The follow is an effort to create a taxonomy of negotiation variance within markets, based on work in law, sociology, and economics, that can be used as an initial guide to variance.[149] We focus on: (a) the characteristics of the transaction subject; (b) the structure of the market; and (c) the norms of the market.

A. Characteristics of the Transaction Subject

The "transaction subject" is the item which is being bought and sold in the market, whether it be a good, a service, real property, intellectual property, legal rights, or some combination thereto. The nature of the subject of the transaction will influence whether there is room for negotiation over the terms of the deal. Perhaps the most obvious factor is the uniqueness of the item. The more unique, rare, or uncommon the item is, the more likely

148 *See* Peter Martin Jaworski & Jason Brennan, *Market Architecture: It's the How, Not the What*, 13 GEO. J.L. & PUB. POL'Y 231, 232 (2015) ("Some markets have a fixed price, like at your local Walmart. Other markets have prices that you are expected to haggle over, like at a garage sale.").

149 Our breakdown of transaction characteristics, structure of the market, and norms of the market, is based on Patrik Aspers' three prerequisites for an ordered market: (1) what the market is about, (2) how things are done in the market, and (3) determining the economic worth of the offer. PATRIK ASPERS, MARKETS 92–100 (Polity Press 2011).

there will be difficulty in precisely pricing it. Because markets first turn to comparator sales to form a basis of market price, the absence of relatively similar comparators will leave the parties looking to second-order principles in pricing. These subsidiary aspects of the item—its cost, the sum of value for its individual components, or its value to the buyer—are less determinable or less known to both parties, and therefore make the transaction more negotiable.

Relatedly, the "elasticity" of a particular market will affect negotiability. Elasticity—or more specifically, the price elasticity of demand—refers to the extent to which the quantity of a particular transaction subject demanded by buyers responds to a price change.[150] The following factors are thought to determine the elasticity of demand: the importance of the item to the buyer, whether the item is a necessity or luxury, whether there are adequate substitutes for the item, and whether a buyer can switch into another category item, and how quickly.[151] A medical drug that is necessary for the buyer's continued survival and that has no substitute would be inelastic as to that buyer.[152] On such an item, the buyer is likely to pay very high amounts—in this case, all of their discretionary income beyond the other needs for survival—to obtain the item. As a result, the seller has significant negotiation power. Similar inelasticity may arise in situations where common but necessary goods have experienced a supply shock—say, potable water in the aftermath of a natural disaster. In such cases, sellers have temporary but extraordinary negotiation power as these items will be in extremely high demand, and there is because of the circumstances a severely constricted (or nonexistent) set of alternatives.[153]

Along these lines, sociologist Patrik Aspers has drawn a distinction between standard markets and status markets.[154] In standard markets, the item itself can stand separate and apart from the individual identities of the sellers and buyers; most markets for fungible goods or raw materials would fall into this category.[155] Status markets, on the other hand, are ranked by the status of their participants, such that the more elite producers can demand more for their products.[156] Goods such as designer-label clothing, while commodities to some extent, fall within status markets because buyers take the status of the seller into account when making the purchase. Standard markets are likely to have lower negotiation variance, as their sale items must on some level be fungible between participants, leading to lower variance

150 SAMUELSON & NORDHAUS, *supra* note 4, at 65-66, 671.

151 *Id.*

152 *Id.*

153 *See, e.g.*, Gregory R. Kirsch, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1235–38 (1993).

154 ASPERS, *supra* note 149, at 88.

155 *Id.* at 89.

156 *Id.* at 88–89.

between contractual sales. Because status markets take identity and social station into account, their value is harder to quantify and thus leaves open more room for variance as to terms.

The quality and quantity of information available about the item also influences its negotiability. Akerlof's "market for lemons" illustrates the instability of a market with highly variable quality along with poor information as to that quality.[157] Negotiation skills can fill the gap in information with persuasion, guile, and even irrelevant or misleading entreaties, as long as it does not cross the line into misrepresentation. The nature of the available information matters as well, as quantifiability of quality reduces the role of negotiation. If the item being sold can be valued according to a specific metric, such as carats for diamonds or karats for gold, prices can sort themselves along the metric with less need for bargaining. There are also quantifiable metrics that are based on qualitative assessments: for example, the Tomatometer for movies[158] or restaurant ratings on Zagat's or Yelp. The notion of market price itself is, in a sense, a quantifiable metric based on qualitative assessments.[159]

B. Structure of the Market

It is not just what is bought and sold that determines negotiability; it's also how it is sold. Markets have various structural characteristics that determine whether the parties can negotiate over price. Most of our consumer good exist in markets that propose a fixed price. Shopping in a supermarket, for example, involves no negotiation—at most, a shopper may have to bargain to return an item without a receipt. However, fixed prices are a relatively recent phenomenon.[160] The two other methods of setting price are private negotiations (or direct bargaining) and auctions.[161] Private negotiations were the primary means of commerce, and they remain familiar in the prototypical bazaar.[162] Auctions are a structured set of consecutive bids from competing potential buyers that result with the highest bid as the winner.[163] All three structures are used in different markets, and some

157 *See generally* Akerlof, *supra* note 46.

158 ROTTEN TOMATOES, "What is the Tomatometer™?", https://www.rottentomatoes.com/about#whatisthetomatometer (last visited Oct. 14, 2020).

159 *See* ELLEN RUPPEL SHELL, CHEAP: THE HIGH COST OF DISCOUNT CULTURE 57 (2009) (describing market price as "subjective" and noting that "[p]rice is a convenient, necessary proxy for a lot of other things") (quoting sociologist Gerald Zaltman).

160 Olav Velthuis, *Damien's Dangerous Idea: Valuing Contemporary Art at Auction*, *in* THE WORTH OF GOODS: VALUATION AND PRICING IN THE ECONOMY 178, 180 (Jens Beckert & Patrik Aspers eds., 2011).

161 *Id.* at 179–80.

162 Clifford Geertz, *Suq: The Bazaar Economy in Sefrou*, *in* MEANING AND ORDER IN MOROCCAN SOCIETY 221–22 (Clifford Geertz, Hildred Geertz & Lawrence Rosen eds., 1979).

163 Velthuis, *supra* note 160, at 180.

markets are mixed: retail car sales, for example, have a fixed price but generally expect negotiation off of that price.[164] Fixed prices have the lowest transaction costs, but they do not allow the price discrimination afforded by the other two markets. But the negotiation variance is much higher with private negotiations than they are with pure versions of the other two systems.[165] While auctions can be expensive to construct and run, the parties simply make a bid; they are not "negotiating" in the traditional sense of the word.[166]

The method of interaction is a related but conceptually different aspect of market structure. Parties can communicate through rich or lean media, along a spectrum of a variety of signals and cajolery, or simply price and specifics. Internet transactions generally have limited interactions; even if the online market allows for bargaining, those negotiations have usually been in the form or text or perhaps emojis. The improving ability for wireless and wired service providers to carry bandwidth makes it easier to communicate through audio or even audio-visual communication. But this communication will be different than in-person interaction, allowing for a different approach to negotiation.

Aspers also differentiates between fixed-role markets and switch-role markets.[167] In fixed role markets, individuals are usually either buyers or sellers. In switch-role markets, the parties change positions over time, serving as both buyers and sellers depending on the transaction. Theoretical markets in economic texts for the most part assume switch-role markets, with atomistic relations between parties, despite the prevalence of fixed-role markets.[168] Because switch-role markets, such as the traditional bazaar, emphasize the importance of trading qua trading, negotiation skills may be more valuable within these markets.[169]

And to the extent markets are creatures of law, the nature of that law will structure the market in myriad ways. We will return more specifically to this topic in Part IV.A, when we examine the role of contract law in addressing negotiation variance. But the rules of the market, as well as the ways in which those rules are interpreted, enforced, and potentially changed, can have a significant impact on the extent to which parties are left to their

164 *See* Pinelopi Koujianou Goldberg, *Dealer Price Discrimination in New Car Purchases: Evidence from Consumer Expenditure Survey*, 104 J. POL. ECON. 622, 623 (1996).

165 Velthuis, *supra* note 160, at 181 ("Economists have little more to say on private negotiations than that these are 'best avoided' because they are likely to result in 'disagreement and inefficiency.'") (quoting Paul Milgrom, *Auctions and Bidding: A Primer*, 3 J. ECON. PERSPS. 3, 19 (1989)).

166 *See* Milgrom, *supra* note 165, at 18–19; Velthuis, *supra* note 160, at 181 (noting the time and expense necessary to host an auction, although noting that online auctions can be held less expensively).

167 ASPERS, *supra* note 149, at 83.

168 *Id.* at 83–84.

169 *Id.* at 84.

own negotiating devices as opposed to appealing to allowing the system to dictate a nonnegotiated result.

C. Norms and Practices of the Market

A critical—but harder to measure—aspect of market negotiation variance is the extent to which the collected norms and practices of a particular market allow for or facilitate private bargaining. As noted above, the practice of posted prices does not preclude buyers from endeavoring to get a better deal, but most markets have an accepted way of proceeding for most of the participants.[170] These practices vary from market to market, and from culture to culture. Modern Americans are thought to be more averse to bargaining than other cultures, with haggling appearing to be aggressive, unpleasant, and impolite.[171] Other cultures have been purported to embrace bargaining more enthusiastically.[172] But even in the United States, bargaining thrives in certain markets, but it finds ways to express itself that are socially acceptable within that market. In her decades-long observations of garage sales, Gretchen Herrmann observed the following bargaining norms: negotiations should be brief; the buyer's offer should not diverge too sharply from the listed price; buyers should not haggle over inexpensive items; negotiating on bulk purchases is seen as reasonable; bargaining over ever items is viewed distastefully; friends do not bargain; and bargaining is more acceptable and prevalent towards the end of the sale.[173] Violations of the norms can shut down bargaining; or, it may work for a particular item but then cut the buyer off from further negotiations.

Standardized terms, known as boilerplate, are used in many industries to shortcut the bargaining process. Standardized agreements, known as contracts of adhesion, collect a set of standardized terms into a form contract that is generally a take-it-or-leave-it affair. These standardized arrangements save negotiation and other transactions costs by reducing the precontractual "negotiations" to a single decision. They are meant to tilt the playing field in the direction of the drafter, with respect to terms over which the other

170 Michael A. Arnold & Steven A. Lippman, *Posted Prices versus Bargaining in Markets with Asymmetric Information*, 36 ECON. INQUIRY 450, 450 (1998).

171 Gretchen M. Herrmann, *Negotiating Culture: Conflict and Consensus in U.S. Garage-Sale Bargaining*, 42 ETHNOLOGY 237, 238, 245 (2003); Ezra Rosser, *Offsetting and the Consumption of Social Responsibility*, 89 WASH. U. L. REV. 27, 33 (2011) ("While in other countries there exists a tradition of negotiating over price, in the United States haggling is almost nonexistent. And while consumers do comparison shop and bargain hunt, there is implicit acceptance that price corresponds to value and that price is market determined.").

172 Herrmann, *supra* note 171, at 247 ("Other foreign-born residents, such as Russians, Ukrainians, and Yugoslavians (self-designation), are known as avid bargainers."); *see also* White, *supra* note 123, at 930 (extemporizing on differences between racial and ethnic groups).

173 Herrmann, *supra* note 171, at 246–47.

party will not understand or care enough about to bargain.[174] These forms tends to be common in the consumer context, and they have especially proliferated in the online environment.[175]

Markets also differ in terms of disclosure, transparency, and secrecy. To some extent, the information available about a transaction will depend on the characteristics of the transaction subject, as well as the economic and legal structure of the market. In employment, for example, wages could easily be made publicly available, but for the most part the norm is to keep one's pay private.[176] These norms differ by career, status, and experience, but they provide for more room for negotiations over the exact contours of the employment relationship. Secrecy leads to information asymmetry, which then provides a larger role for negotiation.[177] Clifford Geertz has documented the role of information search and bargaining as a mixed process in the Moroccan bazaar.[178] In contrast, markets with disclosed prices make it easier for buyers to compare and contrast, and for the market to reward lower prices and punish higher prices without actual bargaining taking place.

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Overall, many markets have products, structures, or norms that reduce the role of bargaining in the transactional process. But certain markets lend themselves to negotiation. Our preliminary taxonomy is designed to provide a starting point for economics, sociological, psychological, and legal scholars in developing further insights into the role of negotiation in particular markets. As legal scholars, we turn to examine the extent to which the law incorporates negotiation variance into its doctrines regarding transactions.

IV. NEGOTIATION VARIANCE AND THE LAW

An acknowledgement of negotiation variance is generally absent from the discussion of markets in various academic disciplines. In this section, we turn expressly to law and examine the ways in which legal doctrines have addressed the role of negotiation ability in the transactional regulation. We

174 *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983) (providing characteristics of adhesive contracts).

175 Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 464 (2002) ("Notably, electronic contracts, like transactions in the paper world, are dominated by standard forms.").

176 Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168–69 (2004); Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 41–42, 47 n.37 (2005).

177 *See, e.g.*, Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885, 1886 (2000).

178 Geertz, *supra* note 89, at 31 ("From the point of view of search, the productive type of bargaining is that of the firmly clientelized buyer and seller exploring the dimensions of a particular, likely to be consummated transaction.").

begin with an overview of contract law and then move to specific examinations of settlement agreements, corporate combinations, and employment. In each of these areas, the law does not overtly recognize negotiation's influence, but its effects can be seen underneath the doctrinal surface.

A. Negotiation and the Common Law of Contract

The common law of contract provides the foundation for transactions in our economic system.[179] The common law addresses a myriad number of aspects of the transactional process: formation, interpretation, defenses, conditions, and enforcement. But negotiation per se is not specifically addressed. The following subsection will explore the extent to which contract law acknowledges, accommodates, or regulates bargaining through doctrines that are not geared exclusively to negotiation but nevertheless encompass it.

1. Requirement of a Bargain

Contracts require a bargain. More specifically, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."[180] The Restatement defines the "two essential elements of a bargain" as "agreement and exchange."[181] The agreement usually manifests through an offer and an acceptance, which signify that the parties both are on the same page as to the terms of the contract.[182] The exchange is represented through consideration, which requires a transaction in which the parties exchange something of value for another thing of value. But consideration must be bargained for. According to the bargain test of consideration, something is bargained for "if it is sought by the promisor in exchange for [the] promise and is given by the promisee in exchange for that promise."[183] One of the primary effects of the bargain requirement is to focus on transactions within a marketplace, while casting doubt on transactions within families or intimate relationships.[184]

179 *See* Hanoch Dagan, Avihay Dorfman, Roy Kreitner & Daniel Markovits, *The Law of the Market*, LAW & CONTEMP. PROBS. (forthcoming 2020) (draft at 4) (available at https://ssrn.com/abstract=3516796) ("Contract is the key mechanism for exchanging entitlements, and this makes contract central to markets however conceived.").

180 RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981).

181 *See id.* § 17 cmt. b.

182 *Id.* § 22.

183 *Id.* § 71(2).

184 *See* FARNSWORTH, *supra* note 37, § 2.2, at 48.

While courts have emphasized the need for a bargain, for the most part they have not required actual bargaining.[185] Instead, the exchange can be arrived at simply, without haggling, as long as the parties each provide something of value in exchange for something of value. A few courts have noted the lack of interchange between parties and therefore found an absence of consideration.[186] For the most part, however, courts only police the exchange itself to insure that the contract is not a gift promise or gratuity.[187] The bargaining itself is not subject to investigation, and neither is the fairness of the exchange.[188] It is well-established contracts dogma that a party may exchange something as small as a peppercorn for something far more valuable, as long as the exchange is genuine.[189]

Commentators have noted that the sometimes-implicit idea behind contracts—that the parties will bargain with each other to reach their exchange—is becoming more of a myth than reality. As one noted hornbook describes it:

Most of contract law is premised upon a model consisting of two alert individuals, mindful of their self-interest, hammering out an agreement by a process of hard bargaining. The process of entering into a contract of adhesion, however "is not one of haggle or cooperative process but rather of a fly and flypaper." Courts, legislators and scholars have become increasingly aware of this divergence between the theory and practice of

185 *See, e.g.*, *id.* § 2.6, at 55 ("[I]t is not required that the parties actually bargain over the terms of their agreement."); Pennsy Supply, Inc. v. Am. Ash Recycling Corp., 895 A.2d 595, 602 (Pa. Super. Ct. 2006) (quoting E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.6 (1990)) ("The bargain theory of consideration does not actually require that the parties bargain over the terms of the agreement.").

186 *See, e.g.*, Jara v. Suprema Meats, Inc., 18 Cal. Rptr. 3d 187, 197 (Cal. Ct. App. 2004) (finding that one party's failure to provide nothing "more than acquiescence" to the other party's proposal "cannot be reasonably construed as a bid to enter into a bilateral contract"); Bogigian v. Bogigian, 551 N.E.2d 1149, 1151 (Ind. Ct. App. 1990) (holding that the parties "did not *bargain* for the release in exchange for any benefits flowing to [one party] for detriments incurred by [the other party]").

187 George S. Geis, *Gift Promises and the Edge of Contract Law*, 2014 U. ILL. L. REV. 663, 668 n.14 (2014) ("A few courts seem to require evidence of negotiations or even haggling. . . . But this is an exaggerated view of the bargaining requirement and not the prevailing approach.") (citations omitted).

188 FRIED, *supra* note 61, at 29 ("The law is not at all interested in the adequacy of the consideration. The goodness of the exchange is for the parties alone to judge—the law is concerned only that there *be* an exchange."); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 4.4, at 154 (6th ed. 2009) ("As a general rule the courts do not review the adequacy of the consideration. The parties make their own bargains.").

189 Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1092 (1935) (arguing that value disparity in an exchange is supportable where the promisor "both knew and desired such disparity") (emphasis omitted); Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 343–44 (2002) ("The consideration can be as nominal as a peppercorn for the agreement to be legally enforceable. Courts do not inquire into the distribution of benefits between the parties.").

contract formation, and new techniques are evolving for coping with the challenges stemming from this divergence.[190]

Despite its name, however, the "bargain theory" of consideration does not concern itself with the level of negotiation that goes into a final agreement.

2. Parties' Ability and Capacity to Negotiate

Contract law does not specifically examine or regulate the individual parties' ability to negotiate. However, certain existing defenses concern the underlying capacity of the parties in a way that may cover extreme types of negotiation variance. The contractual defenses of infancy and incapacity are the primary escape hatches for those who may lack the capacity to contract for themselves—in Farnsworth's words, "an inability to participate meaningfully in the bargaining process."[191] The immaturity defense is a bright-line rule in which anyone under a certain cutoff age can render the contract voidable after the fact.[192] The reasoning behind this defense is that as a class, younger people do not have the reasoning, understanding, or judgment to responsibly bargain for a binding deal.[193] Incapacity generally relates to a permanent or temporary underlying condition that renders one "unable to understand . . . the nature and consequences of the transaction," or "unable to act in a reasonable manner in relation to the transaction."[194] However, courts have recognized something of an exception where the underlying contract is fair, either by fudging the finding of incapacity[195] or through a specific "fairness exception."[196] For some forms of incapacity, especially intoxication, courts have only permitted the defense where the other party knew of the incapacity and was in a position to take advantage of it during the negotiations.[197]

The closest that courts have come to taking into account an individual's own ability to bargain effectively is through the doctrine of unconscionability. Dating back to the English courts of equity, judges have

190 PERILLO, *supra* note 188, at 5 (quoting Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 143 (1970)).

191 FARNSWORTH, *supra* note 37, § 4.2, at 219.

192 RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST. 1981) (rendering contracts voidable "until the beginning of the day before the person's eighteenth birthday").

193 *See, e.g.*, Porter v. Wilson, 209 A.2d 730, 731 (N.H. 1965) (citing to "the common-law conception that a minor does not possess the discretion and experience of adults"); Henry v. Root, 33 N.Y. 526, 536 (1865) (noting that the defense's purpose is to "protect infants or minors from their own improvidence and folly").

194 RESTATEMENT (SECOND) OF CONTRACTS § 15 (AM. L. INST. 1981).

195 PERILLO, *supra* note 188, § 8.9 at 263 ("[I]f the contract is fair and beneficial to the alleged incompetent there will be a great tendency to find sanity; otherwise, the tendency is to find lack of capacity.").

196 RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (AM. L. INST. 1981).

197 *Id.* § 15(1)(b); *id.* § 16.

routinely, though infrequently, policed agreements on the basis of their unfairness.[198] The unfairness of the terms themselves tells part of the story, but courts must also figure out why the one party ended up with such a bad deal. As a result, the doctrine has broken down into two conjunctive parts: substantive unconscionability and procedural unconscionability.[199] Substantive unconscionability refers to "unreasonably favorable" terms; procedural unconscionability refers to the process by which those terms were reached.[200] As described by Allan Farnsworth: "Procedural unconscionability is broadly conceived to encompass not only the employment of sharp bargaining practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power, a term that is often used to include bargaining skill."[201] Procedural unconscionability can include many elements that do not specifically include negotiation ability. For example, arbitration clauses are frequently challenged in consumer or employment contracts, not based on the individual's negotiation effectiveness, but rather on the structural issues of using standard-form agreements that are required for purchase or employment.[202] Even when the courts cite to a "gross inequality of bargaining power," they largely mean structural issues such as monopoly power, disaggregated consumers or employees, or contracts of adhesion.[203]

For a set of unconscionability cases, however, courts have looked at a party's lack of education, lower social status, or personality traits to conclude that the other party took advantage of a bargaining weakness. In the case of *Wollums v. Horsley*,[204] the court denied enforcement of a contract in which Wollums had sold mineral rights on his property to Horsley for much less than market price. Discussing the parties' relative bargaining abilities, the court noted that Wollums was "about [sixty] years old, uneducated, afflicted with disease disabling him from work," while Horsley was "a man of large and varied experience in business."[205] This theme is echoed in other cases. In *Williams v. Walker-Thomas Furniture Co.,* perhaps our most influential unconscionability case, the buyer was "a person of limited education separated from her husband, [who] is maintaining herself and her seven

198 FARNSWORTH, *supra* note 37, § 4.27, at 294–95.

199 *Id.* § 4.28, at 301.

200 *Id.*

201 *Id.*

202 *See, e.g.*, Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1459–64 (2008); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 470 (2006).

203 *See, e.g.*, Rizzo v. Allstate Ins. Co., 185 A.3d 836, 843 (N.H. 2018); Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 35, 39 (Or. 2014) (en banc).

204 Wollums v. Horsley*,* 20 S.W. 781, 782 (Ky. 1892).

205 *Id.* at 781.

children by means of public assistance."[206] Lack of education or "sophistication" are factors in the courts' determination that one party was prone to disadvantage in negotiations,[207] especially when paired with the other party's relative expertise.[208] Conversely, equal bargaining ability has been a factor in finding no unconscionability.[209]

The unconscionability cases show the difficulty in trying to separate negotiation effectiveness from other overlapping characteristics and factors. Education and sophistication are used as a proxy not only for the ability to bargain well, but also for the ability to use information, and even get the information in the first place. The arbitration cases illustrate this: courts point to the fact that the clauses are often complicated and confusing, which means that the average consumer or employee does not have the understanding of the long-term ramifications of the clause.[210] But in such cases, courts either refer to some baseline level of ability, or point out how the particular party would have particular difficulty in bargaining for the contract.[211] Negotiation effectiveness is considered, but often in a bundle with other overlapping considerations.

206 Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. 1964).

207 *See, e.g.*, High v. Cap. Senior Living Props. 2-Heatherwood, Inc., 594 F. Supp. 2d 789, 799 (E.D. Mich. 2008) ("[To determine procedural unconscionability, a court must] focus on the 'real and voluntary meeting of the minds' of the parties at the time that the contract was executed and consider factors such as: '(1) relative bargaining power; (2) age; (3) education; (4) intelligence; (5) business savvy and experience; (6) the drafter of the contract; and (7) whether the terms were explained to the 'weaker' party.'"); Manley v. Personacare, No. 2005-L-174, 2007 WL 210583, at *2 (Ohio Ct. App. Jan. 26, 2007) ("'Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible.'") (quoting Cross v. Carnes, 724 N.E.2d 828, 837 (Ohio Ct. App. 1998)).

208 Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 856 (N.J. 1967) (discussing situations where parties with "experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage").

209 *See, e.g.*, Kerr-McGee Corp. v. N. Utils. Inc., 673 F.2d 323, 330 (10th Cir. 1982) (finding no unconscionability when "experienced negotiators for both parties entered into an agreement after several months of give-and-take").

210 *See, e.g.*, Villa Milano Homeowners Ass'n v. Il Davorge, 102 Cal. Rptr. 2d 1, 11 (Ct. App. 2000) (discussing a "prolix form" that was a "deliberate attempt to circumvent statutory protections").

211 *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?").

3. Structure of the Market

Certain markets employ tactics that severely limit or eliminate one party's ability to bargain over the terms of the deal. In most cases, the law neither facilitates nor hinders these practices. Posted and fixed prices are one method of eliminating the transaction costs related to bargaining. The law does not particularly encourage or discourage the use of fixed prices for consumers; the market has adopted this practice to adjust to mass retail shopping practices.[212] Courts have occasionally grumbled about the fixed nature of contracts of adhesion, noting that they drain the idea of the bargaining process of any actual back-and-forth.[213] With the proliferation of such agreements in modern commerce, especially online, courts have largely acquiesced even with the knowledge that there has been no bargaining or even understanding from one consumer. While "click-wrap" agreements are the subject of much debate by academics, judges, and policymakers,[214] for our purposes we can note that they are common and that they reduce negotiation variance within their marketplaces, at least on the part of the consumer or employee.

4. Nature of Relationship and Conduct between Parties

The common law of contract polices the conduct of parties within the negotiations. Threats of violence are also not a legitimate bargaining tactic. The defense of duress renders a contract void—nonexistent—when "physically compelled,"[215] and the contract is voidable if "induced by an improper threat by the other party that leaves the victim no reasonable alternative."[216] Such threats are usually not considered to be within the realm of legitimate negotiation efforts.

Similarly, parties cannot endeavor to distort the pool of information on which the other party is depending. Fraud or misrepresentation is not

212 State truth-in-advertising laws, as well as the Federal Trade Act's prohibition on deceptive practices, does mean that fixed prices cannot be changed after the fact to make them higher. 15 U.S.C. § 45(a) (2018); 16 C.F.R. § 238.1 (2011) ("No advertisement containing an offer to sell a product should be published when the offer is not a bona fide effort to sell the advertised product.").

213 FARNSWORTH, *supra* note 37, § 4.26, at 285 ("Traditional contract law was designed for a paradigmatic agreement that had been reached by two parties of equal bargaining power by a process of free negotiation. Today, however, in routine transactions the typical agreement consists of a standard printed form containing terms prepared by one party and assented to by the other with little or no opportunity for negotiation.").

214 For a description of one recent effort at the problem by reporters for the American Law Institute, see Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 10–11 (2017).

215 RESTATEMENT (SECOND) OF CONTRACTS § 174 (AM. L. INST. 1981).

216 *Id.* § 175. The scope of improper threats beyond injury includes crimes, torts, criminal or civil prosecution, and bad faith. *Id.* § 176.

permitted; unintentional misrepresentation is merely a contract defense, while intentional fraud can also be a tort or a crime.[217] Generally parties are not required to disclose information except under circumstances involving bad faith or prior assertions.[218] To the extent that lying may be considered a valid negotiation move by some, the law tolerates it if the matter is not material or does not induce the other party to form the contract.[219] One can generally prevaricate when discussing a reservation point or bargaining position.[220] Even though these are "lies," they are set aside as legitimate methods for use in negotiations.

Moving beyond factual information, parties have much more flexibility in how they present their case. Generally, there is no defense against an intentionally incorrect opinion, as the party is not justified in relying on it.[221] Similarly permitted is so-called puffery: "a 'vague statement' boosting the appeal of a service or product that, because of its vagueness and unreliability, is immunized from regulation."[222] Puffery is a well-worn sales tactic that at times skirts the line between permissible and unlawful. To the extent that courts have found opinions and puffery to raise a defense against enforcement, they have focused on more extreme cases in which one side seems to have gotten the better of the other. Commentators have framed these efforts at enforcement as a way of policing the fairness of agreements and the negotiations that led to them.[223] But one of their concerns is disparity in negotiation effectiveness.

One prominent example of crossing the line is casebook staple *Vokes v. Arthur Murray, Inc*.[224] Plaintiff Vokes, a widow who prepaid over $30,000 (between 1961–62) for over 2000 hours of dance lessons, sought the return of the monies she had advanced to the company. Rather than looking to

217 *Id.* § 164 (AM. L. INST. 1981); RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977); MODEL PENAL CODE § 223.3 (AM. L. INST. 1980).

218 *Id.* § 161.

219 *Id.* § 164.

220 *See* White, *supra* note 123, at 927–28.

221 RESTATEMENT (SECOND) OF CONTRACTS § 169 (AM. L. INST. 1981). The exceptions to the rule include fiduciary relationships, the invocation of special skill, judgment, or objectivity, and particular susceptibility to misrepresentation. *Id.*

222 David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1397 (2006); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 169 cmt. b (AM. L. INST. 1981) ("It may be assumed, for example, that a seller will express a favorable opinion concerning what he has to sell. When he praises it in general terms, commonly known as 'puffing' or 'sales talk,' without specific content or reference to facts, buyers are expected to understand that they are not entitled to rely.").

223 Hoffman, *supra* note 200, at 1398 ("Courts seek to discourage speech leading to 'bad' consumption and to protect speech leading to 'good' consumption."); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 724 (1999) ("Once it is acknowledged that consumer risk perceptions may be affected by, for instance, the manner in which information is framed, then it becomes inevitable that manufacturers will exploit those framing effects in a way that maximizes manufacturer profits.").

224 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

unconscionability or incapacity, the court relied on false representations as to Vokes's dancing ability. The studio had used "false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer."[225] Such blandishments must be fairly routine; it's hard to imagine much success for instructors who are ruthlessly honest about their students' skills. But it is extraordinary for a dance student to agree to pay such sums ahead of the actual lessons. The court believed that "it should have been reasonably apparent to defendants that her vast outlay of cash for the many hundreds of additional hours of instruction was not justified by her slow and awkward progress, which she would have been made well aware of if they had spoken the 'whole truth.'"[226] Clearly, the studio had taken advantage of Vokes, and the court stepped in—with a fairly stretched version of misrepresentation—to prevent the bargain from being enforced.

The *Vokes* case has been categorized under the "special skill or judgment" exception to the general freedom to opine. There is also an exception for parties who are particularly susceptible to being misled by false opinions. The exception is aimed at those who are "particularly vulnerable to misrepresentation," and includes "lack of intelligence, illiteracy, and unusual credulity or gullibility."[227] These cases are also handled under the doctrine of undue influence. Although many of the undue influence cases involve special relationships (such as fiduciaries),[228] the defense also encompasses situations in which a more talented negotiator wheedles an unfair bargain out of a näif. The Restatement defines undue influence as "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with [their] welfare."[229] John Calamari and Joseph Perillo cite to four factors in finding a prima facie case of undue influence: (1) susceptibility to influence, (2) opportunity to use influence, (3) disposition to take advantage, and (4) an unfair result.[230]

Undue influence provides courts with a tool to rescue the victims of one-sided negotiations from the consequences, even in the absence of fraud

225 *Id.* at 908.

226 *Id.* at 909.

227 RESTATEMENT (SECOND) OF CONTRACTS § 169 cmt. e (AM. L. INST. 1981). *See also* Adan v. Steinbrecher, 133 N.W. 477, 478 (Minn. 1911) (citing to the facts that "the parties were not dealing at arm's length; that plaintiff was wholly ignorant of the value of property; that by the improper influence exercised over him pending the negotiations by defendant's agent he was deprived of an opportunity to learn the truth").

228 FARNSWORTH, *supra* note 37, § 4.20, at 264–65.

229 RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. L. INST. 1981).

230 PERILLO, *supra* note 188, § 9.10, at 287–88.

or duress. In *Foote v. Wilson*,[231] the court singled out a merchant who cajoled a farmer into buying his wholesale supplies without an inventory:

> So–called "dealers' talk" . . . is morally reprehensible because it is intended to produce the psychological effect of representation without incurring the penalties of representation. Tradesmen of the better class scorn to resort to it. . . . A few dealers still cling to the double standard of morals—one for church on Sunday, and one for business on week days. They display raucous mirth at the "sentimental" notion that men are their brothers' keepers in business, and that the Golden Rule applies to the relation between buyer and seller, and they exercise in full the privilege of trimming with luring "opinions," seductive "puffing," and shrewdly equivocal "shop talk," still permitted them by the remnant of the discredited doctrine of caveat emptor.[232]

This jeremiad against salesmanship—at least in its extreme version—illustrates the use of undue influence to police bargaining results.

Another undue influence case provides a list of hard-bargaining tactics indicative of undue influence:

> [O]verpersuasion is generally accompanied by certain characteristics which tend to create a pattern. The pattern usually involves several of the following elements: (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive.[233]

As these cases point out, the law does not generally police bargaining behavior.[234] But for the exceptional cases of hard bargaining, these defenses are available to correct the injustice.

Despite these many doctrines that do regulate the parties' behavior in the context of negotiations, the common law does not require bargaining in good faith.[235] The notion of good faith has primarily applied to post-formation performance, and the idea is to prevent opportunism after the fact by interpreting the contract in a way that violates its spirit.[236] Before the

231 178 P. 430 (Kan. 1919).

232 *Id.* at 430–31.

233 Odorizzi v. Bloomfield Sch. Dist., 53 Cal. Rptr. 533, 541 (Cal. Ct. App. 1966); *see also* Methodist Mission Home of Tex. v. N—— A—— B——, 451 S.W.2d 539, 542–43 (Tex. Civ. App. 1970) (upholding finding that "plaintiff was subjected to excessive persuasion").

234 *Methodist Mission*, 451 S.W.2d at 543 ("It is true that exerted influence cannot be branded as 'undue' merely because it is persuasive and effective, and that the law does not condemn all persuasion, entreaty, cajolery, importunity, intercession, argument and solicitation."); *Odorizzi,* 53 Cal. Rptr. at 541 ("The difficulty, of course, lies in determining when the forces of persuasion have overflowed their normal banks and become oppressive flood waters.").

235 FARNSWORTH, *supra* note 37, § 3.26, at 189; PERILLO, *supra* note 188, § 11.38, at 412.

236 FARNSWORTH, *supra* note 37, § 8.15, at 566.

contract has been formed, the parties have not committed to the joint performance, and therefore do not have the implied covenant of treating each other in good faith.[237] But parties have been punished for breaching agreements to negotiate in good faith, including cases in which the agreement was implied from the parties' behavior or enforced through promissory estoppel. In *Copeland v. Baskin Robbins U.S.A.*,[238] the court found that the parties had impliedly promised to bargain in good faith, and that one party had failed to do so. The court stated: "[W]e believe there are sound public policy reasons for protecting parties to a business negotiation from bad faith practices by their negotiating partners. Gone are the days when our ancestors sat around a fire and bargained for the exchange of stone axes for bear hides. Today the stakes are much higher and negotiations are much more complex."[239] In a significant line of well-known cases, courts have held parties to their promises during negotiations, even if (or especially if) no agreement has been reached.[240]

* * *

On the surface, the common law of contract purports to let the parties bargain unfettered by restrictions. However, we have seen that in numerous doctrines, courts act in part to correct the results of negotiations that they find to be unfair or substantially uneven. Certainly, as a general rule, courts are not overtly concerned with high levels of negotiation variance. But when confronted with situations in which one party has used that variance to take advantage of the other, they will at times step to adjust the bargain accordingly.

B. Regulating in High-Negotiation Variance Markets

The story is similar in individual markets: the law does not overtly take negotiation effectiveness into account, but the effects ripple through underneath the surface. In markets with high-negotiation variance, assumptions about the consistency of market price, the fairness of the outcome, and the role of the parties within the negotiation do not hold true. We look at three high-variance markets—the markets for lawsuit

237 Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 594 (7th Cir. 1991) ("Before the contract is signed, the parties confront each other with a natural wariness. Neither expects the other to be particularly forthcoming, and therefore there is no deception when one is not. Afterwards the situation is different.").

238 117 Cal. Rptr. 2d 875, 884 (Cal. Ct. App. 2002).

239 *Id.*

240 *See, e.g.*, FARNSWORTH, *supra* note 37, § 3.26, at 196–201; Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274–75 (Wis. 1965).

settlements, corporate control, and employment—and examine how the law has responded to the potential for negotiation imbalance within them.[241]

1. Market for Lawsuit Settlements

Common wisdom about lawsuits in the last forty years of law and economics scholarship posits that most cases will settle, and settlement has been modeled as following a fairly straightforward calculus. When the settlement value is greater for the plaintiff (and lower for the defendant) than the expected value of the case at trial, subtracting transaction costs, settlement will occur.[242] When there is mutual agreement as to the case's expected trial value, then all cases should settle.[243] Because parties do not always have perfect, symmetrical information,[244] and/or because the law is uncertain,[245] they may not agree, and this lack of agreement, in the world of economic analysis, is what stymies agreement.

Scholars of litigation processes have made efforts to build models to predict which cases will go to trial. George Priest and Benjamin Klein, for example, focus on disagreement about the law as the key determinant of settlement versus trial.[246] They argue that cases where settlement will not be reached are most likely to be those with uncertain legal outcomes based on existing precedent; thus, cases that go to trial should thus be resolved in court with approximately an even split between victories for the plaintiff and for the defendant.[247] Other scholars have focused more on the information asymmetries as the determinant of settlement: for instance, Steven Shavell argued against Priest and Klein's "even split" prediction, positing that tried cases could land with any probability distribution for the parties' victories; the determinant would be asymmetrical information between the plaintiff

241 These are by no means the only high-negotiation-variance markets. *See, e.g.*, Levmore & Fagan, *supra* note 6, at 1491–98 (discussing automobile sales, medical services, and law school scholarships).

242 Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1075 (1989); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

243 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 568–89 (6th ed. 2003); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63–64 (1982).

244 POSNER, *supra* note 243, at 69–70; Lucian Ayre Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 404 (1984).

245 POSNER, *supra* note 243, at 589.

246 *See* Priest & Klein, *supra* note 242.

247 *Id.* at 4–5.

and defendant.[248] Empirical data in a variety of studies have not consistently borne out the "even split" hypothesis.[249]

In these models, there is little room for individual human behavior around negotiation: there is no term in these equations for negotiation skill or effectiveness or variation based on the specific interpersonal interaction rather than on structural factors. These models predict that parties with complete information, in a system where the law is fully known and predictable, would all settle their cases[250]—presumably for a similar amount—an amount that perfectly accounted for the expected value of the case minus the transaction costs. Yet even if such information were exchanged and the law was fully transparent, negotiation scholars would insist with certainty that outcomes would vary widely (even if they all satisfied the baseline conditions of surpassing for the party the value of the case minus transaction costs).

What this suggests for the selection of cases for dispute is complicated and difficult to reduce to a single variable. As discussed above, negotiation skill and effectiveness are multifaceted constructs that include a variety of types of behavior, and depend on the unique interaction between the parties. However, considering the role of negotiation acumen in how, when, and whether cases settle can illuminate some of the challenges in pinning down an answer to what kinds of cases will go to trial. It is not even as simple as looking at the skill level of the lawyers involved to make a prediction about whether or not settlement will occur. That is, consider the matrix of potential poor or skilled negotiators in the very simplest of two-party interactions:

	Lawyer A: Poor	Lawyer A: Skilled
Lawyer B: Poor	Poor / Poor	Poor / Skilled
Lawyer B: Skilled	Skilled / Poor	Skilled / Skilled

Nothing about these match-ups is certain, and any effort to make predictions is necessarily speculative until more data about these dyadic processes are gathered. For example, one might imagine that two skilled negotiators would reach agreement any time a settlement offer is greater than the value of the case less transaction costs. However, more skilled negotiators might each set higher aspirations for their negotiation outcome,

248 Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 500 (1996).

249 Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 339–40 (1990); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 188 (1993); Joel Waldfogel, *The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229, 255–56 (1995); Donald Wittman, *Is the Selection of Cases for Trial Biased?,* 14 J. LEGAL STUD. 185, 185 (1985).

250 Shavell, *supra* note 243, at 64.

and their clients might have similarly higher expectations. Two poor negotiators might bumble till neither could reach agreement, but even one poor negotiator may put an offer on the table that is too good to pass up by the other side. And the mismatched pair is likely to be equally unpredictable: stuck at the whim of a poor negotiator, a good negotiator may be hamstrung, or a good negotiator may be able to guide the negotiation smoothly to a satisfactory outcome. In addition, the two-party model only hints at the true complexity of the negotiation process in litigation. Lawyers (even in a simple two-party suit) negotiate not just with one another but with their own clients.[251] Intractable clients, laissez-faire clients, clients who have concerns beyond economic outcomes—all of these factors may influence the success of the lawyer at crafting a durable settlement agreement. While lawyers exert influence over their clients, their clients also retain ultimate settlement authority.[252] Any effort to model the way in which effective negotiation yields cases for trial versus settlement is exceptionally complicated and unlikely to yield accurate prediction based on current data, but it is a mistake to simply write off the negotiation process as meaningless in yielding case outcomes.

Negotiation has not been ignored entirely by those who study case settlement. Robert Mnookin and Lewis Kornhauser's influential exploration of the way that legal endowments help to play a role in guiding outcomes for legal cases changed perceptions of the ways in which negotiations proceeded in the legal arena.[253] Their "bargaining in the shadow of the law" shaped perspectives on negotiation for years to come, guiding numerous scholars to consider the role of legal rules in an array of different settings.[254] Mnookin and Kornhauser explicitly focus on negotiation as the process by which settlement is reached.[255] But what is most notable, for our purposes here, is that their focus is exclusively on the role that the law plays in what they call

251 *See, e.g.*, Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 420–31 (2010).

252 *See, e.g.*, Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 839–42 (1987); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 664 (1976); Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 796–98 (1998); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 364 (2008); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997).

253 *See generally* Mnookin &Kornhauser, *supra* note 147.

254 Indeed, there is almost a cottage industry in "in the shadow of" articles. *See, e.g.*, Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158, 158 (2000); Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After* Tasini, 53 CASE W. RES. L. REV. 605, 605 (2003); Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 621 (2003).

255 Mnookin & Kornhauser, *supra* note 147, at 950.

the "bargaining process," not considering the inverse—that is, the role that the negotiation itself might eventually play in shaping the law.

Nor did Mnookin and Kornhauser go deep into the negotiation process, beyond the idea of bargaining *power,* to critically examine the role of negotiation skill in these cases. They identify factors that they see as the most "important influences or determinants of the outcomes of bargaining," which are:

(1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behavior.[256]

While acknowledging only one real "process" factor, strategic behavior, they go on to state that "[t]he actual bargain that is struck through negotiations—indeed, whether a bargain is struck at all—depends on the negotiation process."[257]

So, what is so-called "strategic behavior" in this negotiation arena? Scholars in this area have essentialized strategic behavior to issues around information and misrepresentation. Mnookin and Kornhauser give several examples: first, regarding information exchange, they note, "information may be accurate or intentionally inaccurate; each party may promise, threaten, or bluff."[258] In addition, they focus on communication about the state of the governing law: "Parties may intentionally exaggerate their chances of winning in court in the hope of persuading the other side to accept less. Or they may threaten to impose substantial transaction costs—economic or psychological—on the other side."[259]

This vision of strategic behavior does implicitly allow for differences in ability to "promise, threaten, or bluff," or to utilize rules, precedent, and reason, but there is no further elaboration on the potential for differences in ability to deploy these strategies and associated tactics more or less effectively. In fact, the decision to engage in one process or the other, and to what extent, seems to be the primary decision point for their imagined negotiator. And so-called "strategic behavior" is largely based in misrepresentation, information withholding, and threats: for example, Mnookin and Kornhauser later assert that negotiation may fail to yield an outcome if "the parties get heavily engaged in strategic behavior and get carried away with making threats."[260]

256 *Id.* at 966.
257 *Id.* at 972.
258 *Id.*
259 *Id.* at 972–73.
260 *Id.* at 975.

Even taking a more expansive view of strategic behavior—for example, defining it as more broadly as "trying to maneuver an opponent into accepting an unfavorable distribution"—leaves much room for individuals to be better or worse in this arena.[261] While highlighting that there are "skillful bargainer[s]" whose "objective . . . is to convince others that [they] intend[] to act in such a way that it is in [the other party's] best interest to do what is in [their] best interest,"[262] scholars have noted that the "array of possible strategies is virtually unlimited."[263] While this relative complexity does not match the streamlined "modeling games" so prominent in academic discussion of legal settlement,[264] even the broadest version of strategic bargaining described here is in turn relatively thin in comparison to the vast scope of psychological and economic research on bargaining and negotiation, which characterizes dozens, if not hundreds, of different types of behavior as more or less effective in negotiation.

In essence, previous literature on legal settlement uses an economic framework to predict negotiation success or failure, but typically isolates only one element of negotiation "skill"—that is, largely, the ability to conceal information, make misrepresentations, and employ threats. Even the broadest definition of strategic behavior relies on a win-lose, zero-sum framework and hones in on what a negotiator does in order to manipulate the other party into accepting an unfavorable outcome. And even in this broader definition of strategic behavior, the approach is fairly crabbed, failing to engage meaningfully in a more sophisticated exploration of what factors actually contribute to negotiation effectiveness.

Much of the extant literature relies on a vision of negotiation as win-lose bargaining game that is belied by the rich tapestry of social science and negotiation literature. While it is certainly the case that some negotiations are characterized by this kind of strategic behavior, it is also the case that even in those settings, some negotiators will be more or less effective in employing these kinds of tactics. Some individuals are better than others at concealment or misrepresentation, some are more credible in making threats, others still are more efficacious in ferreting out dishonesty or threats that lack true leverage. Still others may be more or less skilled in illuminating opportunities to shift from a win-lose to a win-win perspective, or in generating collaborative problem-solving outcomes. All of these features of effective negotiators—complex though they may be—can have a

261 Robert Cooter & Stephen Marks with Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228 (1982).

262 *Id.*

263 Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 328 (1991).

264 In light of the complexity of strategic bargaining, Gross and Syverud add, "[m]ost research on bargaining in litigation consists . . . of modeling games that restrict the structure of offers, demands, and access to information in ways quite alien to actual litigation." *Id.* at 330.

meaningful—albeit currently unpredictable—impact on the set of cases that settle versus going to trial.

2. Market for Corporate Control

The market for corporate control refers to the market for a controlling percentage of shares for publicly held corporations. A majority of outstanding shares is sufficient, but often less can provide control.[265] As developed in Henry Manne's classic article on the subject, the market exists apart from the trade in individual shares and offers opportunities for companies to combine or be absorbed into a larger whole.[266] Purchasing control rights allows the buyer to implement changes in managerial policies and then reap the rewards from those changes.[267] Thus, the most important function of the market is to discipline corporate executives who might otherwise grow complacent in a diffusely-held company by threatening their hold over governance.[268]

For publicly traded companies, one might think that the market for corporate control is entirely devolved to electronic markets, and there is little room for negotiation when shares are bought on public exchanges like the New York Stock Exchange and NASDAQ.[269] These exchanges are perhaps the quintessential example of a low-negotiation-variance market—one where the parties only interact on a binary, yes-no basis and there is no bargaining over price or other terms. But the market for corporate control operates differently than the public market for shares. Due to federal regulation, a party looking to purchase a controlling share of a public company must announce its intentions once it owns or controls more than

265 Many twenty-first century tech companies, such as Facebook and Google, provided their founders with controlling stakes through share holdings that have greater voting rights than the common shares. Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 694, 704–05 (2019); Steven Davidoff Solomon, *Snap's Plan Is Most Unfriendly to Outsiders*, N.Y. TIMES (Feb. 3, 2017), https://www.nytimes.com/2017/02/03/business/dealbook/snap-ipo-plan-evan-spiegel.html.

266 Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965) ("The basic proposition advanced in this paper is that the control of corporations may constitute a valuable asset; that this asset exists independent of any interest in either economics of scale or monopoly profits; that an active market for corporate control exists; and that a great many mergers are probably the result of the successful workings of this special market.").

267 *Id.* at 113 ("The lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently. And the potential return from the successful takeover and revitalization of a poorly run company can be enormous.").

268 *Id.* ("Only the take-over scheme provides some assurance of competitive efficiency among corporate managers and thereby affords strong protection to the interests of vast numbers of small, non-controlling shareholders.").

269 For a discussion of the role of microseconds in the sales of shares, see generally MICHAEL LEWIS, FLASH BOYS (2014).

five percent of the target company's shares.[270] It is not possible for a company to silently or secretly suck up shares on the exchanges and then suddenly announce a controlling stake. Because of this structure, negotiations over the purchase of a controlling stake are done in public through a tender offer or occur behind the closed doors of executive suites. It is these private negotiations in which negotiating ability can have an outsized effect on the outcome.

Discussions over corporate takeovers are held at the highest levels of corporate governance and finance. Because of the desire for secrecy and the need for the negotiating parties to have true bargaining authority, only top executives participate. Although companies are only "in play" at particular moments in their history, the market for corporate control essentially consists of corporate executives, specifically CEOs, and those institutions or individuals who control a large amount of capital, advised by a small coterie of consultants, accountants, attorneys, and investment bankers. Confidentiality in these talks is important to avoid the encouragement of competitors into the market, the weakening of the target if talks fall through, and the avoidance of unnecessary turbulence within the markets as rumors and poor-quality information is spread.[271] As a result, only a small number of company officials are involved in merger and acquisition negotiations. The description of the talks over the AOL-Time Warner merger provide an illustrative example:

> [AOL CEO Steve] Case flew to New York to meet [Time Warner CEO Jerry] Levin for a private dinner. To avoid being spotted together, they booked a suite at Manhattan's Rihga Royal Hotel . . . and ordered room service.
>
> It was an unforgettable evening, that dinner of November 1, 1999. Getting to know each other, Case and Levin talked the night away. They had so much in common—a love of fine wines, for example. More crucially, they were on a common mission. Business was not just about making money, they agreed; it was about integrity, and values, and the greater good, and making a difference.
>
> . . . .

270 The Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d), 78n(d)–(e) (2018)). *See also* Howard F. Mulligan, Note, *The Continuing Validity of State Takeover Statutes—A Limited Third Generation*, 62 NOTRE DAME L. REV. 412, 413 (1987) ("[T]he act makes it unlawful for any person to make a tender offer for more than five percent of the equity securities of a 34 Act company, unless the offeror at the time of the offer has filed a schedule with the SEC, including any solicitation materials prepared in connection with the offer.").

271 *See* Basic Inc. v. Levinson, 485 U.S. 224, 234–35 (1988) ("To avoid a 'bidding war' over its target, an acquiring firm often will insist that negotiations remain confidential, and at least one Court of Appeals has stated that 'silence pending settlement of the price and structure of a deal is beneficial to most investors, most of the time.'" (citations omitted)).

> By the end of the evening, Levin and Case were of one mind. Together they could create the world's most powerful and respected Internet-driven media and entertainment company. They'd make the world a better place.[272]

Although the pool of involved parties expands as the merger moves forward, the key components of the deal remain tied to decisions made early on, and the CEOs retain the ultimate authority. The deal must eventually be approved by the board of directors and, in most mergers, the shareholders, but the merger is something of a fait accompli by the time it reaches these groups. Presumably the board has the benefit of due diligence conducted by investment banks which is designed to draw out any potential flaws in the merger.[273] But there are reasons to believe that bankers will be predisposed to support a deal.[274] Moreover, diligence is conducted in incredibly short periods of time.[275] Critics contend that the process is window dressing as a prelude to the formal announcement.[276] And despite their role in approving most mergers, shareholders have a largely passive role in the combination, with approvals in the vast majority of cases.[277]

There is reason for concern that the market for corporate control does not lead to a highly efficient and value-generating market. Because tender offers and proposed acquisitions generally need to pay more than the shares' current market price, there can be large abnormal returns for the target in the short term.[278] But over the long term, evidence suggests that corporate combinations do not increase overall societal efficiency. Studies on long-

272 NINA MUNK, FOOLS RUSH IN: STEVE CASE, JERRY LEVIN, AND THE UNMAKING OF AOL TIME WARNER 142–43 (2004).

273 *See, e.g.*, Robert J. Giuffra, Jr., Note, *Investment Bankers' Fairness Opinions in Corporate Control Transactions*, 96 YALE L.J. 119, 121–25 (1986). For a narrative example of the role of financial advisors in a merger, see Emerald Partners v. Berlin, No. Civ.A. 9700, 2003 WL 21003437, at *8–12 (Del. Ch. 2003).

274 MUNK, *supra* note 272, at 166 (noting that the two investment banking firms involved in the AOL Time Warner merger each received a fee of $60 million); Giuffra, *supra* note 273, at 127–28 (noting that "investment banks face strong incentives to provide opinions that serve management's interests").

275 For the AOL Time Warner merger, banks were given three days over a weekend to prepare their fairness reports for the companies' boards. MUNK, *supra* note 272, at 161–62. As one of the bankers involved in the opinions noted, "If you do a deal over a weekend, you take shortcuts. . . . In hindsight, it was sloppy." *Id.* at 163.

276 *See, e.g.*, Lucian Arye Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 DUKE L.J. 27, 37–45 (1989) (discussing the conflicts of interest that might lead to such a result); Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557, 1587 (2006) (noting that some contracts provide that the bank will only be paid, or will be paid more handsomely, if the transaction is approved).

277 *See* Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159, 169–71 (2008).

278 Anup Agrawal & Jeffery F. Jaffe, *The Post-Merger Performance Puzzle*, *in* 1 ADVANCES IN MERGERS AND ACQUISITIONS 7 (Cary Cooper & Alan Gregory eds., 2000).

term returns for corporate acquisitions have generally shown "strong evidence of abnormal under-performance[] following mergers."[279] The conventional wisdom is that corporate combinations do not bring long-term gains.[280] Even those who question whether corporate combinations have generally poor results concede that a significant number of them have spectacularly poor results.[281]

Researchers have investigated the possibility that individual personality traits may have an outsized effect on the market for corporate combinations. For example, CEOs may be acting with hubris—an inflated sense of their own abilities and the transactions they seek to effectuate.[282] This hubris may

279 *Id.* at 37. Afra Afsharipour & J. Travis Laster, *Enhanced Scrutiny on the Buy-Side*, 53 GA. L. REV. 443, 446 (2019) ("Empirical studies of acquisitions consistently find that public company bidders often overpay for targets, imposing significant losses on bidder shareholders. Research also indicates that the losses represent true wealth destruction in the aggregate and not simply a wealth transfer from bidder shareholders to target shareholders."); Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 602 (1989); Feng Gu & Baruch Lev, *Overpriced Shares, Ill-Advised Acquisitions, and Goodwill Impairment*, 86 ACCT. REV. 1995, 1996–97 (2011).

280 *See, e.g.*, ROBERT F. BRUNER, DEALS FROM HELL: M&A LESSONS THAT RISE ABOVE THE ASHES 14 (2005) ("The popular view is that M&A is a loser's game."); Robert G. Eccles, Kersten L. Lanes & Thomas C. Wilson, *Are You Paying Too Much for That Acquisition?*, HARV. BUS. REV. July–Aug. 1999, at 136, 136. (noting "30 years of evidence demonstrating that most acquisitions don't create value for the acquiring company's shareholders"); James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 BUFF. L. REV. 249, 280 (2001) ("Evidence from past merger waves shows that public companies engaging in mergers underperform their peer companies that have not followed similar acquisition strategies."); Sara B. Moeller, Frederik P. Schlingemann & René M. Stulz, *Firm Size and the Gains from Acquisitions*, 73 J. FIN. ECON. 201, 202 (2004) (finding that takeovers by large firms have destroyed $312 billion of shareholder wealth over twenty years); Gregory Zuckerman, *Ahead of the Tape*, WALL ST. J., Dec. 30, 2002, at C1 ("Mergers just don't work. A mountain of academic research shows most acquisitions end up costing shareholders . . . .").

281 *See* BRUNER, *supra* note 280, at 95–338 (discussing particularly poor performers). The AOL and Time Warner combination, known as "the worst deal in history," laid waste to the market value of the new company and led to the departure of almost all of the executives responsible for the union. KARA SWISHER, THERE MUST BE A PONY IN HERE SOMEWHERE: THE AOL TIME WARNER DEBACLE AND THE QUEST FOR A DIGITAL FUTURE 9–10 (2003). Three years after the completion of the merger, shareholders in AOL Time Warner had lost over $200 billion in equity value. MUNK, *supra* note 272, at 277.

282 Richard Roll has argued that corporate takeovers were generally a value-neutral proposition, and that therefore rational executives would not seek them out. Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 197–98 (1986) ("It will be argued here that takeover gains may have been overestimated if they exist at all."). In order to explain the frequency of combinations, Roll relied not on rational market theory, but rather managerial hubris. *Id.* at 199–200. Relying on the empirical evidence that individual decisionmaking is not always rational, Roll noted that takeovers were an apt subject for such research, since takeovers reflect individual decisions. *Id.* at 199. Given that the data, in his view, did not show added value from takeovers to the acquiring firm, Roll hypothesized that managerial hubris—namely, the notion that their (higher) valuation of the target was better than the market's (lower) valuation—was responsible for takeover activity. *Id.* at 199–200.

be a product of two types of systematic irrationalities known as behavioral heuristics: the optimism bias and the commitment bias. These two heuristics form what one commentator has labeled the optimism-commitment "whipsaw."[283] Scholars have keyed in on the effects of the optimism or over-confidence bias on high-level corporate decisionmakers.[284] The optimism bias is a documented phenomenon within financial markets.[285] Subjects also believe that their talents are above average.[286] Relatedly, evidence also suggests that individuals underestimate others' abilities, especially those of their competitors.[287]

Another component of the optimism bias is the so-called "illusion of control." This irrationality means that "people not only think that they are better than average when skill or ability is relevant to outcomes, they sometimes believe that they have more control over outcomes than they do."[288] High-level corporate executives may use these traits to rise to the top.[289] However, those same irrationalities may work against the company's

283 Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 147 (1997).

284 *See, e.g.*, MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 37–39 (3d ed. 1994) (discussing overconfidence among managers).

285 *See, e.g.*, Werner F.M. De Bondt & Richard H. Thaler, *Financial Decision-Making in Markets and Firms: A Behavioral Perspective*, *in* 9 HANDBOOKS IN OPERATIONS RESEARCH AND MANAGEMENT SCIENCE: FINANCE 385, 389 (R. Jarrow et al. eds., 1995) ("Perhaps the most robust finding in the psychology of judgment is that people are overconfident.").

286 See David Dunning, Judith A. Meyerowitz & Amy D. Holzberg, *Ambiguity and Self-Evaluation: The Role of Idiosyncratic Trait Definitions in Self-Serving Assessments of Ability*, *in* HEURISTICS AND BIASES 324, 324 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (finding that seventy percent of high school students in one study rated themselves above average in leadership skills, while only two percent ranked themselves below average on that dimension); Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146 (1981) (finding that most drivers believe they are above-average drivers); Ezra W. Zuckerman & John T. Jost, *What Makes You Think You're So Popular? Self-Evaluation Maintenance and the Subjective Side of the "Friendship Paradox,"* 64 SOC. PSYCH. Q. 207, 207 (2001).

287 A notable example of such behavior is the case of "Rahodeb," the online user name for Whole Foods CEO John Mackey. Mackey used his anonymous online account to praise Whole Foods and pillory competitor Wild Oats. David Kesmodel & John R. Wilke, *Whole Foods Is Hot, Wild Oats a Dud—So Said 'Rahodeb'; Then Again, Yahoo Poster Was a Whole Foods Staffer, the CEO To Be Precise*, WALL ST. J., July 12, 2007, at A1.

288 Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 288 (2001); *see generally* Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCH. 311 (1975).

289 *See, e.g.*, Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 288 (2004) (noting that "over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception are *favored* in corporate promotion tournaments, so that people who possess them are disproportionately represented in executive suites"); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition:* Corporate

fortunes when applied to business decisions. And in fact, research has shown that executive overconfidence has demonstrated effects on corporate decisionmaking. According to the research, executive overconfidence leads to excessive entry into unfamiliar markets,[290] overpaying in the context of auctions,[291] an overreliance on the executive's personal information and perspective,[292] and a belief that the market is undervaluing the executive's own company.[293] As a result, executive overconfidence may lead to a consistent pattern of overconfidence in one's judgments and abilities.[294] The "whipsaw" phenomenon combines this tendency towards overconfidence with a commitment to one's positions, even when it is clear that the original idea was a bad one.[295] This reluctance to abandon prior sunk costs is known as the commitment bias.[296] Studies have demonstrated this bias within the corporate world.[297]

The market for corporate control is almost a perfect convergence of a high-negotiability market: high stakes, individuated sales, personal and secret negotiations, significant individual decisionmaking power, and fairly limited review. The possibility for widely divergent prices would not be as problematic if the transactions only involved individual wealth. But CEOs are using shareholders' value and property in effectuating these deals. It is not their money. In fact, the deals are often structured to make sure that the executives involved are paid handsomely, no matter how good the deal is for their side.[298]

Irresponsibility *and the Lessons of Enron,* 70 GEO. WASH. L. REV. 968, 969 (2002). For a brief overview of the tournament theory for managerial talent, see Iman Anabtawi, *Explaining Pay Without Performance: The Tournament Alternative*, 54 EMORY L.J. 1557, 1586–87 (2005).

290 Colin Camerer & Dan Lovallo, *Overconfidence and Excess Entry: An Experimental Approach*, 89 AM. ECON. REV. 306, 306 (1999).

291 *See, e.g.*, RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 50–60 (1992).

292 Antonio E. Bernardo & Ivo Welch, *On the Evolution of Overconfidence and Entrepreneurs*, 10 J. ECON. & MGMT. STRATEGY 301, 302 (2001).

293 J.B. Heaton, *Managerial Optimism and Corporate Finance*, 31 FIN. MGMT. 33, 34 (2002); Ulrike Malmendier & Geoffrey Tate, *CEO Overconfidence and Corporate Investment*, 60 J. FIN. 2661, 2662 (2005).

294 Directors can also suffer from optimism bias. Ted Turner, a Time Warner board member and its largest shareholder, announced that he had voted for the 2000 merger "with as much or more excitement and enthusiasm as I did when I first made love some forty-two years ago." MUNK, *supra* note 272, at 179.

295 *See* Langevoort, *Organized Illusions*, *supra* note 283, at 147.

296 *See, e.g.*, Lawrence A. Cunningham, *Behavioral Finance and Investor Governance*, 59 WASH. & LEE L. REV. 767, 782–83 (2002).

297 *See, e.g.*, Barry M. Staw, *Rationality and Justification in Organizational Life*, *in* 2 RESEARCH IN ORGANIZATIONAL BEHAVIOR 45, 57–58 (Barry M. Staw & Larry L. Cummings eds., 1980); Charles R. Schwenk, *Information, Cognitive Biases, and Commitment to a Course of Action*, 11 ACAD. MGMT. REV. 298, 298 (1986).

298 When a small company is being merged into a bigger company, the so-called "target" company will often pay its departing executives a "golden parachute" to insure a soft landing from

Corporate law has a variety of mechanisms to protect various players, especially shareholders, against opportunism within the system. As an example, when a majority shareholder is buying out minority shareholders, the obvious conflict of interest is managed through a set of special voting mechanisms or the "entire fairness" test.[299] Mechanisms are more limited, however, when it comes to protections against bad negotiating. As noted earlier, deals must generally be approved by both the board of directors and the shareholders. But given the crush of time, the availability of information, the rational ignorance of shareholders, and the potential for onerous deal protection provisions, these approvals may not be a sufficient filter for badly negotiated deals.

Shareholders in a target company also have the appraisal remedy if they are not comfortable with the deal. Under state law, appraisal allows the stockholder to forego the merger consideration and instead file a judicial proceeding to determine an alternative fair value of the shares.[300] Long derided as creaky, cumbersome, and little used,[301] appraisal became more popular in the early 2000s and even led to "appraisal arbitrage," the practice of purchasing shares after a merger's announcement with the intent of using the appraisal remedy.[302] In response to concerns of litigation opportunism, the Delaware legislature amended its corporate law to make appraisal suits more difficult to bring.[303] And in 2017, the Delaware Supreme Court issued two important decisions emphasizing that deal price was the primary measure of fair value for lower courts to use in appraisal proceedings.[304] Delaware's changes to the appraisal doctrine seem to have weakened the remedy significantly.[305]

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the departure. Companies also give executive bonuses when they are on the acquiring end of the deal. According to one study, the acquiring company's CEO received a gratuitous multimillion-dollar bonus in about forty percent of acquisitions. Yaniv Grinstein & Paul Hribar, *CEO Compensation and Incentives: Evidence from M&A Bonuses*, 73 J. FIN. ECON. 119, 125–26 (2004).

299 *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014) ("Where a transaction involving self-dealing by a controlling stockholder is challenged, the applicable standard of judicial review is 'entire fairness,' with the defendants having the burden of persuasion.").

300 Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1553 (2015); *see* DEL. CODE ANN. tit. 8, § 262.

301 Korsmo & Myers, *supra* note 300, at 1553 (noting the "prevailing academic view" that appraisal was "seldom utilized" and "too cumbersome for stockholders to call upon profitably").

302 *Id.* at 1153–56.

303 The amendments required appraisal petitioners to meet threshold requirements, such as the consideration for the shares equaling at least $1 million, DEL. CODE ANN. tit. 8, § 262(g), and also allowed corporations to reduce the amount of pre-judgment interest that they potentially owed. *Id.* § 262(h).

304 Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 5, 23–24 (Del. 2017); DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 366 (Del. 2017).

305 Wei Jiang, Tao Li & Randall Thomas, *The Long Rise and Quick Fall of Appraisal Arbitrage* 51 (Vand. U. L. Sch. Legal Stud. Rsch. Paper Series, Working Paper No. 20-16, 2020), https://ssrn.com/abstract=3546281 (finding that "while the returns to appraisal arbitrage were

The merits of a stronger appraisal remedy are much debated: proponents cite to evidence that target companies received better deals in the shadow of a stronger appraisal remedy,[306] while opponents lack faith in a judicial system of valuation.[307] Both the opponents and the Delaware Supreme Court place significant trust in the "market price" as negotiated between the parties.[308] The Court has also focused on the specifics of the process, with the negotiated price receiving deference if proper procedures have been followed.[309] But the market for corporate control has significantly high negotiation variance when it comes to the actual assessment of the corporation's control premium. The idea of one particular "market price" becomes more akin to a "market price zone" with considerable discretion within. As such, there should be less faith that this market would find the appropriate price on its own.

A comprehensive review of the merger process and its regulatory oversight are beyond the scope of this paper. But the market for corporate control is notable for its combination of high negotiation variance and high stakes. The law of corporate combinations reflects the tension between the traditional approach of leaving people to their bargains and the desire to protect people—especially weaker parties—from the consequences of bad negotiating. Courts, lawmakers, and commentators should more explicitly

robust during 2000–2014, they fell drastically in 20152109 [sic] because of changes to the Delaware appraisal statute and adverse opinions of the Delaware Supreme Court in the *DFC Global* and *Dell* cases").

306 *See* Audra Boone, Brian Broughman & Antonio J. Macias, *Merger Negotiations in the Shadow of Judicial Appraisal*, 62 J.L. & ECON. 281, 283 (2019) ("We find—consistent with shareholder protection—that shareholders of Delaware targets receive higher acquisition premiums and abnormal returns following events that strengthen the appraisal remedy compared with deals involving non-Delaware targets over the same period.").

307 William J. Carney & Keith Sharfman, *The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters*, 43 DEL. J. CORP. L. 61, 109 (2018) ("We have mainly argued here for reliance on the pre-deal market price for share valuation in appraisal litigation involving public companies. To achieve this result, the courts would simply need to give actual respect to market prices rather than merely pay them lip service as the Supreme Court has consistently done, most recently in *Dell* and *DFC*.").

308 *DFC*, 172 A.3d at 349 ("[E]conomic principles suggest that the best evidence of fair value was the deal price, as it resulted from an open process, informed by robust public information, and easy access to deeper, non-public information, in which many parties with an incentive to make a profit had a chance to bid."); Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 EMORY L.J. 221, 224 (2018) ("The Supreme Court's message to the trial courts is simple: absent a culpable breach of duty, trust the market and have faith in the negotiated price.").

309 *DFC*, 172 A.3d at 349 (noting that "the transaction resulted from a robust market search that lasted approximately two years in which financial and strategic buyers had an open opportunity to buy without inhibition of deal protections"); Guhan Subramanian, *Appraisal After* Dell, *in* THE CORPORATE CONTRACT IN CHANGING TIMES 222, 226 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (recommending a safe harbor if the process is "pristine").

take the negotiation process into account and understand the role that negotiation effectiveness can play in this high-variance market.

3. Market for Employment

As a general matter, the market for employment has a high variance based on negotiated outcomes. A number of factors contribute to this negotiability: the uniqueness of each person's match to a particular job; the importance of employment to the applicant; the fact that employment is a status market;[310] the difficulty in obtaining clear and reliable information about the applicant and the employer; the expectation of negotiation; and the general lack of pay transparency.

The law has generally focused on structural issues within the employment market that disadvantage larger swathes of workers. The National Labor Relations Act[311] is specifically directed at the "inequality of bargaining power" between employees and employers and provides a mechanism for collective representation.[312] Along with the rights to act collectively, the key provision is the requirement that both unions and employers bargain together in good faith over terms and conditions of employment.[313] Good-faith bargaining focuses both on procedural concerns, such as time spent, as well as negotiating tactics, such as openness to compromise.[314] But the parties are not required to agree, nor are they required to make any substantive proposals. Labor law is primarily about shifting the structure of the labor market from one of individual bargaining to one of collective negotiation.[315] The negotiation effectiveness of the parties can play a significant role in specific bargaining sessions, but the law does not do much to police the bargaining behavior of the parties.

As to individual employees, the primary legal interventions are mandatory minimums and antidiscrimination provisions. One of the first mandatory terms was the ban on yellow-dog contracts; employers could not bargain with employees to forego their right to unionize.[316] Many more have

310 ASPERS, *supra* note 149, at 88.

311 29 U.S.C. §§ 151–69.

312 *Id.* § 151.

313 *Id.* § 158(a)(5), (b)(3).

314 *Id.* § 158(d).

315 Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407 (1958) ("The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards."). One popular suggested reform is the move to sectoral bargaining, rather than enterprise bargaining; *see, e.g.*, Kate Andrias, *Union Rights for All: Toward Sectoral Bargaining in the United States*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 56, 57–59 (Richard Bales & Charlotte Garden eds., 2020).

316 *See* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1037 n.146 (1996) ("'Yellow dog contracts' are employment contracts in which workers promise not to join a union in order to

followed, including minimum wage and overtime provisions,[317] unpaid family and medical leave,[318] workplace safety requirements,[319] health insurance coverage,[320] and unemployment insurance.[321] These required terms circumvent the need to bargain. In addition, federal antidiscrimination provisions shield those who fall into protected classes.[322] The law of employment structures the basics of the relationship such that employers and employees know that a certain foundational level of wages and benefits will be offered, no matter what the parties negotiate.

Within these constraints, however, there still exists for many workers a range of possible outcomes that varies depending on negotiation effectiveness. And the variance can play out in troubling ways. As discussed in Part II, significant discrepancies in pay for women and people of color persist despite antidiscrimination provisions.[323] The Equal Pay Act of 1963 was an effort to rectify the imbalance between men's and women's salaries by requiring equal pay for equal work.[324] The statute specifies that employees shall not be paid less based on gender if they are doing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[325] Much of the debate over gender-based pay discrepancies has centered around comparable worth—namely, the extent to which different types of jobs which have different gender profiles should nevertheless have similar wage structures because their positions are comparable.[326] However, even the basics of fair pay—the notion that people in the same job description should have the same pay structure—have proven exceedingly difficult to effectuate. Because such claims can be difficult to unearth,

obtain employment. They were prevalent in the early decades of the twentieth century and were approved by the Supreme Court in the *Hitchman Coal* and *Coppage* cases."). The Norris-LaGuardia Act banned such contracts. Norris-LaGuardia Act, ch. 90, § 3, 47 Stat. 70, 70 (1932), (codified at 29 U.S.C. § 103).

317 *See, e.g.*, 29 U.S.C. §§ 206–07 (providing for federal minimum wages and overtime).

318 *Id.* §§ 2601–54 (providing for family and medical leave).

319 29 U.S.C. §§ 651–78.

320 26 U.S.C. § 4980H(a).

321 *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 1051 (7th ed. 2011) ("Fifty states, the District of Columbia, and Puerto Rico have individual unemployment insurance (UI) programs determining the length of unemployment insurance benefits and their amounts for qualifying recipients.").

322 *See, e.g.*, 42 U.S.C. § 2000e-2(a) (prohibiting discrimination against employees based on race, sex, ethnicity, or religion); 29 U.S.C. § 630(f) (prohibiting discrimination against employees based on age); 42 U.S.C. § 12112(a) (prohibiting discrimination against employees based on disability).

323 *See* Part II.C.4 *supra*.

324 Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d)).

325 29 U.S.C. § 206(d)(1).

326 *See, e.g.*, Janice R. Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 655, 658 n.16 (1984).

Congress was moved to extend the statute of limitations for such claims to allow for after-the-fact discovery.[327] But because individual workers are generally loath to share salary information, workers may never find out about the disparity no matter how long they have to file a suit.[328] Some employers may further inhibit disclosure by trying to label salary information confidential.

Academics have generally approached these complex issues of pay discrimination as a combination of discrimination and information disparity, and many have proposed that transparency as a reform.[329] Undoubtedly, information about co-workers' pay would inform employee efforts to make sure they are paid appropriately. But negotiation plays a role here as well. Certain groups may not negotiate for the same level of salary, either because of individual preferences, societal norms, or discrimination against hard bargaining by those groups.[330] As a result, employers may have systemic and even severe pay disparities without intentional discrimination due to negotiating disparities.[331]

The proposed Paycheck Fairness Act[332] endeavors to address the issue of negotiation difference. The legislation would broaden the scope for comparable pay, tighten up exceptions to the Equal Pay Act, and provide for compensatory and punitive damages.[333] On the information front, it would require employers to disclose salaries to the Equal Employment Opportunity Commission and would protect workers against retaliation for talking about their pay with other employees.[334] The Department of Labor would be tasked with "conducting and promoting research . . . [surrounding] pay disparities, with specific attention paid to women and girls from historically underrepresented and minority groups."[335] But in addition to these provisions, the Act would provide funding for the Secretary of Labor to

327 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5.

328 *See* Bierman & Gely, *supra* note 176, at 176; Edwards, *supra* note 176, at 55–56.

329 *See, e.g.*, Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 958 (2011) ("[G]ender pay discrimination should be viewed as a market failure caused, in part, by pay secrecy and information asymmetries about market wages."); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 UC IRVINE L. REV. 781, 783 (2014) ("I conclude that there is a fairly strong though not uncomplicated case to be made that mandatory disclosure of meaningful salary information would tend to produce less discrimination, less favoritism, and probably somewhat lower disparities overall."); Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1046–47 (2012) (proposing incentives for employers to provide pay transparency).

330 *See* Part II.C.4 *supra*.

331 Ramachandran, *supra* note 329, at 1045 ("[N]either the employer nor the employee is entirely at 'fault,' in the commonly understood sense of the term, when that employee has been socialized not to apply for certain jobs or to ask for more money.").

332 Paycheck Fairness Act, H.R. 7, 116th Cong. (2019).

333 *Id.* § 3.

334 *Id.* §§ 3(b), 8.

335 *Id.* § 6(a)(1).

"make grants on a competitive basis to eligible entities to carry out negotiation skills training programs for the purposes of addressing pay disparities, including through outreach to women and girls."[336] The grants would be available for state and local governments, as well as private nonprofits. The Department would also have to implement regulations or policy guidance providing for the integration of negotiation skills training into existing programs at the Departments of Labor and Education.[337] After eighteen months, the Secretary would provide a report on the Department's training efforts.[338]

The Paycheck Fairness Act's efforts to explicitly address negotiation disparities illustrates an understanding of the role of negotiation in cementing and deepening discriminatory practices even after overt discrimination has been addressed. When examining markets such as employment for their inefficiencies and injustices, academics and policymakers have looked to structural economic bargaining power and information asymmetries to address market problems. But disparities in negotiation effectiveness are an important factor, too. We should determine whether markers have a high or low negotiation variance, and if high, then whether there are systemic disparities caused by differences in negotiation effectiveness.

CONCLUSION

The technological advances of the twenty-first century are rapidly changing many marketplaces. Online auctions have loosened time and place restrictions to enable bidding for extended periods with participants from all over the world. Web-based merchants such as Amazon allow for the convenience of delivery and a wealth of potential choices—along with the fear that its efficiencies will enable it to consume the marketplace.[339] Social media companies provide their services to users at no monetary cost but take in enormous amounts of data and then charge advertisers for access.[340] Website shopping algorithms find the best deals for customers based on their

336 *Id.* § 5(a)(2).

337 *Id.* § 5(b) (covering programs under the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–76, the Carl D. Perkins Career and Technical Education Act of 2006, 20 U.S.C. §§ 2301–08, the Higher Education Act of 1965, 20 U.S.C. § 1001 et seq., and Workforce Innovation and Opportunity Act, 29 U.S.C. §§ 3101–3361).

338 *Id.* § 5(c).

339 Stacy Mitchell, *Amazon Doesn't Just Want to Dominate the Market—It Wants to Become the Market*, THE NATION, (Feb. 15, 2018), https://www.thenation.com/article/archive/amazon-doesnt-just-want-to-dominate-the-market-it-wants-to-become-the-market/.

340 Levmore & Fagan, *supra* note 6, at 1516.

preferences.[341] Our markets may develop radically transformed structures even sooner than we think.[342]

As we move into the future of capitalism, it is important to recognize and study the role of negotiation in market dynamics. The law has largely not recognized the role of negotiation variance in markets explicitly, even though many doctrines evidence the ripples of this concern. Scholars should identify negotiation variance as a factor and then research its effects within particular markets. In some situations, transparency and disclosure of terms will equalize the playing field and eliminate whatever nefarious effects negotiation variance may have.[343] However, in many markets negotiations will remain necessary to establish price and terms and to divide the surplus between parties. Ignoring the role of bargaining or wishing it away does not realistically deal with the potential problems.

This Article is an effort to develop further study of the role of negotiation in markets, particularly in the field of law. While much research on markets and negotiation has already been conducted in the fields of economics, behavioral psychology, social psychology, and sociology, more attention should be paid to the specific role of negotiation and the effects that negotiation variance has on the market players. As we develop a more nuanced understanding of the interplay between bargaining, markets, transactions, and the law, we expect that the construction and regulation of markets will better handle the complexities of these interactions and provide for fairer allocations.

341 VIKTOR MAYER-SCHÖNBERGER & THOMAS RAMGE, REINVENTING CAPITALISM IN THE AGE OF BIG DATA 61 (2018) ("[A] computer may be capable of transacting in the marketplace better than we can or, at the very least . . . can greatly aid humans in conducting market transactions . . . .").

342 *Id.* at 212 (predicting that data will replace price as the salient aspect of transactions).

343 Levmore & Fagan, *supra* note 6, at 1470–71 (arguing that transparency in pricing and nonnegotiability will improve efficiency and lower costs).