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## Sex Matters: Considering Gender in Consumer Contracts

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# SEX MATTERS: CONSIDERING GENDER IN CONSUMER CONTRACTING

AMY J. SCHMITZ\*

*We hear about the so-called “War on Women” and persisting salary gaps between men and women in the popular media, but contracts scholars and policymakers rarely discuss gender. Instead, dominant voices in the contracts field often reflect classical and economics-driven theories built on assumptions of gender neutral and economically rational actors. Furthermore, many mistakenly assume that market competition and antidiscrimination legislation address any improper biases in contracting. This Article therefore aims to shed light on gender’s importance by distilling data from my own e-survey of Colorado consumers along with others’ research regarding gender differences in contract outcomes, interests and behaviors. In light of this research, the Article calls for open discussion of gender in contract and consumer law. It also suggests ideas for considering research findings and the importance of context in designing financial literacy and contract education programs that acknowledge gender while honoring individuality and avoiding stereotype reinforcement.*

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## INTRODUCTION

The so-called “War on Women” and persisting salary gaps between men and women have caught the public eye.<sup>1</sup> Political conversations highlight disagreements between and within the Republican and Democratic parties regarding such “women’s issues” as contraception and abortion.<sup>2</sup> At the same time, some commentators argue that traditional male attributes are no longer valued, and that concern for boosting girls’ achievements has left boys behind.<sup>3</sup>

The data on debt nonetheless reveals women’s financial woes. Studies in the lending industry indicate that brokers and financial institutions steer a disproportionate share of women toward subprime loans despite credit worthiness and capacity to repay on par with male borrowers.<sup>4</sup> Bankruptcy data then adds to this picture of women falling financially behind men by showing women filing for bankruptcy in higher numbers than men.<sup>5</sup> Furthermore, Professor Ian Ayres revealed discrimination in Chicago car sales with his finding that area male and

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<sup>1</sup> See, e.g., Gary Shapiro, *The Real War on Women*, FORBES (June 13, 2012), available at <http://www.forbes.com/sites/garyshapiro/2012/06/13/the-real-war-on-women> (noting the popularity of war on women debates).

<sup>2</sup> These sources highlight the 2012 Presidential election debates regarding “women’s issues” and the fight for female voters. See Jon Cohen & Krissah Thompson, *Romney Wins Over Republican Women, Shrinks Popularity Gap with Obama in New Poll*, WASHINGTON POST (May 30, 2012), available at [http://www.washingtonpost.com/politics/mitt-romney-winning-over-gop-women-according-to-new-poll/2012/05/30/gJQAB2Q21U\\_story.html](http://www.washingtonpost.com/politics/mitt-romney-winning-over-gop-women-according-to-new-poll/2012/05/30/gJQAB2Q21U_story.html) (discussing the importance of capturing women voters and divisive issues such as fair pay and contraception); Associated Press, *Senate GOP Blocks Democrats’ Equal Pay Bill*, FOX NEWS (June 5, 2012), available at <http://foxnews.com/us/2012/06/05/obama-senate-dems-court-women-with-fair-pay-bill> (highlighting political debates); Justin Sink, *Poll: Obama Edges Romney by 3 Points Nationwide*, THE HILL (June 29, 2012), <http://thehill.com/blogs/blog-briefing-room/news/235693-poll-obama-edges-romney-by-3-points-nationwide> (highlighting the tight fight between Obama and Romney for women’s votes).

<sup>3</sup> See Cheryl Hanna, *The Price She Pays*, 10 SEATTLE J. SOC. JUST. 815, 815-23 (2012) (discussing Hanna Rosin, *The End of Men*, THE ATLANTIC (July/Aug. 2010), available at [www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135/#](http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135/#), and other similar articles).

<sup>4</sup> See John Sarto, *The Disproportionate Representation of Women in Subprime Lending: Cause, Effect, and Remedies*, 31 WOMEN’S RTS. L. REP. 337, 349-53 (2011).

<sup>5</sup> See Leslie E. Linfield, *2008 Annual Consumer Bankruptcy Demographics Report: American Debtors in a Recession*, INST. FOR FIN. LITERACY (June 2009), available at <http://ssrn.com/abstract=1414337>. See also *infra* notes 57-62 and accompanying text (discussing further data indicating female overrepresentation in bankruptcy).

female salespersons alike charged significantly higher prices to female and minority consumers than to white men regardless of market competition.<sup>6</sup>

Despite this research, there is a surprising silence about gender in contracts and commercial law and literature.<sup>7</sup> This flows from classical contract law. Contract law is built on classical liberalism, which assumes a free market filled with actors who have the requisite power to compete for goods and services.<sup>8</sup> Classical law requires strict promise enforcement aimed to promote market certainty and long-term planning in an industrial society. Law and economics theory, predominant in contract law, adds to classical notions by further promoting strict contract enforcement with an aim toward advancing economic efficiency. It presumes that decision-makers and contracting individuals are gender and race neutral, and act in economically wise ways that will result in optimal economic efficiency. The assumption is that the market is efficient enough to address any discrimination.<sup>9</sup>

Contracts scholars then usually avoid addressing gender biases or differences among men and women with respect to contracting perceptions, behaviors, and interests.<sup>10</sup> Although this may be due in large part to the dominance of classical and economics-oriented voices, it also coincides with the academic tendency to separate contract from civil rights law by a private/public dichotomy. This artificial dichotomy assumes that “public” constitutional and anti-discrimination laws address any improper inequalities, and “private” law covering transactions need not foray into policy or context.<sup>11</sup> In reality, however, policy and contextual issues pervade contract and commercial law in action.

Furthermore, constitutional constraints only come into play when state action is involved, and the limited statutes prohibiting gender discrimination in contracting generally target discrimination in limited contexts.<sup>12</sup> Although there is a patchwork of laws outlawing gender discrimination in lending, housing, and

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<sup>6</sup> Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817-19 (1991).

<sup>7</sup> See Hila Keren, “*We Insist! Freedom Now*”: Does Contract Doctrine Have Anything Constitutional to Say?, 11 MICH. J. RACE & L. 133, 133-41, 154-56 (2005) (emphasizing how contract law has ignored discrimination).

<sup>8</sup> See Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1249-50, 1259-65 (1999) (exploring how contract law has been mistakenly deemed immune from male bias, and arguing that contract law is susceptible to sexism).

<sup>9</sup> See Keren, *supra* note 7, at 155-57. The author discusses these arguments and Professor Richard Epstein’s claim “that anti-discrimination laws create more injustices than they can repair.” *Id.* at 156.

<sup>10</sup> See Laura Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis*, in NEGOTIATION THEORY AND RESEARCH 203-11 (Leigh L. Thompson ed., 2006) (noting scarcity of investigation regarding gender’s role in negotiating behavior).

<sup>11</sup> See Keren, *supra* note 7, at 159-61 (discussing the public/private divide).

<sup>12</sup> See, e.g., Alabama Fair Housing Law, ALA. CODE § 24-8-1 (1975); Arkansas Fair Housing Act, ARK. CODE ANN. § 16-123-201 (2005); Arkansas Equal Consumer Credit Act of 1975, ARK. CODE ANN. § 4-87-101 (1975) (consumer contracts); Song-Beverly Credit Card Act of 1971, CAL. CIV. CODE § 1747 (1971) (credit contracts); California Fair Employment and Housing Act, CAL. GOV. CODE § 12900 (housing and employment).

employment contexts, there are few laws addressing discrimination in consumer contracting generally.<sup>13</sup> Moreover, these laws are largely ineffective with respect to subtle biases and misuse of stereotypes.

In addition, it is very difficult for one to prove discrimination. Claimants face a tough burden in gathering data and trying to prove disparate treatment, let alone disparate impact based on a business's particular practices.<sup>14</sup> Furthermore, this is especially tough with respect to lending or other contracting because lenders and merchants can easily explain away actions by citing indeterminate business factors. This is in part why, for example, the Equal Credit Opportunity Act ("ECOA") has done little to stop discriminatory lending.<sup>15</sup>

General consumer protection laws also may allow gender discrimination to persist in subtle ways. For example, commentators have criticized the Federal Reserve's ruling pursuant to the Credit Card Accountability, Responsibility and Disclosure ("CARD") Act of 2009 as severely restricting stay-at-home mothers' access to credit.<sup>16</sup> The seemingly neutral rule that became effective on October 1, 2011, prevents credit card issuers from continuing to consider household income when assessing creditworthiness.<sup>17</sup> Instead, issuers must focus only on an individual's "independent ability." These regulations can be beneficial by preventing consumers from accumulating debt they cannot repay, but even CARD Act authors have criticized the regulations as creating "a serious risk for women in abusive domestic partnerships" who do not jointly own accounts of their partners and need to build credit histories to forge a path out of abusive relationships.<sup>18</sup>

At the same time, anti-discrimination laws and policies promoting gender diversity must generally remain vague in order to avoid crossing constitutional

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<sup>13</sup> See Keren, *supra* note 7, at 133, 140-44 (highlighting the patchwork of antidiscrimination law and problems for practical enforcement).

<sup>14</sup> See, e.g., Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 297-98 (2011) (noting the difficult burden to bring a disparate impact case); *Plummer v. Western Int'l Hotels Co., Inc.*, 656 F.2d 502, 505 (9th Cir. 1981) ("A civil rights plaintiff has a difficult burden of proof, and should not be deprived of what may be persuasive evidence.").

<sup>15</sup> See Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 LAW & CONTEMP. PROBS. 147, 173, n.153 (2009) ("[L]enders continue to deny loans to creditworthy consumers and practice gender and spousal discrimination[]" despite passage of the ECOA) (quoting Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: A Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583, 585-86 (1996)).

<sup>16</sup> See Martin Merzer, *Fed Rule Limits Credit Cards for Stay-at-Home Parents*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/stay-at-home-parent-credit-cards-household-income-1282.php> (last visited Oct. 5, 2011) (highlighting criticisms of the new regulations).

<sup>17</sup> Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1736 (2009). The CARD Act is codified in the Truth in Lending Act, 15 U.S.C. § 1601-1666j. The regulations appear at 76 Fed. Reg. 22948-01 (Apr. 25, 2011), Regulation Z, 12 C.F.R. § 226.51(a), and Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.51(a) (Supp. I).

<sup>18</sup> Merzer, *supra* note 16 (quoting U.S. Reps. Carolyn Maloney, D-NY, and Louise Slaughter, D-NY, principal authors of the CARD Act). Note that the regulation could harm *any* partner or spouse—male or female—who is without significant outside income or credit history for building a credit score.

lines by creating quotas or other special rights for any particular group.<sup>19</sup> For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)<sup>20</sup> requires each federal agency to create an Office of Minority and Women Inclusion (“OMWI”) to promote “fair inclusion and utilization” of minorities and women in agency business.<sup>21</sup> Under this vague charge, agencies such as the Consumer Financial Protection Bureau (“CFPB”), which establishes consumer protections for financial products and services, have done little to no implementation.<sup>22</sup>

There also are additional budgetary constraints and policy concerns regarding government initiatives and protections for women in contracting.<sup>23</sup> Government action requires allocation of limited public resources, and policymakers need more research regarding the existence and extent of gender discrimination and differences in private contracting. There also are valid concerns about how to design any sort of law or regulation that would address subtle gender biases and behavioral differences without reinforcing stereotypes, making improper assumptions about women and men, or otherwise overstepping into paternalism.

The available data nonetheless suggests that it is time to end the silence, and engage in open and honest discussion of gender in consumer contracting. Classical contract assumptions and law and economics theory have failed to properly address law in action, let alone gender’s role in real-world contracting. The reality is that individuals are not all economically rational actors with perfect information. Instead, they may fall prey to contracting pitfalls. In addition, the existing data suggests that women have fallen financially behind men when it comes to debt

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<sup>19</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (holding medical school set-aside for minority applicants unconstitutional); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497-507 (1989) (striking as unconstitutional the City’s requirement that its prime contractors subcontract at least 30% of the dollar amount of each contract to minority-owned businesses); *but see Grutter v. Bollinger*, 539 U.S. 306, 307 (2003) (upholding a law school’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining a diverse student body); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women in that particular instance due to clear evidence of the disparity in bargaining power suffered by women seeking employment at that time).

<sup>20</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter *Dodd-Frank*].

<sup>21</sup> *Dodd-Frank* § 342, 12 U.S.C. § 5452(a)(1). The OMWI does not, however, have civil rights compliance authority. *Id.* § 5452(a)(2).

<sup>22</sup> *See, e.g., Consumer Financial Protection Bureau Hires Stuart Ishimaru to Head the Office of Minority and Women Inclusion*, CFPB (Apr. 30, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-hires-stuart-ishimaru-to-head-the-office-of-minority-and-women-inclusion/> (explaining that the newly appointed director of the OMWI must operate with little to no administrative or financial support). *See also* 12 U.S.C. § 5452(a)(1)(B) for the directive to the Bureau to establish an OMWI within the proscribed time period; *see* 12 U.S.C. § 5301(2)(4) for explanation that “Bureau” means the Bureau of Consumer Financial Protection. Note that this article refers to the Consumer Financial Protection Bureau as both “CFPB” and “Bureau.”

<sup>23</sup> Catherine H. Tinsley et al., *Women at the Bargaining Table: Pitfalls and Prospects*, 25 NEGOTIATION J. 233, 243-44 (2009) (emphasizing how women resist admission of differences or biases).

loads and consumer pricing.<sup>24</sup> This impacts not only women's finances, but also their physical and emotional health—as well as the health of their children and families.<sup>25</sup>

This Article therefore invites consideration of gender differences and biases in consumer contracting. Gender issues should no longer lurk in the shadows of “political correctness” or assumptions that women have attained full equality with men in the marketplace. Instead, gender is among the contextual factors that play an important role in what I term “*contracting culture*.”<sup>26</sup> This conception of culture builds on relational and behavioral theories to view exchanges in light of a wide range of economic and non-economic factors that impact parties' contracts.<sup>27</sup>

Gender is salient in this contracting culture because female consumers may have different interests, understandings, and styles with respect to borrowing money, purchasing products, and making other contract decisions.<sup>28</sup> Although all women are by no means the same, the data is worth considering because it may influence how companies market to and deal with women versus men. As noted above, the limited data that exists suggests that treatment differentials may result in women obtaining less financially attractive loans, which may help explain why more women than men file for bankruptcy.<sup>29</sup>

This Article, therefore, aims to spark further research, as well as acknowledgement and discussion regarding gender in contract law and policy.<sup>30</sup> Part I of the Article sheds light on why gender matters by distilling data from my own e-survey of Colorado consumers along with others' research regarding gender differences in contract outcomes, interests and behaviors. Part II then discusses the statutory and common contract law that has failed to adequately address gender discrimination and differences, and Part III contrasts that law with more nuanced

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<sup>24</sup> See Linda Barkacs & Stephen Standifird, *Gender Distinctions and Empathy in Negotiation*, 12 J. ORG. CULTURE COMM. & CONFLICT 83 (2008) (providing research indicating that there are real differences—but calling for further consideration of research to inform policy).

<sup>25</sup> See Deborah Thorne, *Women's Work, Women's Worry? Debt Management in Financially Distressed Families*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 136 (Katherine Porter ed., 2012) (discussing the impact of debt on women and their families, especially since women take responsibility for paying bills and managing debt).

<sup>26</sup> Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123 (2007) [hereinafter Schmitz, *Contracting Culture*]. I have proposed a continuum analysis of contracting cultures ranging from “intra communal” to “extra communal” based on parties' relations, understandings, and values. I place contracts that businesses offer to consumers—business-to-consumer, or “B2C” contracts—at the extra communal end of the continuum due to consumers' lack of connections or shared interests with companies that employ these adhesive contracts.

<sup>27</sup> *Id.* See also LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY 7-8 (Carolina Acad. Press 2007) (noting works in this area by Professor Blake Morant); Jeffrey Z. Rubin & Frank E. A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOTIATION J. 249, 250-53 (1991) (highlighting the importance of considering cultural differences relating to ethnicity, nationality, race, gender, and age).

<sup>28</sup> Kray & Babcock, *supra* note 10, at 203.

<sup>29</sup> *Id.*; *infra* notes 57-62 and accompanying text (citing studies).

<sup>30</sup> Broad discussion of Dodd-Frank and CFPB powers and policies are beyond the scope of this article.

consideration of context under relational and critical theories. Part IV calls for further research, and use of that research in designing contextually cognizant financial literacy and contracting education programs that acknowledge gender while remaining careful to honor individuality and avoid stereotype reinforcement.

#### I. EMPIRICAL AND COGNITIVE RESEARCH REGARDING ROLES OF GENDER IN CONTRACTING

Consideration of gender in contracting should begin with the data to determine the existence and extent of gender differences in contract outcomes and behaviors. This contributes to an understanding of law in action, including individuals' different motivations, behaviors, and understandings in varied exchange contexts.<sup>31</sup> Although there is need for more research, available data suggests that women may obtain less advantageous sales and loan contracts than men, and are overrepresented in bankruptcy. Furthermore, other research suggests that stereotypes and biases, along with gender differences in contract behaviors and interests, may hinder women's financial success in the marketplace.

##### *A. Deals and Debt Outcomes*

Although more research is needed, the research to date generally suggests that women often obtain less economically beneficial contracts than men obtain. For example, Ian Ayres tested whether women and minorities were given worse deals in purchasing cars in metropolitan Chicago.<sup>32</sup> He found that salespersons offered better prices to white men than to female and minority consumers although the car dealerships systematically steered the tester-buyers to salespersons who shared their gender and race characteristics.<sup>33</sup> Specifically, white women had to pay forty percent higher prices than white men, regardless of market competition that should have eliminated such discrimination.<sup>34</sup> In addition, he found that salespersons offered higher prices to black men and the highest prices to black women.<sup>35</sup>

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<sup>31</sup> Despite emerging research, there is still a need for more empirical studies exploring consumer attitudes and behavior with respect to form contracts. See Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 856 n.24 (2006); see also Sumit Agarwal et al., *Do Consumers Choose the Right Credit Contracts?* 1 (University of Pennsylvania Working Paper No. WP-06-11, 2007), available at [http://finance.wharton.upenn.edu/~souleles/research/papers/ContractChoice\\_1207s.pdf](http://finance.wharton.upenn.edu/~souleles/research/papers/ContractChoice_1207s.pdf) (reporting credit card study); Victoria C. Plaut & Robert P. Bartlett III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 35 L. & HUM. BEHAV. 16 (2011) (discussing how the non-readership of online contracts cuts across gender, demographic and personality characteristics).

<sup>32</sup> Ayres, *supra* note 6, at 819.

<sup>33</sup> *Id.* at 827-28. The author also showed how salespersons asked buyers different questions and used disparate sales tactics depending on the buyer's race and gender. *Id.* at 819.

<sup>34</sup> *Id.* at 819, 821. The author noted others' animus-based theories of discrimination and providing further detail regarding the research methodology and findings. *Id.* at 822-43.

<sup>35</sup> *Id.* at 828, 831.



Similarly, researchers who conducted a later study of Chicago car sales also found that salespersons' initial and final offers were higher to women than to men.<sup>36</sup> This was true even when all participants completed the same negotiation training and believed they had negotiated good deals.<sup>37</sup> In addition, other studies in California suggested that hairdressers, drycleaners, and perfume merchants were charging women higher prices than they charge men, without valid justification.<sup>38</sup>

Although the data is limited and mixed, most research in lending contexts also indicates that company representatives may provide the best deals to white male consumers.<sup>39</sup> For example, studies in the United States have shown that lenders may steer minorities and women toward subprime and less desirable loans although they could qualify for prime mortgages.<sup>40</sup> Thirty-two percent of women borrowers received subprime loans versus twenty-four percent of male borrowers in a 2005 Consumer Federation of American ("CFA") study.<sup>41</sup> Furthermore, a 2006 CFA study concluded that lenders were five times more likely to saddle upper income black women than upper income white men with a subprime mortgage.<sup>42</sup>

This results in women being more likely than similarly situated men to hold subprime mortgages. It also may help explain why more women than men face foreclosure.<sup>43</sup> Notably, these women include middle class and poor, as well as old and young. Indeed, the foreclosure crisis has disproportionately burdened families headed by single women.<sup>44</sup>

Research abroad also has indicated that women pay more for financing. For example, researchers found that women in Italy paid higher interest rates than men on lines of credit used for their small businesses.<sup>45</sup> This was true after controlling

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<sup>36</sup> Barkacs & Standifird, *supra* note 24, at 88 (discussing a 2007 study by Lewicki & Sanders).

<sup>37</sup> *Id.* at 88-89.

<sup>38</sup> See also Harvard Law Review Association, *Civil Rights—Gender Discrimination—California Prohibits Gender-Based Pricing—Cal. Civ. Code § 51.6 (West Supp. 1996)*, 109 HARV. L. REV. 1839, 1840, 1844 n.1 (1996) (discussing studies finding gender discrimination in pricing for clothing, perfume, and other sundries. *Id.* at 1844 n.28) [hereinafter *Civil Rights*].

<sup>39</sup> Alice F. Stuhlmacher & Amy E. Walters, *Gender Difference in Negotiation Outcome: A Meta Analysis*, 52 PERSONNEL PSYCHOL. 653 (1999) (digesting research indicating gender differences, but noting some studies revealing no gender differences in outcomes).

<sup>40</sup> See Carol Necole Brown, *Women and Subprime Lending: An Essay Advocating Self-Regulation of the Mortgage Lending Industry*, 43 IND. L. REV. 1217, 1217-22 (2010) (compiling research regarding discriminatory lending). The research has left many people—including the author—asking: "Why would people who could qualify for prime mortgage loans end up with subprime loans?" *Id.* at 1217.

<sup>41</sup> Sarto, *supra* note 4, at 342 (reporting the finding that of these 32% of women, 11% held especially high-cost subprime mortgages versus only 7.7% of men).

<sup>42</sup> Isabelle Agier & Ariane Szafarz, *Credit to Women Entrepreneurs: The Curse of the Trustworthier Sex* 1-23 (2011), available at <http://dx.doi.org/10.2139/ssrn.1718574>.

<sup>43</sup> See Sarto *supra* note 4, at 338 (discussing research and policy regarding gender and debt).

<sup>44</sup> *Id.* at 340-42.

<sup>45</sup> Alberto Alesina & Francesca Lotti, *Do Women Pay More for Credit? Evidence from Italy* 2, 18 (Harv. Inst. of Econ. Res. Discussion Paper No. 2159, 2008) (revised Jan. 2009), available at <http://www.economics.harvard.edu/faculty/alesina/files/Do%20Women%20Pay%20More%20for%20Credit-Evidence%20from%20Italy.pdf> (examining a large data set of lines-of-credit provided by banks in Italy).

for risk factors, credit history, and any other differences in business, borrower or market characteristics, and despite evidence that the female borrowers were likely safer credit risks.<sup>46</sup> The researchers proposed that although all borrowers benefitted from “social capital” built through establishing relationships with lenders, men reaped greater benefits from these relationships. A similar study in Brazil found that lenders offered smaller loans to women regardless of likely ability to repay.<sup>47</sup>

Studies also have suggested that credit card companies generally charge higher interests rates to female versus male cardholders.<sup>48</sup> For example, researchers found that the women in a recent FINRA study paid half a percentage point more in credit card interest than the men, regardless of demographic characteristics or financial literacy levels.<sup>49</sup> This was surprising in light of evidence suggesting that financial literacy would mitigate problematic credit card behaviors. Moreover, the seemingly small percentage point spread between men and women raised reason for concern because it could lead women to pay thousands of dollars more than men over a long period of time.<sup>50</sup>

In addition, other research has highlighted the cumulative effects of debt and low salaries on women. Data suggests that higher credit card interest rates and reliance on credit cards combine with lower salaries to produce higher debt loads for women than men.<sup>51</sup> These loads are likely to include not only credit card debt, but also student loans. One study reported that among workers in 2004 aged twenty-five to thirty-four, twenty-three percent of women as compared with sixteen percent of men with bachelor’s degrees spent over ten percent of their earnings repaying student loans.<sup>52</sup>

Evidence also indicates that financial stresses and targeted marketing may push more women than men into riskier debt contracts like payday loans, which usually have effective APRs exceeding three-hundred percent. For example, a 2010 study reported as an average that sixty-four percent of the visitors to eighteen

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<sup>46</sup> *Id.* at 8, 19 (noting that female-run businesses had a lower failure rate than male-run businesses during the data set period, and acknowledging that the results could have stemmed in part from the Italian notion of “traditional” women and the nominal number of women on the boards of Italian banks).

<sup>47</sup> Agier & Szafarz, *supra* note 42, at 11 (concluding in this study of the Brazilian microfinance institution Vivacred that men often reap greater financial benefit than women from relationships with lenders).

<sup>48</sup> See Gary R. Mottola, *In Our Best Interest: Women, Financial Literacy and Credit Card Behavior*, INSIGHTS: AMERICAN FINANCIAL CAPABILITY, FINRA INVESTOR EDUCATION FOUNDATION (April 2012), <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p125971.pdf> (reporting findings).

<sup>49</sup> *Id.* at 4.

<sup>50</sup> *Id.* (noting that more research is needed to understand this surprising finding).

<sup>51</sup> See Jeremy M. Simon, *Young Women Suffer From Greater Debt*, CREDIT CARD.COM (Oct. 17, 2006), <http://www.creditcards.com/credit-card-news/young-women-suffer-from-greater-debt.php> (discussing research on gender and debt).

<sup>52</sup> *Id.*

different internet payday loan sites in November of that year were female.<sup>53</sup> Researchers using 2007 Federal Reserve data similarly reported that a disproportionate number of households headed by women use payday loans as compared with households headed by men or married couples.<sup>54</sup> Studies in Wisconsin, Illinois, and Colorado also indicated predominance of women among payday loan consumers in those states.<sup>55</sup> Similarly, researchers found that twenty-five percent more women than men use payday loans in Britain due in large part to marketing targeting women.<sup>56</sup>

Financially unattractive loan and other contracts may help explain why data consistently indicate that women file for bankruptcy more often than men do.<sup>57</sup> As part of the 2007 Consumer Bankruptcy Project, researchers studied approximately 2500 bankruptcy cases,<sup>58</sup> and Professor Robert Lawless calculated that 55.5% of all the respondents in that study were female, including single filers, one of two joint filers, and non-filing spouses of a single filer.<sup>59</sup> He also calculated that 67.3% of the solo filers without another person in their homes were women, indicating the significant overrepresentation of single women in bankruptcy.<sup>60</sup> Similarly, Leslie Linfield found that 52.8% of the bankruptcy filers in her study were female in 2007

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<sup>53</sup> Nathalie Martin & Ernesto Longa, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 Loy. Consumer L. Rev. 524, 534-35, 561 n.44 (2012) (discussing the study). Furthermore, it seemed that a significant portion of these women were single moms because over half of the payday loan consumers reported children seventeen years or younger in the household. *Id.* at 535-46 (noting additional studies indicate the prevalence of single mothers as among payday loan borrowers).

<sup>54</sup> Donald P. Morgan & Kevin J. Pan, *Do Payday Lenders Target Minorities?*, LIBERTY STREET ECONOMICS BLOG, (Feb. 8, 2012), <http://libertystreeteconomics.newyorkfed.org/2012/02/do-payday-lenders-target-minorities.html> (finding that users of payday loans are worse off economically than non-users).

<sup>55</sup> Martin & Longa, *supra* note 53, at 542. The authors noted statistics for Illinois and Wisconsin. *Id.* at 548, 550; ADMINISTRATOR OF THE COLORADO UNIFORM CONSUMER CREDIT CODE (UCCC), *Payday Lending Demographic and Statistical Information: July 2000 through December 2009*, 1-4 (revised March 8, 2010), available at <http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/DDLASummary2009corr.pdf> (reporting predominance of women in terms of payday loan consumers in Colorado from 2001 through 2009).

<sup>56</sup> Ruth Lythe, *How Women Are Being Seduced into Debt by Payday Parasites: 'Instant' Cash Firms with Interest Rates as High as 16,000% are Ruining Lives*, DAILY MAIL, (Jan. 31, 2012, 11:27 AM), [www.dailymail.co.uk/news/article-2094115/Instant-money-loans-Payday-loan-firms-ruining-lives.html](http://www.dailymail.co.uk/news/article-2094115/Instant-money-loans-Payday-loan-firms-ruining-lives.html) (describing advertisements placed during TV shows targeting women, and payday loan websites showing young women using payday loans to make them "glamorous").

<sup>57</sup> Linfield, *supra* note 5, at 4.

<sup>58</sup> Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 354-55 (2008). Researchers also examined written surveys and answers from hundreds of telephone interviews of families whose bankruptcies were part of the sample. *Id.* at 388-89.

<sup>59</sup> E-mail from Robert M. Lawless to Amy J. Schmitz (Monday, July 16, 2012) (on file with author) (reporting the data).

<sup>60</sup> E-mail from Robert M. Lawless to Amy J. Schmitz (Monday, July 18, 2012) (on file with author) (indicating this calculation based on the data from the Consumer Bankruptcy Project and explaining how although it is possible that single women were more likely to answer the survey, that seems unlikely because the financial variables in the bankruptcy schedules for nonrespondents looked similar to the respondents). Professor Lawless also noted, however, that there was no gender effect on filer choice between chapter 7 versus chapter 13.

and 52.6% were female in 2008.<sup>61</sup> Furthermore, Elizabeth Warren reported data indicating that women outnumbered men by roughly 150,000 in 2001, and that almost 40% of those filing for bankruptcy in the 1999 Consumer Bankruptcy Project study were divorced or single women.<sup>62</sup>

Accordingly, sex matters from empirical and policy perspectives. Although there is need for more research regarding gender differences with respect to consumer contracting and pricing, the available data suggests that women may receive less financially attractive sales and loan contracts, which may lead to higher debt loads for women. This may be due to not only overt or subtle biases, but also differences in behaviors and priorities in borrowing money, buying products, and making other contracts.

### *B. Risk Aversion*

Most individuals are risk-averse.<sup>63</sup> Women, however, tend to be more risk-averse than men in negotiation studies.<sup>64</sup> This can be good and bad with respect to contracting. Risk avoidance can lead to responsible borrowing and purchasing. However, it also can hinder women from advancing in their careers, asking for better prices or contracts, investing in an economically optimal manner for their age or otherwise achieving financial success on par with men.

Risk aversion may help women in buying insurance. Female participants in one experiment involving choice of insurance coverage chose disaster coverage more frequently than male participants.<sup>65</sup> However, it may lead women to buy extended service contracts, which consumer advocates generally advise not to purchase. One study reported that women were more attracted to these contracts when the data was viewed in light of other consumer characteristics, product attributes and marketing strategies.<sup>66</sup> Nonetheless, the men in another study were more likely to purchase extended warranties when the warranties were presented to cover replacement costs.<sup>67</sup>

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<sup>61</sup> See Linfield, *supra* note 5, at 4 (using data on clients in credit counseling).

<sup>62</sup> Elizabeth Warren, *What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 21-28 (2002) (discussing the data and proposing how commercial law involves significant "women's issues").

<sup>63</sup> Melanie Powell & David Ansic, *Gender Differences in Risk Behaviour in Financial Decision-Making: An Experimental Analysis*, 18 J. ECON. PSYCHOL. 605, 615 (1997) (reporting results from experiments).

<sup>64</sup> *Id.* at 622; Kray & Babcock, *supra* note 10, at 206-07.

<sup>65</sup> Powell & Ansic, *supra* note 63, at 615 (noting women chose cover less frequently for damage).

<sup>66</sup> See Tao Chen et al., *Why Do Consumers Buy Extended Service Contracts?*, 36 J. CONSUMER RES. 611, 613-15 (2009) (noting no statistically significant correlation based on gender per se but indicating that there was some suggestion that female risk-aversion was important when considered in light of other factors).

<sup>67</sup> *Id.* at 621 (finding overall that low-income consumers were most likely to buy extended warranties due to concern they could not replace broken products).

My own e-survey research of Colorado consumer behaviors and perceptions also suggests that women are more concerned than men that purchases will go awry.<sup>68</sup> In my sample of 306 completed surveys, 73.5% of female versus 56.3% of male respondents considered warranty terms “very important” or “somewhat important” in purchasing a new cellular phone.<sup>69</sup> Similarly, when asked to think generally about the times they had looked at contract terms with respect to their consumer purchases, 82% of female versus 69.9% of male respondents said that warranties are “very important.”<sup>70</sup>

Risk-aversion may translate into market hesitance. In a study measuring participants’ decisions about entering or leaving an unfamiliar currency market, the female participants left the market more quickly regardless of re-entry costs.<sup>71</sup> In addition, the male participants were more willing than the women to remain in the market when prices fell, and to accept the possibility of unknown losses.<sup>72</sup> This was true although all study participants had equal education and experience in this market.<sup>73</sup>

Women may benefit from leaving a market to avoid loss. However, it also may lead women to seek “safer” and thus suboptimal investment strategies. Investment advisors also may presume women are risk-averse, and therefore steer female clients away from what may ultimately result in the best investment strategies for their age and overall retirement portfolio.<sup>74</sup> Women unwilling to

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<sup>68</sup> See Amy J. Schmitz, *Consumer Survey, Data and Notes (2007 to present)* (unpublished survey, data and files held by author) [hereinafter Schmitz, *Survey Notes*]. I worked with the Institute for Behavioral Science (IBS) at the University of Colorado and Survey Sampling International (SSI) in order to ensure confidentiality and full approval by the Human Research Council at the University of Colorado. The survey was sent to roughly 10,000 Colorado residents over 18 years old in October and November of 2007 in order to ultimately produce a sample of 306 properly completed surveys. Prior to that time, we had dropped from our sample any partial responses or responses that were otherwise faulty due to skipped questions, “flat-lined” responses, and other indications that the respondent “cheated” in some way. Through our attempts to gather more male responses, we learned that women are much more receptive to answering online surveys.

<sup>69</sup> Amy J. Schmitz, *Consumer Survey Results (2007 to present)* (survey data attached as Appendix due to direct relevance to this discussion) [hereinafter Schmitz, *Consumer Survey*]. The sample identified as three quarters Caucasian or white and reported varying levels of education, with 43% having Bachelor’s or post-graduate degrees, 44% completing some college but no degree, and the rest having a high school diploma or less. Forty-two percent reported full-time employment, 16 % reported part-time jobs, and the rest reported no employment outside the home. Many did not identify themselves with respect to occupation. Of the 82% of those that reported income, roughly 30% were under \$29,999, 30% \$30,000-49,000, 19% \$50,000-\$74,999, 9.6% \$75,000-\$99,999, and 11.2% over \$100,000; see *id.* at Section 1, Question 5 with respect to cell phone warranties (attached as Appendix).

<sup>70</sup> *Id.* at Section 2, Question 7(f) (attached as Appendix) (measuring importance on a scale of “very”, “somewhat”, “minor”, or “not” important). Note that the result may not be that strong to the extent that 28.2% male versus 16% of female respondents indicated “somewhat”—which could be seen to slightly balance out the significance if one combines “very” and “somewhat.”

<sup>71</sup> Powell & Ansic, *supra* note 63, at 615-23 (showing different strategies of men and women in financial decision-making, with women indicating lower preference for risk than men).

<sup>72</sup> *Id.* at 620.

<sup>73</sup> *Id.* at 623.

<sup>74</sup> Catherine C. Eckel & Philip J. Grossman, *Sex Differences and Statistical Stereotyping in Attitudes Toward Financial Risk*, 23 *EVOLUTION AND HUMAN BEHAVIOR* 281, 290-92 (2002) (noting

remain in the market during times of setback are likely to take immediate losses and miss out on market gains.<sup>75</sup> Women who fear risk also may take lower-paying jobs.<sup>76</sup>

Other studies also have suggested women's propensity for risk aversion in most aspects of their lives.<sup>77</sup> However, women indicated more preference for risk than men in only one area: social decisions.<sup>78</sup> This is not surprising in light of research suggesting that social conditioning pressures women to do what it takes to gain social acceptance.<sup>79</sup> Data indicates, for example, that need for social acceptance leads girls to take more risks at same-sex schools.<sup>80</sup>

This and other research indicates that female risk-aversion is not inherent, but is the result of social conditioning.<sup>81</sup> As with any generalization or stereotype, risk-aversion is not true for all women. The research regarding gender differences with respect to risk is somewhat mixed.<sup>82</sup> Still, the overall research supports a conclusion that women tend to be more risk-averse, which may help women in making some contracting choices, but also may hinder women in achieving financial success.<sup>83</sup>

### *C. Lower Expectations and Less Confidence*

Risk aversion often dovetails with lower expectations and lack of confidence, which may impact contract and negotiation behaviors and outcomes.<sup>84</sup> For

how advisors may steer women toward overly low-risk investments, resulting in lower earnings and suboptimal investment portfolios overall for female clients).

<sup>75</sup> *Id.* at 281-95.

<sup>76</sup> Alison Booth & Patrick Nolen, *Gender Differences in Risk Behaviour: Does Nurture Matter?* (IZA Discussion Paper No. 4026, 2010) (concluding that girls' socially conditioned risk-aversion may dissuade them from taking high-paying jobs due to uncertainty).

<sup>77</sup> Elke U. Webster et al., *A Domain-Specific Risk-Attitude Scale: Measuring Risk Perceptions and Risk Behaviors*, J. BEHAV. DEC. MAKING 263 (2002).

<sup>78</sup> *Id.* at 282-83.

<sup>79</sup> See Booth & Nolen, *supra* note 76, at 5 (analyzing results of study comparing risk-aversion among girls at single-sex versus coed schools).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Although most research indicates that men take greater risks in decision-making than women, women in one study made riskier supplier choices than men when the decision was framed as a gain. James E. Stoddard & Edward F. Fern, *Risk-Taking Propensity in Supplier Choice: Differences by Sex and Decision Frame in a Simulated Organizational Buying Context*, 16 PSYCHOL. & MARKETING 563, 568-70 (1999) (noting that the study involved university students and there was no measurable difference when framed as a loss).

<sup>83</sup> See Richard T. Bliss et al., *Decision Making and Risk Aversion in the Cash Cab*, 22-25 (2011), available at <http://ssrn.com/abstract=1818145> (reporting study results regarding game show contestants' behaviors and outcomes, and finding women more risk-averse); Daniel K.N. Johnson & Tracy R. Gleason, *Who REALLY Wants to Be a Millionaire: Game Show Contestant Behavior Under Risk* 4-19 (Colorado College Working Paper No. 2005-02, 2005), available at <http://ssrn.com/abstract=847848> (examining gender differences in behaviors and outcomes of contestants on the game show "Who Wants to Be a Millionaire," and finding that although the women on the show may be less risk-averse due to self selection, men attained much greater winnings than women and think less about risks of negative outcomes).

<sup>84</sup> See Susan W. Coleman & Dorothy E. Weaver, *Women and Negotiation: Tips from the Field*, 18

example, one who does not expect or believe he or she deserves a raise or a better price will not even ask for it. In contrast, one who confidently asks for a raise or better deal citing reasons why he or she deserves it is much more likely to get it. This is not surprising or revolutionary. However, the available data, at least in the employment context, suggests that this lack of confidence and lower expectations perpetuates gender inequities and salary differentials because women are less likely than men to ask for a raise.<sup>85</sup>

Studies also show that setting lower goals leads to less favorable contract outcomes for women, even when they share equal experience and education with their negotiation opponents.<sup>86</sup> For example, men in one mock salary negotiation study involving MBA students set goals nearly five percent higher than the women set, even though participants shared identical education and tactical knowledge.<sup>87</sup> As a result, the men in the study achieved higher salaries than the women.<sup>88</sup> Although that is in the employment context, data also shows that lower expectations and confidence dissuade women from using complaint systems to obtain remedies for claims against vendors.<sup>89</sup>

The women in my e-survey also indicated less confidence than the men in obtaining contract changes. Overall, the respondents indicated skepticism regarding their power to negotiate purchase terms, but this was especially true for the women in the survey. When the respondents were asked their level of agreement with various statements regarding form purchase terms, 68.8% of the female versus 61.1% of the men said “strongly agree” or “somewhat agree” that they “assume [they] cannot get a seller to change form terms.”<sup>90</sup> This was a statistically significant difference indicating that the women had slightly lower expectations with respect to negotiating purchase terms.<sup>91</sup>

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No. 3 DISP. RESOL. MAG. 12, 18 (2012) (“[I]f [women] believe [they] are unworthy, then it become self-fulfilling prophecy[.]”).

<sup>85</sup> See Linda Babcock & Sara Laschever, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003); see generally Coleman & Weaver, *supra* note 84, at 15 (noting gender imbalances, gendered salary differentials for equal work, and female responsibilities for most of the housework in dual-earning households).

<sup>86</sup> See Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 *LAW & INEQ.* 109, 116-20, 125-26 (2008) (discussing research regarding gender in negotiations); Babcock & Laschever, *supra* note 85, at 1-4 (addressing the “voice” inside many women’s heads telling them they should be happy with what they have and not greedily ask for more).

<sup>87</sup> Kray & Babcock, *supra* note 10, at 205.

<sup>88</sup> *Id.* (reporting results from a sales study, in which the male buyers set goals that were 9.8% more aggressive than those set by female buyers).

<sup>89</sup> Wendy Reiboldt, *Complaint Behavior and Satisfaction with Complaint Outcome: A Look at Gender Differences*, 2002 *CONSUMER INTERESTS ANNUAL* 1, 1-4 (reporting survey results of consumers who used a third party complaint handling in California).

<sup>90</sup> Schmitz, *Consumer Survey*, *supra* note 69, Section II, Question 6b (attached as Appendix G).

<sup>91</sup> *Id.* This was only approaching significance, but nonetheless shows slightly less confidence on the women’s part.

Women's lower expectations may also have translated into greater inertia in seeking contract changes. Although only 8.6% of all respondents said that they "frequently" or "nearly all the time" seek to negotiate their consumer purchase terms,<sup>92</sup> it was significant that 71.3% of female as compared with 53.4% of male respondents reported that they "never" or "rarely" try to negotiate form terms.<sup>93</sup> Furthermore, 20.4% of male versus 9.9% of female respondents reported that they had been able to get companies to change warranty terms in their consumer form contracts.<sup>94</sup> Similarly, 20.4% of male versus 12.3% of female respondents successfully negotiated changes with respect to interest rates for their credit payments.<sup>95</sup>

One unscientific poll of women in the business world confirmed female propensity to undervalue themselves and set lower expectations.<sup>96</sup> When asked to rate their level of agreement with statements on a 1-10 scale (with 10 showing highest level of agreement), the female respondents assigned an average of 8 to "I am afraid I under value myself" versus 5.4 to "I believe I fairly value myself." The average rating of agreement with "It is difficult for me to make an aggressive first offer" was 8.3, and 8.2 with "It is difficult for me to make a counter-offer."<sup>97</sup> Nonetheless, these same respondents averaged 7.7 in agreement with "I consider myself to be an assertive woman."<sup>98</sup> Again, this poll data was unscientific and lacked comparison data with male responses, but nonetheless sheds light on female self-perceptions—even among businesswomen.

Perceptions, expectations, and confidence matter.<sup>99</sup> Individuals who approach contracts and negotiations with less confidence regarding their bargaining skills lower their goals and expectations. This is important with respect to gender because women generally report less confidence than men in facing contract negotiations.<sup>100</sup> Women in one study "tended to equate negotiating with going to the dentist," while the male respondents were more likely to compare negotiations

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<sup>92</sup> *Id.* Section III, Question 1 (attached as Appendix J). 38% of respondents reported "never" and 27.4 % stated "rarely" when asked how often they "try to negotiate or change" form contracts or terms in making consumer purchases.

<sup>93</sup> *Id.* See also *supra* notes 84-85 and accompanying text discussing female assertiveness.

<sup>94</sup> Schmitz, *Consumer Survey*, *supra* note 69, Section III, Question 1b (attached as Appendix J).

<sup>95</sup> *Id.*

<sup>96</sup> Victoria Pynchon, *Women's Attitudes, Skills and Fears About Negotiation*, NEGOTIATION LAW BLOG (June 11, 2010), <http://www.negotiationlawblog.com/she-negotiates/womens-attitudes-skills-and-fears-about-negotiation>. This was an unscientific poll of women in business from 2010 published in a blog, and should be assessed accordingly. However, this at least sheds light on female feelings and beliefs about negotiations and indicates need for more scientific research exploring these questions.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Leigh Thompson, *Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues*, 108 PSYCHOL. BULL. 515, 518-19 (1990) (noting perception and impression formation in negotiations).

<sup>100</sup> Powell & Ansic, *supra* note 63, at 606-10.



with “a wrestling match or winning a ballgame.”<sup>101</sup> Lower expectations also may lead women to accept poor customer service because they do not expect better treatment or believe that they deserve it.<sup>102</sup>

In addition, researchers have found that men in bargaining studies report greater satisfaction than the women regardless of comparable performance due to men’s greater confidence and expectation of winning.<sup>103</sup> This has been true even in studies involving law and MBA students. For example, researchers reported that female law students in negotiation exercises at New York University were consistently more self-deprecating about their performances than male law students, and reported feeling less competent, especially with respect to working with numbers and bluffing.<sup>104</sup> This was true even when female students outperformed the men, and achieved comparable outcomes with the men.<sup>105</sup>

Similarly, in a study of the effectiveness of bargaining training programs involving MBA students, the female students negotiated an average of \$1,350 less than the men, although the women scored slightly higher on a test of tactical knowledge.<sup>106</sup> The women knew what tactics to use, but nonetheless set lower goals and had lower aspirations in the negotiations. This resulted in lower negotiated outcomes.<sup>107</sup> However, the women significantly improved their outcomes after self-management training that increased their feelings of self-efficacy and perceived control.<sup>108</sup>

That is not to say that all women lack confidence in negotiations, or fare worse than men in bargaining. Indeed, many women are more successful than men in negotiating, and it is unwise to overstate gender differences.<sup>109</sup> Still, the data

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<sup>101</sup> Kray & Babcock, *supra* note 10, at 206 (noting how men said negotiating was “fun” while women said it was “scary”).

<sup>102</sup> See Wendy Reiboldt, *Factors that Influence a Consumer Complainer’s Rating of Service Received from a Third Party Complaint-Handling Agency—the Los Angeles Department of Consumer Affairs*, 16 J. CONSUMER SATISFACTION, DISSATISFACTION & COMPLAINING BEHAV. 166, 174 (2001) (noting that women may rate service higher than men because they have lower expectations regarding customer service).

<sup>103</sup> Stuhlmacher & Walters, *supra* note 39, at 653 (reviewing findings from studies on gender in negotiations); Kray & Babcock, *supra* note 10, at 210-11 (reporting studies).

<sup>104</sup> Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 291, 294, 300, 303 n.70 (1999).

<sup>105</sup> *Id.* at 278, 294 (explaining study and results, and the Workways program aimed to improve legal education for and reduce stress for female and minority students).

<sup>106</sup> Cynthia Kay Stevens et al., *Gender Differences in the Acquisition of Salary Negotiation Skills: The Role of Goals, Self-Efficacy, and Perceived Control*, 78 J. APPLIED PSYCHOL. 723, 732 (1993) (reporting findings of gender in a salary negotiation study involving MBA students who had received a 2-stage training program, as well as supplemental training in goal setting or self-management).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* The author explained how tactics training failed to improve women’s outcomes, while self-management training “may increase women’s persistence in the face of employer resistance and may provide women with a wider array of tactics to use.” *Id.* at 733.

<sup>109</sup> Bård Tronvoll, *Complainer Characteristics When Exit is Closed*, 18 INT’L J. SERVICE INDUSTRY MGMT. 25, 33-35 (2007) (noting research regarding gender).

overall tends to indicate that women tend to be more risk-averse and insecure than men in bargaining. This may hinder women in proactively setting higher goals and asking for what they want in making purchases and negotiating other contracts.

#### *D. Gender Stereotypes*

Conscious and subconscious biases and stereotypes matter in contract negotiations. They impact how individuals behave, react, and perceive others in the marketplace. This may burden women to the extent that traditional stereotypes often cast women as pushovers and poor negotiators in comparison to men.<sup>110</sup> Merchants may offer worse deals to women than men because they perceive them as less formidable bargainers.<sup>111</sup> That is why some continue to advise women to bring men with them to buy a car in order to be “taken seriously.”<sup>112</sup>

This would seem to suggest that women may benefit from being more assertive in making purchases and negotiating other contracts. However, this may harm women’s success. Women rightfully worry about being labeled “the Bitch” if they become the “squeaky wheel” about compensation or if they “grandstand” about their accomplishments.”<sup>113</sup> Studies show that women face a so-called “backlash effect” from promoting themselves: self-promoting women often are viewed as less competent, less socially attractive, and less hireable than self-promoting men.<sup>114</sup> Even the United States Supreme Court has recognized how this backlash may hinder women in the workplace.<sup>115</sup>

This backlash effect may place women in what has been called a “double bind”: women may be perceived as competent but unlikable, or likable but incompetent.<sup>116</sup> This amounts to a catch-22 for women built on a double standard for men and women. In one experiment, participants watched videos showing a finance director—alternatively a man or a woman—choosing between a work crisis and a family emergency, and then rated the director for competence and likability. When the female director chose to stay at work, she was rated as competent but unlikable; when she went home, she was rated as incompetent but likable. The choices that male directors made did not affect the way they were judged by the respondents.<sup>117</sup>

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<sup>110</sup> See Laura J. Kray et al., *Reversing the Gender Gap in Negotiations: An Exploration of Stereotype Regeneration*, 87 *ORG. BEHAV. & HUMAN DECISION PROCESSES* 386, 387-88 (2002).

<sup>111</sup> See *supra* notes 6, 32-37 and accompanying text (discussing the car sales studies).

<sup>112</sup> See Kray et al., *supra* note 110, at 387.

<sup>113</sup> See Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 *TEX. J. WOMEN & L.* 27, 69 (2004).

<sup>114</sup> Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 629, 630-45 (explaining this effect).

<sup>115</sup> See Kray et al., *supra* note 110, at 387 (noting this in *Hopkins v. Price Waterhouse* and how stereotypes may burden women in negotiations).

<sup>116</sup> Tinsley, *supra* note 23.

<sup>117</sup> *Id.* at 236.

Similarly, researchers in another study coached male and female actors to remain “cooperative and pleasantly assertive” while working with groups who did not know they were actors.<sup>118</sup> Afterwards, group participants described the men as having “more ability, skill, and intelligence,” but described the women behaving in the same manner as “emotional, bossy, and domineering.” The participants nonetheless denied having any sex biases when asked directly about their attitudes.<sup>119</sup> Similarly, participants judged female job candidates as significantly more demanding and less nice than the male candidates although all of them asked for the same raise in compensation.<sup>120</sup>

Such differentials in perceptions for the same behaviors may lead salespersons to treat men and women differently. Researchers found in a simulation study that when a manager negotiated for a refund on unused hotel space, the manager was judged more offensive and less likely to receive a refund when the role was played by a woman than by a man.<sup>121</sup> Nonetheless, studies have suggested that women may suffer fewer negative consequences for being assertive in environments where they hold high status.<sup>122</sup>

Furthermore, women may not suffer backlash for assertiveness when advocating on behalf of others because this complies with overall expectations that women should be communal or nurturing.<sup>123</sup> For example, women lawyers did not face negative consequences for assertive bargaining in a study asking participants to rate each other after engaging in mixed-gender negotiations.<sup>124</sup> The lawyers’ assertive behavior was attributed to position rather than gender and was seen as appropriate because it was on behalf of clients.<sup>125</sup>

Stereotypes also may further complicate individuals’ use of speaking opportunities to signal certain characteristics such as strength or intelligence, as well as how those receiving the communications may assess whether the speaker possesses valuable characteristics.<sup>126</sup> For example, salespersons may negatively

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<sup>118</sup> Babcock & Laschever, *supra* note 85, at 61.

<sup>119</sup> *Id.*; see also W. Reiboldt, *Complaint Behavior and Satisfaction with Complaint Outcome: A Look at Gender Differences*, 2002 CONSUMER INTERESTS ANNUAL 1, 2-4 (reporting survey results regarding complaint handling by an agency in California and noting how male complainants were more likely than female complainants to indicate satisfaction with the process and feelings that they received necessary information); Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L.J. 513, 523 (2010) (highlighting prejudice at the unconscious level).

<sup>120</sup> Tinsley, *supra* note 23, at 237.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 237-38. Commentators noted this double bind in the 2008 Presidential election to the extent that the public viewed Hilary Clinton as more competent but unlikeable because she was less feminine than Sarah Palin, who they viewed as more likeable but less competent. Andrea Kupfer Schneider et al., *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 DUKE J. GENDER L. & POL’Y 363, 363-71, 378 (2010).

<sup>123</sup> Tinsley, *supra* note 23, at 237-38.

<sup>124</sup> Schneider, *supra* note 122, at 373-78.

<sup>125</sup> *Id.* at 378.

<sup>126</sup> Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 107 (2000); Wilkinson-Ryan & Small, *supra* note 86. *But see* Robert Geffner & Madeleine M. Gross, *Sex-Role*

perceive as “pushy” women’s attempts to communicate strength in negotiating contract terms.<sup>127</sup> This also may lead a female employee to refrain from requesting a raise or promotion due to concerns that she will appear hostile and lose her job.<sup>128</sup> However, women cannot obtain better contracts and salaries unless they ask for them. In the end, women often “lose” in terms of likeability and/or getting what they want either way—if they are or are not assertive.<sup>129</sup>

This “stereotype threat” in contract negotiations also may exacerbate the lack of confidence and lower expectations noted above.<sup>130</sup> Empirical studies show that simply knowing that feminine traits are linked to poor negotiation skills and contracting outcomes negatively impacts women’s performance in negotiations. This is true regardless of whether one believes the stereotypes are true.<sup>131</sup> For example, a woman’s subconscious internalization of pushover stereotypes may hinder her in setting higher expectations, and thus obtaining better outcomes, when negotiating a purchase price.<sup>132</sup>

### *E. Relational Concerns and Values*

Stereotypes dovetail with societal expectations that women should be altruistic and cooperative, and nurture relationships over economic goals.<sup>133</sup> From an early age, girls often learn to choose egalitarian allocations,<sup>134</sup> and to express positive emotion to avoid social costs.<sup>135</sup> Many women also grow up learning to

*Behavior and Obedience to Authority: A Field Study*, 10 *SEX ROLES* 973, 973-85 (1984) (hypothesizing that women would refrain from asserting power, but concluding from their field study of obedience to traffic directions that females disobeyed directions more frequently and were not “submissive” as expected).

<sup>127</sup> Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 *J. SOC. ISSUES* 743, 743-47, 759 (2001).

<sup>128</sup> See Carbado & Gulati, *supra* note 126, at 109-10, 114-22, 133-39. A female Latino employee in a white male-dominated workplace may be more cautious in criticizing institutional policies due to the stereotype of Latinos being hostile or less loyal than their white male counterparts. Those individuals considered “outsiders” who believe that others view them negatively due to a stereotype are likely to lose opportunities in their careers. *Id.* at 109.

<sup>129</sup> *Id.* (highlighting research indicating that women incur employment costs in the workplace regardless of whether they enact agentic or communal behaviors).

<sup>130</sup> Kray et al., *supra* note 110, at 388-90 (explaining the “stereotype threat” and studies that confirm this in various contexts, even controlling for knowledge variables).

<sup>131</sup> *Id.* at 392.

<sup>132</sup> *Id.* at 400-08.

<sup>133</sup> Stuhlmacher & Walters, *supra* note 39, at 653-58 (highlighting research indicating that women are more cooperative and relationship-focused in negotiations, but providing that it is unclear whether this has any effect on negotiation outcomes); Raymond A. Hopkins & Thomas L. Powers, *Development and Test of New Dimensions of Altruistic Buying Behavior*, 26 *J. CONSUMER MARKETING* 185 (2009) (noting perception of women as more altruistic but also highlighting the array of demographic differences and dimensions of altruism that should be considered when marketing products).

<sup>134</sup> Ernst Fehr et al., *The Development of Egalitarianism, Altruism, Spite and Parochialism in Childhood and Adolescence* (University of Innsbruck Working Paper No. 2011-07, 2011) (finding female preference for egalitarian allocations that weakens with age and noting particularly altruistic types in men that increase with age).

<sup>135</sup> See, e.g., Barkacs & Standifird, *supra* note 24, at 84-85.

seek means for signaling generosity in order to gain others' acceptance and respect.<sup>136</sup> In one survey, female participants reported that a "typical woman" is more interdependent and concerned with others, while the male respondents more frequently defined themselves as independent and self-assertive.<sup>137</sup>

"In general, men are more concerned with winning and maximizing their outcomes, whereas women are more concerned with maintaining the relationship."<sup>138</sup> Studies suggest that women are more likely than men to view a conflict in relationship terms, and place relationships and need for acceptance above winning.<sup>139</sup> Men place greater importance than women on coming out favorably in negotiations.<sup>140</sup> Women may be "more sensitive and reactive to the interpersonal aspects of the negotiations than men," and to be more empathetic to others' situations when engaged in conflict resolution.<sup>141</sup>

Although it was an unscientific poll, the businesswomen who responded to the same 2010 poll noted above confirmed relational inclinations. The respondents' levels of agreement on a one to ten scale were very high with respect to relational statements. For example, they assigned an average of 9.2 to "I prefer cooperative negotiations to competitive ones," 9.4 to "I prefer negotiations that make my bargaining partner as happy as me[.]" and 8.2 to "Relationship is more important to me than money."<sup>142</sup> In contrast, the respondents only indicated an average 3.6 agreement with "I prefer negotiations that end with a deal that gives me a better bargain than my bargaining partner."<sup>143</sup>

Women are said to prioritize "fostering positive relationships" and "maintaining self-respect" above men's stated concerns with "a comfortable life and being logical."<sup>144</sup> Women do worry about their financial security.<sup>145</sup>

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<sup>136</sup> James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464, 464 (1990) (noting female altruism); Deborah M. Kolb & Gloria G. Coolidge, *Her Place at the Table: A Consideration of Gender Issues in Negotiation*, in *NEGOTIATION THEORY AND PRACTICE* 261-64 (Jeffrey Z. Rubin & J. William Breslin eds., 1991) (noting that women would rather "talk than fight" and consider others' needs in negotiations); David Reinstein & Ferhard Riener, *Reputation and Influence in Charitable Giving: An Experiment* (draft on file with author) (discussing female propensity to signal generosity, especially when a female leader is making a charitable donation).

<sup>137</sup> Serge Guimond et al., *Social Comparison, Self-Stereotyping, and Gender Differences in Self-Construction*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 221, 221-42 (2006) (examining gender stereotyping and reporting study results indicating gender differences in self-perceptions that shape behavioral differences).

<sup>138</sup> Thompson, *supra* note 99, at 520. Again, this is not true for all women or men—but only a general encapsulation of the data.

<sup>139</sup> Barkacs & Standifird, *supra* note 24, at 83-85.

<sup>140</sup> Thompson, *supra* note 99, at 520.

<sup>141</sup> *Id.* (also emphasizing that the evidence is inconclusive).

<sup>142</sup> Pynchon, *supra* note 96. Again, this poll was not scientific, but it is interesting because it polled women in business asking them to rate from 1 to 10 their agreement with a statement that they considered themselves assertive. The average number was 7.7. Also, it sheds light on average female perceptions that shape their realities.

<sup>143</sup> *Id.*

<sup>144</sup> Kray & Babcock, *supra* note 10, at 206-07.

<sup>145</sup> See Talya Miron-Shatz, "Am I Going to Be Happy and Financially Stable?": *How American*

However, their financial worries often are secondary or directly linked with their concerns for partners, parents and children.<sup>146</sup> This relational focus can hinder women from asking for what they want or deserve, thereby leading them to attain less financially attractive deals in negotiations.<sup>147</sup>

My own e-survey research suggested that although women may be more aware than men of contract term importance, they nonetheless are less likely to focus on terms at the time of purchase. As an initial matter, 74.2% of female versus 65% of male respondents in my survey indicated “somewhat” or “strongly” disagree that “It is a waste of time to read form terms.”<sup>148</sup> Similarly, 76.7% female versus 69.9% male respondents reported that they “somewhat” or “strongly” disagree that they “Do not see why” they should read form terms, and 81.2% female versus 75.5% male said “strongly” or “somewhat” agree that “It is very important to read” purchase terms.<sup>149</sup>

When asked about their last purchase of an electronic item, however, 51.5% of male versus 36.5% of female respondents said that they read the applicable contract terms before making the purchase.<sup>150</sup> Furthermore, 84.4% of male versus 69.3% of female respondents reported that they considered contract terms important in deciding whether to get their last credit card.<sup>151</sup> The FINRA study noted above similarly found that thirty-seven percent of male versus thirty-one percent of female respondents comparison-shopped for credit cards.<sup>152</sup>

FINRA also reported that the women in its study were more likely than the men to carry a balance, pay only the minimum due, and incur late and over the limit fees.<sup>153</sup> The FINRA report attributed this to its other finding that women tend to have lower levels of “financial literacy.”<sup>154</sup> However, the FINRA study based

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*Women Feel When They Think About Financial Security*, 4 JUDGMENT & DECISION MAKING 102 (2009), available at <http://journal.sjdm.org/9118/jdm9118.html> (reporting results of surveys of women regarding their financial concerns and how it links with their life satisfaction).

<sup>146</sup> *Id.* at 108-12 (indicating that women often coupled financial concerns with “lack of a support network” and familial uncertainties).

<sup>147</sup> Barkacs & Standifird, *supra* note 24, at 83-92 (gathering research and theory).

<sup>148</sup> Schmitz, *Consumer Survey*, *supra* note 69, Section 2, Question 6h (attached as Appendix) (constituting 71.1% of respondents overall).

<sup>149</sup> *Id.* Section 2, Questions 6i & j (attached as Appendix) (constituting 74.4% and 79.3% respectively overall).

<sup>150</sup> *Id.* Section 2, Question 1 (attached as Appendix).

<sup>151</sup> *Id.* Section 2, Question 2 (attached as Appendix). Specifically asking “If you read the terms before you got the credit card, did you consider any terms important in deciding you wanted that card?” *Id.*

<sup>152</sup> Mottola, *supra* note 48, at 2.

<sup>153</sup> *Id.* (reporting research, and noting the “bright spot” for women in the FINRA report was that women were less likely to use their credit cards for cash advances).

<sup>154</sup> The researchers reached this conclusion because they found the differences in costly behaviors only appeared among respondents who had “low levels of financial literacy,” and found that 32% of the women with low financial literacy versus 24% of women with high financial literacy reported engaging in problematic credit card practices. *Id.* at 3. Men and women with “high financial literacy” were equally (both at 24%) likely to engage in problematic credit card behaviors. *Id.* at 3, 4 (suggesting that financial literacy training could be particularly beneficial for women in order to address this issue).

“low levels of financial literacy” merely on the respondents’ answers to five financial literacy questions. Also, the age of respondents may have impacted their answers to these questions to the extent that older women may have grown up without access or exposure to financial education.<sup>155</sup>

Furthermore, other research suggests that women and men do not differ in their logical thinking, data organization, and problem-solving skills, but that women may make more care-based decisions than men due to framing and different priorities.<sup>156</sup> Accordingly, although less financial know-how may have contributed to women’s greater propensity for problematic credit card practices in the FINRA study, this also could have emanated in part from differences in priorities. For example, the female respondents in my study placed greater importance than men on factors that some may consider relational or “feminine.” When asked to rate the level of importance of various factors in generally making consumer purchasing decisions, there was a significant correlation between a respondent’s gender and attribution of importance to “store reputation,” “friend or family recommendations,” and “friendly salesperson.”<sup>157</sup> Eighty seven percent of the women versus 77.5% of the men for store reputation, 68.8% of the women versus 56.9% of the men for recommendations, and 72.8% of the women versus 62.4% of the men for friendliness indicated “very” or “somewhat” important.<sup>158</sup>

The female respondents in my survey also were more likely than the men to indicate higher importance with respect to relational and altruistic factors when asked how they would rate various considerations in choosing to purchase a car from one over another car dealership. In particular, the female respondents attributed greater importance than the male respondents to “salesperson makes eye contact,” “other dealership sued for discrimination,” “dealership donates 5% to charity,” and “dealership is environmentally friendly.”<sup>159</sup> Ninety-two percent of

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<sup>155</sup> *Id.* at 2.

<sup>156</sup> Art Hinshaw & Jess K. Alberts, *Gender and Attorney Negotiation Ethics*, 39 WASH. U. J.L. & POL’Y 145, 177-78 (2012). This was discussed in the context of a study of lawyers facing morally ambiguous ethical scenarios. *Id.* at 184.

<sup>157</sup> Schmitz, *Consumer Survey*, *supra* note 69, Section 1, Question 3 (attached as Appendix) (specifically asking “When you do “shop around” or compare choices, what leads you to make final purchasing decisions? Think about the factors below and indicate how important each of the factors generally is to you in deciding what to buy[]”); listed factors also included but generating no significant gender differences included relationship to seller, availability, brand, financing, contract terms, “want it,” consumer reviews, “gut feeling,” and price).

<sup>158</sup> *Id.* The Kendall’s tau values provided in the Appendix indicate the strength of correlation. For example with respect to recommendations, female respondents were therefore significantly more likely to find these recommendations important per a Kendall’s tau of -.121 between gender (coded 1 for male and 2 for female) and an indication of importance (coded 1 to 4 for “very important,” “somewhat important,” “minor importance,” and “not important”).

<sup>159</sup> Schmitz, *Consumer Survey*, *supra* note 69, Section 1, Question 4 (attached as Appendix) (specifically asking: “You have decided that you would like to purchase a particular model of new car with certain options. Two car dealerships in your area list this new car with the options you want at the same price. At one of the dealerships, you learn or experience the following, listed below. How important would each of these be in leading you toward purchasing at this dealership instead of the other?”; listing 17 other factors related to the salesperson and dealership practices such as friendliness,

the women versus 80.6% of the men with respect to eye contact, 73.8% of the women versus 48.5% of the men regarding discrimination, 67% of the women versus 41.7% of the men with respect to donation to charity, and 71.3% of the women versus 57.3% of men with respect to environmental friendliness reported “very” or “somewhat” important.<sup>160</sup>

Relational concerns often are laudable, and it may be that a relationally beneficial but less economically advantageous contract brings more satisfaction in the long run. However, some women may feel constrained in a “psychological straitjacket” that hinders them from negotiating, or seeking what they really want or need in contracting contexts.<sup>161</sup> Because women tend to view situations within relationships, they may be less likely than men to feel entitled to ask for better deals or recognize opportunities for bargaining. Furthermore, this may dovetail with stereotypes and societal expectations so that “[e]ven if a woman feels entitled, she may stop herself from acting in what is typically defined as a masculine behavior.”<sup>162</sup> Some women also may fear that asserting themselves in negotiations will signal rudeness or harm positive relationship-building.<sup>163</sup>

Accordingly, relational priorities, stereotype threat, and lower expectations work together to contribute to women’s propensity to be less competitive than men in negotiations. Male participants in a tournament study measuring competitiveness were more aggressive and thus attained greater outcomes than the female participants.<sup>164</sup> Similarly, male participants in another negotiation study sought to further their own interests about four times more often than the female participants.<sup>165</sup> The men in the study also were much more likely than the women to even recognize opportunities to negotiate.<sup>166</sup>

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knowledge, long-time relationship with the company, etc. that did not indicate significant correlation with gender).

<sup>160</sup> See *id.*

<sup>161</sup> See Rudman, *supra* note 114, at 629-631 (explaining socialized behavioral differences between men and women and expectations that women should be more “community oriented” and less proactive in protecting their own economic interests); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 Mich. J. Gender & L. 299, 302 (1999) (discussing gender in negotiations); Linda Babcock & Sara Laschever, *Ask For It* (2008) (suggesting strategies to help women better evaluate their worth and assert themselves in ways that comport with their personalities).

<sup>162</sup> Barkacs & Standifird, *supra* note 24, at 86 (discussing female expectations regarding “niceness” and gender differences in taking advantage of opportunities to negotiate). Women also may refrain from using complaint processes because the processes do not allow them to adequately voice their feelings. See Nancy M. Henley & Marianne LaFrance, *Gender as Culture: Difference and Dominance in Nonverbal Behavior*, in NONVERBAL BEHAVIOR: PERSPECTIVES, APPLICATIONS, INTERCULTURAL INSIGHTS 351-71 (Aron Wolfgang ed., 1984); Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers: What Difference Does “Gender Difference” Make?*, 18 NO. 3 DISP. RESOL. MAG. 4, 6-7 (2012).

<sup>163</sup> Kray & Babcock, *supra* note 10, at 206-07.

<sup>164</sup> *Id.* at 205-08 (citing studies).

<sup>165</sup> Babcock & Laschever, *supra* note 85, at 4, 41.

<sup>166</sup> *Id.* (noting how women were 45% more likely to score low on a rating scale assessing whether people saw their situations as open to change via negotiations).



That said, research also indicates that some women may be better negotiators than men due to their more cooperative and relational approaches.<sup>167</sup> This is especially true when women are acting for the benefit of others. For example, there is some evidence that women may be more successful than men when negotiating salary and other benefits on behalf of others.<sup>168</sup> Some studies also indicate that women often show superior problem-solving, advocacy and leadership skills when acting in a representative capacity, rather than negotiation for one's own benefit.<sup>169</sup> In addition, one researcher found that female lawyers may fare better when representing clients in mediation because they are more comfortable engaging in collaborative problem-solving than raw adversarial processes.<sup>170</sup>

Again, generalizations are not true for all women or men, and individual differences remain paramount. The evidence is mixed and not all women fit any particular negotiation profile. Indeed, bargaining behaviors and outcomes are intricately related to situations, external cues, background, and overall context.<sup>171</sup> Nonetheless, gender, framing, and emotion impact negotiations.<sup>172</sup> The evidence suggests that stereotypes and bargaining dynamics raise costs and risks for women in negotiations.<sup>173</sup> This has led negotiation educators to develop programs to assist women in overcoming communications barriers they face in the workplace and marketplace.<sup>174</sup>

## II. LIMITED CONSIDERATION OF GENDER IN CONTRACT AND CONSUMER LAW

One may assume that contract law and discrimination legislation would address gender discrimination and companies' taking improper advantage of gender stereotypes and behavioral propensities. In reality, however, "the most common manner in which contract doctrine deals with the problem of discrimination is by not dealing with it at all[.]" and consumer laws generally do little to preclude

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<sup>167</sup> See M. AFZALUR RAHIM, *MANAGING CONFLICT IN ORGANIZATIONS* 133-40 (3rd ed. 2001) (highlighting how the evidence is mixed at best).

<sup>168</sup> Lu-in Wang, *Negotiating the Situation: The Reasonable Person in Context*, 14 *LEWIS & CLARK L. REV.* 1285 (2010) (discussing women's social costs in negotiations and importance of gender in understanding contract behavior).

<sup>169</sup> See Menkel-Meadow, *supra* note 162, at 4-8 (gathering citations to research and conclusions).

<sup>170</sup> *Id.* at 4-9.

<sup>171</sup> Dorothy E. Weaver & Susan W. Coleman, *The Literature on Women and Negotiation: A Recap*, 18 *NO. 3 DISP. RESOL. MAG.* 13, 3-4 (2011) (discussing how gender may matter in negotiations but is highly dependent on situation and context); Menkel-Meadow *supra* note 162, at 6-10 (emphasizing how case-type and legal standards impact gender-differential behaviors).

<sup>172</sup> See Jerry Plymire, *Complaints as Opportunities*, 5 *J. SERVICES MARKETING* 61, 61-62 (1991) (explaining emotional components of complaint discussions).

<sup>173</sup> Carbado & Gulati, *supra* note 126, at 110-11, 136-37, 141-42 (explaining how employers may exploit outsider vulnerabilities).

<sup>174</sup> Nina Schichor, *Mitigating Gender Schemas: The Women, Leadership & Equality Program at the University of Maryland School of Law*, 30 *HAMLIN J. PUB. L. & POL'Y* 563, 564-70 (2009) (describing and discussing a law school program aimed at assisting women in workplace negotiations through theoretical, experiential, and applied components).

discrimination in private consumer contracting.<sup>175</sup> Constitutional and statutory protections mainly target overt discrimination, while classical contract doctrine glosses over context, including gender considerations. Instead, contract law influenced by law and economics theory assumes that individuals with perfect information make rational contracting choices that serve economic efficiency goals.<sup>176</sup> Furthermore, the limited discrimination laws targeting consumer contracting generally focus on lending and create high hurdles to proving claims—especially with respect to disparate impact or other more subtle bias.

#### *A. Classical Contract Assumption of Gender Neutrality*

Classical contract law aims to preserve freedom of contract and ensure promise enforcement in a presumably competitive market.<sup>177</sup> Furthermore, it is founded on objective theory with respect to buyers, sellers, and judges.<sup>178</sup> It presumes that purchasers, sellers and decision-makers are rational actors with requisite information and bargaining power to make well-informed decisions.<sup>179</sup> These neutral actors are somehow immune from perceptions and biases, and are therefore blind to sexism, stereotypes, and behavioral propensities that defy what may appear objectively “rational” based on simple cost/benefit analyses.<sup>180</sup>

This classical law also seeks to avoid what may appear as paternalism or improper interference with freedom of contract or family privacy.<sup>181</sup> Instead, classical theory dissuades courts from expending resources to consider contextual factors such as gender when enforcing private agreements. This is especially true with respect to business-to-consumer, or “B2C,” sales contracts that businesses present to consumers on a take-it-or-leave-it basis.

Courts treat these forms like any other contract although they are generally non-negotiable and easily bypass consumer attention under the shroud of confusing internet links or useless paper in bill stuffers. Furthermore, the Uniform Commercial Code (“UCC”) Article 2 governing sale of goods does not directly limit enforcement of form contracts.<sup>182</sup> Instead, the UCC Article 2 is built on

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<sup>175</sup> Keren, *supra* note 7, at 140. See also Luis Diaz-Serrano & Josep M. Raya, *Is there Discriminatory Mortgage Pricing Against Immigrants in the Spanish Lending Market?*, (IZA, Discussion Paper No. 5578 2011), available at <http://ssrn.com/abstract=1790689> (noting lack of anti-discrimination laws regarding housing and lending markets in Europe and discussing study finding significant discrimination in housing and lending markets in Spain).

<sup>176</sup> See Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 97 (2006) [hereinafter Schmitz, *Safety Net*].

<sup>177</sup> See Threedy, *supra* note 8, at 1260 (noting this is fundamental).

<sup>178</sup> See DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 208-13 (2006) (discussing objective theory of classical legal thought).

<sup>179</sup> DiMATTEO ET AL., *supra* note 27, at 1218-21 (discussing classical conceptions of contract).

<sup>180</sup> *Id.* at 198.

<sup>181</sup> See Threedy, *supra* note 8, at 1252-55, 1260-62 (arguing that what she calls “the game” of contract law skirts gender issues).

<sup>182</sup> See Schmitz, *Safety Net*, *supra* note 176, at 73-97 (noting how the UCC’s seemingly broad unconscionability provision has failed to promote courts’ active consideration of context).

classical assumptions and therefore limits regulation of form contracts to general contract defenses such as unconscionability.<sup>183</sup>

This classical law has joined forces with law and economics theory over the years to enhance classical law's pro-enforcement aim and objective vision of buyers and sellers. Law and economics augments the normative focus on promoting market efficiency, and enhances warnings against judicial consideration of context. Economists emphasize how courts' strict enforcement of contracts without deep contextual consideration is necessary for optimal distribution of resources through market competition.<sup>184</sup>

Law and economics theorists argue that legislative regulation of contract terms or other intrusion on freedom of contract produces negative consequences not only for companies, but also for consumers and the overall economy.<sup>185</sup> This is because companies pass on costs of regulations and contract litigation to consumers through increased prices and decreased quality of goods and services. Furthermore, courts' unpredictable enforcement of contracts may cause merchants to avoid transactions with those likely to challenge adhesive contracts.<sup>186</sup> Some scholars add that strict enforcement of form contracts benefits all consumers regardless of the contracts' adhesive nature because standardization lowers transaction costs and fosters production overall.<sup>187</sup>

An example of how classical and economic theories influence contract law can be seen in opinions like *Hill v. Gateway 2000, Inc.*<sup>188</sup> In that case, the court emphasized the efficiency of form contracting in enforcing an arbitration provision buried in the packaging that came with the computer the Hills had purchased over the phone. The court concluded that the Hills assented to the provision by not returning the computer within thirty days as permitted by the approve-or-return proviso in other packaged terms.<sup>189</sup> The court gave little thought to the Hills' lack

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<sup>183</sup> See, e.g., Threedy, *supra* note 8, at 1262-63 (discussing perspectives on cases such as *Williams v. Walker-Thomas Furniture Co.* in which courts consider gender in applying unconscionability).

<sup>184</sup> See KENNEDY, *supra* note 178, at 212-13 (noting the efficiency basis for the objective versus subjective approaches).

<sup>185</sup> See Schmitz, *Safety Net*, *supra* note 176, at 95 n.181 (scholars fail to "dig[] down as deep as one might into the moral question: why, or under what circumstances, should 'consent' justify state enforcement of agreements?"); see also Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975) (discussing strict enforcement under classical contract doctrine); Peter Huber, *Flypaper Contracts and the Genesis of Modern Tort*, 10 CARDOZO L. REV. 2263, 2268-69 (1989) (highlighting how the operation of classical contract law can result in harsh outcomes).

<sup>186</sup> See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

<sup>187</sup> See, e.g., Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1403-04, 1433-51 (2009) (arguing that consumers prefer standardized contracts over spending time negotiating individualized terms, and that standardization allows for innovation through segmented consideration).

<sup>188</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (enforcing a form computer purchase contract requiring arbitration). *But see* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571-75 (App. Div. 1998) (enforcing the identical Gateway arbitration clause, but vacating the portion of the clause requiring arbitration before a tribunal that may be excessively costly).

<sup>189</sup> See *Hill*, 105 F.3d at 1150-51. The Court also rejected the Hills' claims that the arbitration

of bargaining power, psychological barriers to sending goods back, shipping costs, and other burdens of product returns.<sup>190</sup> It indicated no sympathy for consumers who fail to read and take action with respect to form terms *ex ante*.<sup>191</sup>

Similarly, the Ohio Supreme Court in *Hayes v. The Oakridge Home* refused to consider age and gender in strictly enforcing an arbitration clause in a form contract between a nursing home and its 95-year-old female resident.<sup>192</sup> The court had a nearly eagle-eyed focus on the fact that the resident who passed away before trial had signed the written arbitration contract. The court gave little credence to her estate representative's claims that the contract eliminated her right to trial and punitive damages without her true consent.<sup>193</sup> Instead, the court warned that judicial consideration of such contextual concerns might violate constitutional rights to private contract.<sup>194</sup>

Many courts routinely apply this efficiency-focused and formulaic analysis to enforce consumer contracts despite their non-negotiable nature.<sup>195</sup> They often justify this strict enforcement as proper under classical contract principles and necessary to the vitality of an efficient market economy.<sup>196</sup> Courts borrow from economists in advancing form contracts as means for fostering convenience and cost savings that corporations may pass on to consumers.<sup>197</sup> Many also subscribe to the notion that consumers remain free to reject form contracts and bear responsibility for their failures to shop for or negotiate their contracts.<sup>198</sup>

Although not all courts strictly subscribe to classical and economic analysis, many courts do. Focus on classical contract with a law and economics bent produces a market and efficiency focus that dissuades courts from considering

clause was invalid regardless of its nonconsensual nature because it precluded class relief, curtailed their right to recover attorney fees under the Magnusson Moss Warranty Act ("MMWA"), and required them to arbitrate their claims in a potentially expensive forum.

<sup>190</sup> *Id.*

<sup>191</sup> *See id.*; *see also* *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108-09 (9th Cir. 2002) (finding that an employee assented to an arbitration clause an employer imposed after hiring the employee because the employee could opt out within thirty days). Companies now go further by requiring consumers to revisit companies' "terms and conditions" on their websites to learn of contract changes and additions that consumers are deemed to accept by continuing to use a company's products or services. *See, e.g.*, Meetup Terms of Service Agreement, MEETUP.COM, <http://www.meetup.com/terms> (last visited May 23, 2011).

<sup>192</sup> *Hayes v. Oakridge Home*, 908 N.E.2d 408, 409-16 (Ohio 2009).

<sup>193</sup> *Id.* at 412-16.

<sup>194</sup> *Id.* at 412-14 (highlighting United States and state constitutional provisions requiring courts to defend the right to private contract).

<sup>195</sup> *See generally* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780, at 1860-73* (1st ed. 1977).

<sup>196</sup> *See id.* at 161.

<sup>197</sup> *See, e.g.*, Hillman & Rachlinski, *supra* note 186, at 440-41.

<sup>198</sup> *See id.* at 437, 441; *see also* Hill, 105 F.3d at 1148-50 (finding assent to a form arbitration clause). *But see* Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1382-86 (1996) (critiquing the courts for "drifting away from, or perhaps abandoning altogether, society's traditional notions of meaningful consent").

contextual factors such as parties' gender and race. "The tendency to downplay the harm of discriminatory contractual behavior is a common response to the problem, especially among economists and scholars who can be described as 'market-oriented.'"<sup>199</sup> "Free market" supporters propose that the market will cure any discriminatory contracting because sellers will remain blind to biases as they compete for customers, and this will eventually squeeze any discriminatory businesses out of the market.<sup>200</sup> This again assumes that sellers and buyers are economically rational actors.

Again, the resulting contract law seeks mainly to promote promise enforcement, and places special trust in the market to weed out any discrimination. Courts remain reluctant to regulate contracts or consider context when enforcing contract terms. This takes away courts' cognizance of biases, stereotypes, societal norms, and behavioral propensities that may affect contracts in the real world.

### *B. Scarce Statutory Attention to Gender Discrimination in Consumer Contracting*

The United States Constitution coupled with federal and state statutes provide some protection for women from discriminatory contracting practices. The law is not entirely blind to gender discrimination. However, the existing laws are narrow and difficult to use, especially when it comes to protecting women from more subtle discriminatory contracting practices. Furthermore, seemingly neutral laws may disproportionately burden women, or otherwise permit companies to consciously and/or subconsciously treat women differently than men to women's detriment in the marketplace.

As an initial matter, constitutional due process and equality provisions only apply when state action is involved. The U.S. Constitution therefore was important in quashing state laws that deemed married women incompetent to make contracts.<sup>201</sup> It nonetheless was not until 1981 that the United States Supreme Court finally put an end to the last vestiges of such discrimination, by holding that laws allowing a husband to sell or encumber marital property without a wife's consent were unconstitutional.<sup>202</sup> Meanwhile, constitutional equal protection constraints have become important in quashing quotas or other state action that

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<sup>199</sup> Keren, *supra* note 7, at 155.

<sup>200</sup> *Id.* at 156-58 (discussing market-oriented hostility to regulating contracts).

<sup>201</sup> John A. Ward, *Husband and Wife—Contracts—Married Woman Not Liable on Mercantile or Trading Contract Unless Disability of Coverture Removed—Wyner v. Express Publishing Co.*, 288 *W.2d* 583 (*Tex.Civ.App.—San Antonio* 1956, *Error Ref'd N.R.E.*), 34 *TEX. L. REV.* 1094, 1094-96 (1956) (highlighting courts' applications of covertures statutes directing that a married woman cannot enter binding contracts made for purchase or sale of goods and services); Edgar H. Keltner, Jr., *Suggested Legislative Action to Liberalize the Contractual and Property Rights of Texas Married Women*, 25 *TEX. L. REV.* 657, 658-66 (1947) (critiquing Texas laws' refusal at that time to grant married women the right to enter into binding contracts).

<sup>202</sup> *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (ruling that the Louisiana statute was unconstitutional under the Fourteenth Amendment because it gave authority to the husband as "head and master" to alienate marital property without spousal consent).

provides racial minorities or women with special rights.<sup>203</sup> Such action will only survive constitutional scrutiny if it is narrowly tailored to further a compelling state interest.<sup>204</sup>

Meanwhile, state and federal anti-discrimination statutes usually focus on employment, housing, and lending. Claimants under the Civil Rights Act and other discrimination laws generally must show disparate treatment or disparate impact based on their race, gender or other such suspect classification.<sup>205</sup> Such claims have had the most success with respect to employment discrimination, especially with the benefit of the U.S. Equal Employment Opportunity Commission's focus on addressing employers' discriminatory practices.<sup>206</sup> Recently, the federal government also prevented erosion of the Civil Rights Act and other anti-discrimination acts by clarifying that the 180-day window for filing a discriminatory compensation claim begins each time compensation is paid pursuant to an unlawful decision or practice.<sup>207</sup>

Still, gender salary gaps remain.<sup>208</sup> Furthermore, the proposed Fair Pay Act failed in June 2012, to the dismay of many women's groups and cheers of those who claimed the bill would have encouraged frivolous litigation. The Act would have shifted the burden to require employers to justify differences in pay based on qualifications, education and other objective criteria unrelated to gender.<sup>209</sup> It also

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<sup>203</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989) (finding Richmond's requirement that its prime contractors subcontract at least 30% of the dollar amount of each contract to minority-owned businesses was unconstitutional because it was not narrowly tailored to rectify past discrimination in the construction industry).

<sup>204</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (upholding a law school's use of race in admissions decisions because it was narrowly tailored to further a compelling interest in obtaining a diverse student body); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (upholding a Washington state minimum wage law for women due to documented evidence) ("[E]xploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.").

<sup>205</sup> See, e.g., Arkansas Fair Housing Act, ARK. CODE ANN. §§ 16-123-201-16-123-210 (2011); Florida Fair Housing Act, FLA. STAT. §§ 760.20-760.37 (2011); South Carolina Fair Housing Law, S.C. CODE ANN. §§ 31-21-10 to 31-21-150 (2010); Texas Fair Housing Act, TEX. PROP. CODE ANN. §§ 301.001-301.005 (2011); Utah Fair Housing Act, UTAH CODE ANN. §§ 57-21-1 to 57-21-14 (2011).

<sup>206</sup> See U.S. Equal Employment Opportunity Commission, *Sex-Based Discrimination*, <http://www1.eeoc.gov/laws/types/sex.cfm?renderforprint=1> (last visited June 29, 2012) (defining the scope of discrimination the commission covers).

<sup>207</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2012). It was passed to supersede the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), which held that 180 day window to bring a pay discrimination claim begins on the day when the employer set the discriminatory pay. *Id.* The Act restores the EEOC's prior position linking the filing window to the receipt of any paycheck where the pay was discriminatory. *Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009*, EEOC, [http://www.eeoc.gov/laws/statutes/epa\\_ledbetter.cfm](http://www.eeoc.gov/laws/statutes/epa_ledbetter.cfm) (last visited June 25, 2012).

<sup>208</sup> See *supra* note 85 (citing references regarding the salary gap).

<sup>209</sup> See Janet Hook, *US Senate Republicans Block Women's Wage Bill*, WALL ST. JOURNAL, Jun. 5, 2012, <http://online.wsj.com/article/BT-CO-20120605-710409.html> (last visited July 31, 2012); Jennifer Steinhauer, *Senate Republicans Again Block Pay Equity Bill*, N.Y. TIMES, Jun. 5, 2012, <http://www.nytimes.com/2012/06/06/us/politics/senate-republicans-block-pay-equity-bill.html>.

would have prohibited employers from retaliating against employees who discuss wages in response to a complaint or investigation, and would have subjected employers to compensatory or punitive damages for statutory violations.<sup>210</sup>

In the lending context, the Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against any applicant with respect to any aspect of a credit transaction on the basis of sex or marital status.<sup>211</sup> Furthermore, Arkansas, California, Colorado, Connecticut, Georgia, Missouri, Nevada, New York, North Dakota, Ohio, and Oklahoma have state statutes prohibiting discrimination in consumer credit transactions on the basis of sex or marital status.<sup>212</sup> New Mexico, New Hampshire, New Jersey, South Carolina, and the District of Columbia also have state statutes prohibiting gender discrimination in the insurance context.<sup>213</sup> Kentucky has a general statute that prohibits gender discrimination in financial practices.<sup>214</sup>

A handful of states also have broader anti-discrimination laws with respect to contracting.<sup>215</sup> California is especially proactive.<sup>216</sup> Along with barring gender discrimination in credit contracts, the California Civil Code also prohibits discrimination in granting franchises<sup>217</sup> and discriminatory provisions in letters of credit or other documents.<sup>218</sup> In 1996, California also became the first state to specifically prohibit gender discrimination in prices charged for services of similar or like kind.<sup>219</sup> The law aimed to address well-documented discrimination against

<sup>210</sup> See Hook, *supra* note 210 (noting how the law would have exempted the federal government from punitive damages). See also *How the Paycheck Fairness Act Will Strengthen the Equal Pay Act*, NWLC (May 2012), <http://www.nwlc.org/sites/default/files/pdfs/broadpaycheckfairnessfactsheet.pdf> (providing facts about the proposal before its failure in the Senate).

<sup>211</sup> Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2011).

<sup>212</sup> ARK. CODE ANN. § 16-123-107(4) (2011) (Arkansas) (consumers have the “right to engage in credit and other contractual transactions without discrimination.”); Song-Beverly Credit Card Act of 1971, CAL. CIV. CODE § 1747-1748.95 (2010) (California); COLO. REV. STAT. § 5-3-210 (Colorado); CONN. GEN. STAT. § 46a-65 (2011) (Connecticut); GA. CODE ANN. §§ 7-6-1 and 2 (2011) (Georgia); MO. REV. STAT. § 408.550 (Missouri); NEV. REV. STAT. §§ 598B.010–598B.180 (2011) (Nevada); N.Y. CLS EXEC. § 296-a (2011) (New York); N.D. CENT. CODE § 14-02.4-17 (2011) (North Dakota); OHIO REV. CODE ANN. § 4112.02 (2011) (Ohio); OKLA. STAT. tit. 14A, § 1-109 (2011) (Oklahoma).

<sup>213</sup> N.M. STAT. ANN. § 59A-16-13 (2011) (New Mexico); N.H. REV. STAT. ANN. § 417:4 (2011) (New Hampshire); N.J. STAT. § 17:29B-4 (2011) (New Jersey); S.C. CODE ANN. § 38-75-1210 (2010) (South Carolina); D.C. CODE § 31-1603 (District of Columbia).

<sup>214</sup> KY. REV. STAT. ANN. § 344.370 (2011).

<sup>215</sup> See, e.g., N.M. STAT. ANN. § 28-1-7 (2011) (New Mexico); Human Rights Law, N.Y. CLS EXEC. §§ 290–301 (2011) (New York); N.C. GEN. STAT. § 99D-1 (2011) (North Carolina); N.D. CENT. CODE § 14-02.4-01 (2011) (North Dakota); OHIO REV. CODE ANN. § 4112.02 (2011) (Ohio); 43 PA. STAT. ANN. § 955 (2011) (Pennsylvania); Virginia Human Rights Act, VA. CODE ANN. §§ 2.2-3900–2.2-3902 (2011) (Virginia).

<sup>216</sup> See generally CAL. CIV. CODE §§ 51–53 (2011); Song-Beverly Credit Card Act of 1971, CAL. CIV. CODE §§ 1747–1748.95 (2010); Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750–1784 (1971); California Fair Employment and Housing Act, CAL. GOV. CODE §§ 12900–12906 (2011).

<sup>217</sup> CAL. CIV. CODE § 51.8 (2011).

<sup>218</sup> *Id.* § 16721.5 (2011).

<sup>219</sup> *Civil Rights*, *supra* note 38, at 1839-44 (discussing the Gender Tax Repeal Act); CAL. CIV. CODE § 51.6 (2011). This augmented the Unruh Civil Rights Act, all persons, no matter their sex, marital status, or sexual orientation, must have full and equal accommodations, advantages, facilities, privileges,

women in pricing for haircuts, laundry, dry cleaning and alterations that cost California women approximately \$15 billion annually.<sup>220</sup> Nonetheless, the law exempts price differentials in the sale of goods and has been criticized for allowing businesses to rather easily justify price differentials for services based on “time, difficulty, or cost[.]”<sup>221</sup>

Laws like ECOA and state discrimination statutes are most helpful in attacking disparate treatment or other overt and well-documented discrimination. For example, a plaintiff may survive a motion to dismiss where she proves disparate treatment based on evidence that a creditor used gender-based epithets in threatening to increase the amount owed on a debt.<sup>222</sup> However, even disparate treatment claimants face difficulties in finding and obtaining company memos or other evidence to prove their allegations.<sup>223</sup>

Disparate impact cases are even more difficult to prove. Claimants bear a tough burden in (1) establishing that the defendant employed a specific policy or practice in order to discriminate, and (2) demonstrating with statistical data that the policy or practice had a demonstrable adverse effect on the claimants.<sup>224</sup> Furthermore, such claims are particularly difficult to prove in lending and other consumer contract cases because defendants may easily hide misuse of gender biases or stereotypes in determining rates and prices under the guise of “business justifications.”<sup>225</sup> It is nearly impossible for consumers to rebut “discretionary

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and services in all business establishments of every kind whatsoever. CAL. CIV. CODE § 51 (2011).

<sup>220</sup> *Civil Rights*, *supra* note 38, at 1840 (also noting that this was costing each woman about \$1,351 per year). This law also requires businesses to disclose in writing the pricing for standard services, and provide customers with a complete price list upon request. CAL. CIV. CODE § 51.6 (2011).

<sup>221</sup> *Civil Rights*, *supra* note 38, at 1840. The author critiqued the narrow scope of the law and proposing a ban on use of such “business necessity” excuses for price discrimination. *Id.* at 1844.

<sup>222</sup> *Sharp v. Chartwell Financial Services Ltd.*, 2000 WL 283095, at \*2, \*2-5 (N.D. Ill. Mar. 6, 2000) (finding plaintiffs survived the creditor’s motion to dismiss on their ECOA and FDCPA claims where they had specific evidence of harassing threats with gender-based and racial epithets).

<sup>223</sup> In addition, women may be able to use the FDPA to recover against debt collectors who harass them with threats against their children or negative comments about their marriages and capacity to raise children. *See, e.g., Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 867-75 (awarding plaintiff damages under the FDCPA where a collector told her that she “shouldn’t have children” due to her hospital debt); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 162-64 (affirming injunction and fines against a company that told female debtors that their children would see them “being taken away in handcuffs,” and “be bringing their mommy care packages in prison.”); *Black v. Aegis Consumer Funding Group, Inc.*, 2001 WL 228062, at \*2, \*2-9 (S.D. Ala. 2001) (awarding damages under the FDCPA where the collectors told a mother that they would take her “kids’ clothing,” and hounded her about whether her marriage was the reason she was not paying her debts).

<sup>224</sup> *See Carle*, *supra* note 14, at 256-57, 297-98 (It is “very rare for plaintiffs [in disparate impact cases] other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII [in the employment context.]”).

<sup>225</sup> *Musudi v. Ford Motor Credit Co.*, 2008 WL 2944643, at \*2, \*2-5 (E.D. N.Y. 2008) (dismissing an ECOA claim for failure to meet this burden of proof, and dismissing the FDCPA claim because the defendant was a creditor and not a collector). Borrowers also have launched “reverse redlining” cases against lenders that target racial minority communities for overpriced loans, but these actions are difficult for plaintiffs and their attorneys to recognize, let alone prove and bring to successful fruition. *See Andrew Lichtenstein, United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L.A. L. REV. 1339 (2010) (discussing reverse redlining



pricing” as justification for subtle discrimination.<sup>226</sup> This allows subtle discrimination to persist, especially with respect to gender due to lack of available data documenting historical and continuing structural gender biases.<sup>227</sup>

At the same time, general consumer lending protections like the Truth in Lending Act (“TILA”) and the Real Estate Settlement Act (“RESPA”) have been criticized for disproportionately burdening women by overloading consumers with disclosures.<sup>228</sup> The TILA requires lenders to disclose key information such as fees and interest rates, and regulation Z implementing the TILA mandates that disclosures be “clear and conspicuous.” RESPA provides similar disclosure-focused rules. Although such disclosures may help consumers in making informed borrowing decisions, some commentators argue that women tend to be less financially experienced and confident than men in making lending decisions, and therefore disclosures may further cloud women’s borrowing decisions.<sup>229</sup>

Nonetheless, this critique may be unwarranted and most consumer advocates support disclosure rules. Furthermore, other research indicates that women are just as financially savvy as men, and may make better borrowing decisions than men by avoiding overly risky behavior.<sup>230</sup> Still, the impact of disclosures on women is at least worth considering in light of additional research suggesting that lenders have disproportionately preyed on female consumers.<sup>231</sup>

Furthermore, as noted above, some also have criticized recent credit card regulations for disproportionately harming women in the marketplace. The new Federal Reserve rules precluding credit card issuers from considering household income are beneficial to the extent that they restrict consumers from racking up debt they cannot repay. However, these new rules may be problematic for stay-at-

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claims); Pouya Bavafa, *The Intentional Targeting Test: A Necessary Alternative to the Disparate Treatment and Disparate Impact Analyses in Property Rentals Discrimination*, 43 COLUM. J.L. & SOC. PROBS. 491, 496 (2010) (discussing reverse redlining in housing rentals and “substantial difficulty establishing discrimination under traditional civil rights jurisprudence.”).

<sup>226</sup> See Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375 (2010) (discussing difficulty of proving discrimination in mortgage cases, and the role of “discretionary pricing”).

<sup>227</sup> Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443 (2010) (highlighting persistence of discrimination at the “subtle level” and difficulty of proving discrimination claims under Title VII, especially with respect to gender); Deval L. Patrick et al., *The Role of Credit Scoring in Fair Lending Law—Panacea or Placebo?*, 18 ANN. REV. BANKING L. 369, 386-89 (1999) (noting how the difficulty of proving lending discrimination has left it to the U.S. Department of Justice to enforce fair lending laws, and that the Department has had to focus most of its limited resources on disparate treatment cases with respect to race).

<sup>228</sup> See Sarto, *supra* note 4, at 349-52 (proposing need for gender considerations in regulating lending).

<sup>229</sup> *Id.* at 350 (noting this critique).

<sup>230</sup> See *supra* notes 63-65 and accompanying text (noting studies indicating how women may make better decisions due to risk avoidance).

<sup>231</sup> See Sarto, *supra* note 4, at 350; see also Mottola, *supra* note 48, at 1 (stating research indicating that “women consistently score lower than men on measures of financial literacy”); *supra* notes 40-42 and accompanying text (discussing research indicating that brokers disproportionately steer women toward subprime lending products despite their equal capacity to pay).

home moms and women under the thumbs of abusive partners by hindering them from building their own credit scores. The regulations allow consideration of jointly owned accounts, but many women do not have joint ownership of their partners' accounts. This may effectively preclude these women from establishing independent credit, which is necessary for not only obtaining credit cards and other loans, but also renting cars, making online or in-flight purchases, and accessing housing and beneficial insurance rates.<sup>232</sup>

Moreover, laws do not address gender discrimination in pricing of goods and have been largely ineffective in curing disparate impact and more subtle misuse of stereotypes as proxies for justifying contract discrimination.<sup>233</sup> Understandably, overt discrimination is easier to target than subtle practices that are easy to hide under the guise of business judgment. Furthermore, consumer protection and contract laws must be careful not to indoctrinate gender stereotypes and there are laudable constitutional and statutory constraints on discriminatory contracting practices. Current laws, however, set high burdens for individuals asserting gender discrimination claims, and are largely ineffective in protecting women from more subtle discriminatory contracting practices. Furthermore, policymakers rarely consider gender-related contracting data or explore how seemingly neutral laws may disproportionately burden women.

This has led some commentators to advocate direct gender consideration in financial reforms.<sup>234</sup> With respect to lending regulations, one commentator has proposed proactive regulations to account for women's disproportionate burdens from foreclosure, especially when they have families to support on no or low income.<sup>235</sup> Commentators also have proposed an independent mechanism for reviewing and approving standard form contracts,<sup>236</sup> while other countries impose stiff criminal penalties on companies that breach fairness standards.<sup>237</sup>

Nonetheless, such outright regulation of private contracts may overly intrude in contractual freedom without truly addressing the real hurdles women face in contracting. Instead, a better approach may be to more seriously consider gender as

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<sup>232</sup> Merzer, *supra* note 16 (discussing the impact of the new credit card regulations).

<sup>233</sup> *Civil Rights*, *supra* note 38, at 1843 (highlighting lack of laws addressing gender discrimination and specific exemptions for sale of goods based on market efficiency interests and arguments).

<sup>234</sup> See Sarto, *supra* note 4 (discussing how reforms could address gender issues).

<sup>235</sup> *Id.* at 348-51 (highlighting need for gender considerations in lending reforms).

<sup>236</sup> Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 68 U. MICH. J.L. REFORM 747, 750-55, 800-04 (2007) (advancing central clearing house for contracts); see Robert A. Hillman, *On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, Cornell Law School Res. Paper Series No. 05-12, 1-30 (2005), available at <http://ssrn.com/abstract=686817> (proposing requirements that e-businesses make terms available on their websites and follow substantive mandatory rules for forum selection and choice of law provisions).

<sup>237</sup> See Rebecca de Lorenzo, *On Good Terms*, 153 SOLICITORS J. 16, 16 (2009) (discussing the U.K.'s Unfair Terms in Consumer Contracts Regulations 1999, Unfair Contract Terms Act 1997, and Consumer Protection from Unfair Trading Regulations 2008, and how they may impose criminal sanctions for unfair consumer contracts).

an important component of context when analyzing and enforcing contracts. Contract theory provides means for such consideration, as discussed below. Furthermore, policymakers can further promote genuine contractual consent by augmenting financial education and contract training programs.<sup>238</sup>

### III. CONTEXTUAL RECOGNITION OF GENDER REALITIES

Formalistic and classical contract approaches have dominated contract law and literature, but have not had free reign. Relational and behavioral theorists have highlighted context and relational dynamics in questioning formalistic notions of consent, especially with respect to long-term and intra-industry transactions.<sup>239</sup> These theorists highlight how the objective focus of classical contract principles may ignore particularities of contracting parties who transact not in an ideal and rational universe, but in the real world wrought with life's messiness.<sup>240</sup> In addition, critical legal theory has added emphasis on how classical contract law may perpetuate power imbalances. Together, relational and critical theories, therefore, may improve contract law and commentary by shedding light on factors, such as gender, that are salient in understanding and applying law in action.

#### *A. Behavioral and Relational Theories*

Efficiency has remained at the core of the UCC Article 2 sales law. However, its architect, Professor Karl Llewellyn, first envisioned the law as recognizing a more contextual view of contracting parties who act within groups. Llewellyn's contractual actor was a contextual being to the extent it operates within the particular transaction and group.<sup>241</sup> This is distinct from the narrow "reasonable person" of classical theory. This person is socially cognizant and textured by continually changing realities.

Relational and behavioral theorists have echoed and enhanced these considerations of context in contract law. Relational theorists recognize that transactions are not purely discrete, but instead involve a web of interactions

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<sup>238</sup> See, e.g., Babcock & Laschever, *supra* note 85 (providing a manual to assist women in identifying pitfalls in their negotiations and finding ways to better assert themselves); Barkacs & Standifird *supra* note 24, at 90-91 (highlighting how confronting gender stereotypes can improve women's negotiation performance).

<sup>239</sup> See generally Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (exploring the use of a private legal system in the cotton industry); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1 (1963) (studying contextual relations in commercial exchanges); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (discussing the relational nature of long-term contracts).

<sup>240</sup> Amy J. Schmitz, *Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith*, 56 DEPAUL L. REV. 55, 69 (2006) (highlighting the "messiness" of real world contracting).

<sup>241</sup> DIMATTEO ET AL., *supra* note 27, at 199-200 (discussing a broader notion of the contractual self).

among real people with varying interests, understandings, and agendas.<sup>242</sup> These theorists challenge contract law to consider negotiation motives and to protect relationships, rather than simply focus on enforcement of rights.<sup>243</sup>

Consideration of context also resonates in my “contracting culture” work noted above.<sup>244</sup> This analysis highlights how even consideration of particular attributes, such as gender, is not sufficient. Instead, contracting behaviors and outcomes depend on complex webs of social, behavioral, economic, and other factors as they interrelate within different communities and institutions.<sup>245</sup> With respect to enforcement of arbitration agreements, for example, I proposed a continuum analysis of contracting cultures ranging from “intra-communal” to “extra-communal” based on parties’ relations, understandings, and values. I placed B2C contracts at the extra-communal end of this continuum due to consumers’ lack of connections or shared interests with companies that employ these adhesive contracts.<sup>246</sup>

The research by cognitive theorists also has illuminated individuals’ erroneous assessments of contract terms.<sup>247</sup> They highlight how individuals are prone to ignore contract terms *ex ante* due to overconfidence that nothing will go wrong with their purchases.<sup>248</sup> Furthermore, short attention spans hinder individuals from reading long or complex terms, and contracting inertia causes individuals to accept preprinted terms even if they defy legal defaults.<sup>249</sup> Individuals also may fail to negotiate for fear that they will “rock the boat.”<sup>250</sup>

<sup>242</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMER. SOC. REV. 55 (1963) (studying contextual relations in commercial exchanges); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (discussing the relational nature of long-term contracts).

<sup>243</sup> See Macneil, *supra* note 242, at 879, 891–901 (discussing suitability of dispute resolution mechanisms to protect ongoing relations).

<sup>244</sup> See Schmitz, *Contracting Culture*, *supra* note 26 (discussing “contracting culture” analysis).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* See also Deborah Kolb, *Too Bad for the Women or Does it Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years*, 25 NEGOT. J. 515, 520–25 (2009) (proposing how some theorists view gender within a system of social and cultural practices as they relate to different institutions).

<sup>247</sup> See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–22 (2006) (discussing cognitive biases generally); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (discussing law-and-economics’ assumptions regarding consumer rationality and proposing that “buyers are boundedly rational rather than fully rational decisionmakers,” and, therefore, market forces often will lead to inefficient terms in sellers’ form contracts).

<sup>248</sup> Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 122–25 (explaining behavioral law and economics basics); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1607–09, 1627 (1998) (noting individuals’ “tunnel vision” is skewed by their biases). *But see* RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 264–65 (2001) (critiquing behavioral law-and-economic assumptions as merely a psychological and sociological account of human behavior that confuses explanation and prediction and lacks “theoretical ambition”).

<sup>249</sup> See Korobkin, *supra* note 248, at 1626–27 (advancing the “inertia theory” that parties prefer default contract provisions).

<sup>250</sup> See *id.* (explaining how negotiators may avoid potentially deal-breaking departures from status

Individuals' rationality is therefore "bounded" to the extent they do not properly assess contracts to protect their long-term economic interests.<sup>251</sup>

Consumers may fall prey to psychological and behavioral patterns such as confirmation bias, which leads us to seek information to justify or confirm our initial inclinations although they may be false.<sup>252</sup> Similarly, consumers seek to justify their behaviors in order to avoid cognitive dissonance. We want to prove we are right, even when we are wrong. Furthermore, consumers are vulnerable to sunk cost effect, which leads us to continue with a transaction once we "invest" any time or money in the process. Together, these propensities dissuade us from unbiased research and analysis necessary to make economically rational decisions.<sup>253</sup>

Stress, lack of experience, and external mental stimuli also impact rational decisionmaking.<sup>254</sup> We are vulnerable to low-ball techniques sellers use in offering less favorable prices than a perfect market would provide.<sup>255</sup> Furthermore, moral constraints impact our understandings of contract duties, as well as our actual behaviors.<sup>256</sup> Consumers also may acquiesce in a low power status that hinders their insistence on fair treatment.<sup>257</sup> Many consumers, especially those in marginalized groups, underestimate what they "deserve." Sellers then may use their power to capitalize on consumers' acquiescence and optimism regarding their purchases and impose onerous form terms through their consumer contracts.<sup>258</sup>

This suggests that law and economics' assumptions are inherently flawed. These assumptions are based on rote calculations and rigid rules, and "can degenerate into combinational explosions."<sup>259</sup> In reality, consumers are not always

quo contract terms); Macaulay, *supra* note 239, at 15 ("Detailed negotiated contracts can get in the way of creating good exchange relationships between business units.").

<sup>251</sup> Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–80, 1546–47 (1998) (also indicating hope that economists and lawyers would incorporate empirical findings into their assumptions). *But see* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 72–74, 125–32 (2002) (critiquing behavioral law-and-economics' view as based on only limited empirical research and failing to precisely apply data to account for variation among decision-makers).

<sup>252</sup> Korobkin, *supra* note 248, at 1607–09, 1627 (discussing psychological biases); *see* Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987).

<sup>253</sup> Full discussion of these patterns is beyond the scope of this Article, but I invite you to see Becher, *supra* note 248, at 124–35, for further explanation of these various patterns.

<sup>254</sup> Gary Klein, *SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS* 275–93, 161–75 (1998) (explaining research and data on how expertise relates to decision-making).

<sup>255</sup> *See* Becher, *supra* note 248, at 124–35.

<sup>256</sup> Zev J. Eigen, *Empirical Studies of Contract*, (Northwestern University School of Law, Law and Economics Series No. 12-02) (Feb. 6, 2012), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1998483](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1998483) (surveying empirical analysis literature with respect to contracting).

<sup>257</sup> *See* Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 29–33 (2002).

<sup>258</sup> *See* Becher, *supra* note 248, at 136–77 (noting consumers' failure to properly assess risks and information buried in impenetrable forms).

<sup>259</sup> Klein, *supra* note 254, at 261–69 (discussing limits of rational analysis).

economically rational and do not neatly fit economists' vision of the paradigmatic person. Factors such as gender are salient in the real world.<sup>260</sup> Moreover, "success" or what is "rational" in contracting may be about more than dollars and sense in any given context.

Accordingly, some courts and commentators question the legitimacy of adhesion contracts companies routinely use in B2C contexts. For example, some courts have refused to enforce the Gateway arbitration terms upheld in *Hill*, based on their findings that these terms were unconscionable or constituted proposals for modification the consumers were free to reject.<sup>261</sup> Courts also have found that post-purchase terms cannot be enforced in the absence of express agreement or without reasonable notice.<sup>262</sup> Some also have refused to enforce post-purchase modifications to consumer contracts under terms giving the company free reign in changing the contract at any time.<sup>263</sup>

Nonetheless, courts and commentators have resisted recognizing gender differences and biases. Many assume men and women have attained equity in the marketplace, and fear unpopular perceptions of discussing gender-related behavioral and social differences.<sup>264</sup> This is not surprising, in that it may appear paternalistic or improper to expressly address gender differences in opinions or articles. Moreover, not all women or men are alike; generalizations are unwise.

That does not, however, condone silence about gender in contracting. Instead, gender is a salient factor worth consideration as part of a contextual analysis of real world contracts. Relational and behavioral theories therefore have capacity for enhancing the law and literature by acknowledging that sex matters as one of many factors impacting contracts.<sup>265</sup> Such consideration of gender in this contextual analysis also should guide creation and design of programs and policies addressing problematic gender differences in contract outcomes and experiences.

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<sup>260</sup> See Menkel-Meadow, *supra* note 162, at 5-9 (discussing the role of gender in negotiations, but highlighting how gender is just one of many contextual factors that play a part in contracting).

<sup>261</sup> See, e.g., *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1338-42 (D. Kan. 2000) (holding shrink-wrap terms were rejected proposals); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572-75 (N.Y. App. Div. 1998) (finding consumers subject to terms in the box but severing the unconscionable arbitration clause).

<sup>262</sup> See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (3d Cir. 1991) (holding that a buyer could not be subject to shrink-wrap terms on a software box he received after purchasing the software over the telephone); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 21-25 (2d Cir. 2002) (finding arbitration terms in an e-contract unenforceable because they were presented below the "I accept" button).

<sup>263</sup> See Juliet M. Moringiello & William L. Reynolds, *Electronic Contracting Cases 2008-2009*, 65 BUS. LAW. 317 (2009) (discussing e-contract cases).

<sup>264</sup> See Kray & Babcock, *supra* note 10, at 204-11 (highlighting the situational complexity and textured differences between men and women in negotiations).

<sup>265</sup> See Wang, *supra* note 168. The author discussed women's social costs in negotiations and importance of gender in understanding contract behavior. *Id.* at 1295.

*B. Critical Legal Theories*

Recognition of the interactive character of contracts has created connections among relational and critical feminist theorists.<sup>266</sup> Critical theorists also have gone further in pushing relational and behavioral ideas to encompass the acknowledgment of disparities due to race, gender and ethnicity.<sup>267</sup> Critical theorists argue that the law should recognize how disparities impact contractual fairness and the workings of contract rules.<sup>268</sup> Critical scholars also highlight how classical legal doctrines disparately impact different groups, and reinforce hierarchical power imbalances in society. They expose how repeated abuses of imbalances may result in unfair individual contracts and hinder market integrity.<sup>269</sup>

Within the critical movement, feminist legal theorists have diverged in their approaches toward gender in contracting: some have emphasized gender “sameness” while others have focused on “difference.”<sup>270</sup> Assimilationists who emphasize gender sameness promote gender-neutrality as means for assimilating women in the marketplace on the same terms as men.<sup>271</sup> They are hostile to the recognition of gender differences, and to reinforcement of what they view as gender stereotyping and paternalistic protectionism.

Some of these and other feminist scholars are open to discussion of gender in bargaining, but challenge labeling and assumed differences between men and women in contracting.<sup>272</sup> They instead propose a more nuanced vision of gender, and reject correlation between gender and sex as reinforcement of stereotypes and female oppression. That is in large part why these commentators promote gender-neutral means for protecting all people regardless of biology.<sup>273</sup>

In contrast, other feminists highlight gender differences and warn that a focus on gender-neutrality may impede women’s advancement in the marketplace.<sup>274</sup> They propose that the law should recognize gender differences and provide protections that address these differences. Some add that the law’s disparate impacts on women perpetuate a patriarchy, and argue that legal rules reinforce the

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<sup>266</sup> See Threedy, *supra* note 8, at 1257-58 (noting relational contracting connections with feminism). Note that this Article does not attempt to distill the various facets of critical legal theory or feminist legal thought. Instead, this Article’s discussion aims merely to highlight how critical and feminist perspectives help inform contextual cognition of gender in contract law.

<sup>267</sup> DiMATTEO ET AL., *supra* note 27, at 201-40 (exploring critical perspectives and the *Williams v. Walker-Thomas Furniture Company* case).

<sup>268</sup> *Id.* at 206.

<sup>269</sup> DiMATTEO ET AL., *supra* note 27, at 228-29 (discussing critical theories as applied to contract law).

<sup>270</sup> Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 798 (1989) (addressing different feminist approaches).

<sup>271</sup> *Id.* at 798.

<sup>272</sup> *Id.* at 836-45.

<sup>273</sup> *Id.* at 802.

<sup>274</sup> *Id.* at 797.

subordination that has plagued women throughout history.<sup>275</sup> They note that an ostensibly “objective” law that seeks to ignore contextual differences is not truly neutral. Instead, these vanilla laws merely reinforce status quo built on historical prejudice and biases.

At the same time, some researchers have viewed gender as an “essential” factor in negotiations. They propose that male and female “hard-wiring” impacts negotiation behaviors and outcomes.<sup>276</sup> This is in contrast to social-constructivists who downplay biology as far less important than externalities and context.<sup>277</sup> These scholars suggest more nuanced consideration of gender differences such as women’s cooperative and relational ethics in negotiations and resolving disputes.<sup>278</sup> They highlight how policymakers should consider perspectives and personal aspects of the individuals involved, and call for more empirical research to uncover how feminist approaches fare in negotiations and dispute resolution.<sup>279</sup>

In sum, relational, behavioral and critical studies highlight context and “law in action.” They push classical doctrine to recognize the realities of a world that is not truly objective and neutral. Actors in a messy society operate within groups with different relations, and involve individuals with their own personal psychological and societal tendencies. Furthermore, individuals are not blind to gender, race, age, nationality, religion, or other cultural differences. Moreover, contextual factors work in concert on a continuum to create different contracting cultures that may take on lives of their own.

#### IV. BUILDING ON CONTEXTUAL CONTRACT THEORY TO RAISE GENDER AWARENESS IN CRAFTING LAW AND POLICY

Prevailing contract law and policies have espoused gender neutrality, or blindness. This can be beneficial for the most part in order to avoid paternalism and indoctrination of stereotypes, but goes awry when it ignores realities of real-world contracting.<sup>280</sup> Classical contract law should give way to more contextual theory like that discussed above, and this contextual view should inform consumer policy and education. This means that contract scholars and policymakers should gather and consider data regarding gender biases, stereotypes, and behavioral/interest differences in contracting and debt accumulation. Gender

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<sup>275</sup> See e.g., Martha A. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 29-33 (1990) (exploring feminist legal critique).

<sup>276</sup> See Kolb, *supra* note 246, at 515-20.

<sup>277</sup> *Id.*

<sup>278</sup> Dayna Shocair Reda, *Critical Conflicts Between First-Wave & Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193, 210-14 (2011); Kray & Babcock, *supra* note 10, at 204-11.

<sup>279</sup> Kray & Babcock, *supra* note 10, at 204-11.

<sup>280</sup> See Keren, *supra* note 7, at 133-41, 154-56 (highlighting how contract law has ignored discrimination and its context).



matters not only in traditional realms like family and labor law, but also in contract and commercial matters.<sup>281</sup>

Accordingly, step one is to gather and consider the data regarding gender in contracting behavior and outcomes. Step two is to then use that data in crafting contextually informed financial and contract education programs. Indeed, antidiscrimination policy must begin by collecting the relevant data, and using that data to raise awareness of overt and subtle biases and to inform well-designed programs.<sup>282</sup> Although open discussion of gender biases and stereotypes makes many uncomfortable, it is a necessary step in educating buyers, sellers, lenders, and borrowers about the persistence of subtle biases that may impact consumers' contracts.

### *A. Compilation and Consideration of Gender Data*

Classical contract law and prevailing law and economics theory have largely overlooked gender differences, and existing gender discrimination laws may help alleviate overt or easily provable discrimination against women. However, these laws do little to address subtle biases and stereotypes that hinder women in the marketplace.<sup>283</sup> Furthermore, policymakers craft consumer protections per laws such as Dodd-Frank and the Troubled Asset Relief Program ("TARP") without considering data regarding gender differences in consumer purchasing, borrowing, and other contracting.<sup>284</sup> This Article therefore invites commentators, researchers, and policymakers to gather and consider empirical data regarding gender in not only financing, but also sales and other contracts.

Dodd-Frank at least requires each federal agency to form an OMWI to promote government contract opportunities for women and women-owned businesses.<sup>285</sup> The regulations also direct that OMWI develop "standards and procedures" to maximize "fair inclusion and utilization" of women and minorities in the financial industry.<sup>286</sup> The law is ambiguous, however, and has left some wondering whether it replicates existing laws or attempts to create a quota system.<sup>287</sup> The law is also narrow and limited in that it does not apply to private

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<sup>281</sup> Warren, *supra* note 62 (highlighting how commercial law raises important gender issues).

<sup>282</sup> See Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 400-15 (2012) (emphasizing the importance of gathering data and using that data to raise awareness regarding biases and stereotypes in the context of race).

<sup>283</sup> See *supra* Part II.B (discussing general laws).

<sup>284</sup> *Dodd-Frank*, Pub. L. No. 111-203, 124 Stat. 1376 (2010). See also Sarto, *supra* note 4, at 349-53 (noting lack of attention to gender issues).

<sup>285</sup> Minority and Women Inclusion, 75 Fed. Reg. 81402 (Dec. 28, 2010) (to be codified in 12 C.F.R. pt. 1207.1) (defining terms and duties of the office); Minority and Women Inclusion, 75 Fed. Reg. 81403-34 (Dec. 28, 2010) (to be codified in 12 C.F.R. pts. 1207.3 & 1207.21) (providing that the Office of Finance and the regulated entities shall implement policies and procedures to encourage diversity in all contracts within financially safe and sound business practices).

<sup>286</sup> 12 U.S.C.A. § 5452(a)(3) (2010). Again, *Dodd-Frank* does not transfer civil rights compliance authority to the OMWI, but it does give the OMWI a role in remedying compliance issues.

<sup>287</sup> *Id.* § 5452(d). See also James Nelson Lewis, *Hidden in Dodd-Frank: A Look at the Office of*

contracts or “lending policies and practices,” and does not require any particular action based on its review of existing policies.<sup>288</sup>

That said, Dodd-Frank directs the CFPB to study various aspects of financial products and services, and to consider this data in crafting consumer protections. This study could include research regarding differing impacts of financial regulations on women versus men.<sup>289</sup> As the research above indicates, gender appears salient to contracting behaviors and outcomes. However, more data is needed to assess how much and when gender matters with respect to contracting. Such data would help inform CFPB programs and regulations as means for addressing the aforementioned gender gap in debt burdens. Indeed, contextual recognition of gender differences would contribute to sound contract and consumer protection law.

### *B. Acknowledgment and Training to Address Gender*

“To fully participate in society today, financial literacy is critical.”<sup>290</sup> Increased financial literacy and training is generally beneficial for everyone—men and women. Consumers should have access to free financial literacy resources in order to help justify predominant contract law presuming that actors in the marketplace have perfect information. Such resources are especially necessary to address uneven bargaining power in B2C contexts, and consumers’ growing inability to understand the complexities of modern form contracts. Financial and contracting education also may be particularly helpful in assisting women and minorities to overcome disadvantages in the marketplace. Such education and resources, however, have marginal value if created without the benefit of contextual data on the linkages between financial knowledge and behaviors, well-being, and outcomes.<sup>291</sup>

Policymakers would be wise to use the relevant data in developing financial literacy courses in all United States schools. Despite rhetoric regarding the importance of financial education, a recent survey reported that only fourteen states require that schools offer a course in personal finance, and only twenty-two states

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*Minority and Women Inclusion*, THE MOD. AM. 2, 2-9 (Fall 2011) (critiquing Dodd-Frank’s provisions for the OMWI, and questioning its meaning, application, and redundancy).

<sup>288</sup> 12 U.S.C.A. §5452 (b)(4) (2010).

<sup>289</sup> See also David S. Evans & Joshua D. Wright, *How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products* (George Mason Univ. L. & Econ. Res. Paper Series 09-51, 2009), available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/0951HowtheCFPAAct.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/0951HowtheCFPAAct.pdf) (critiquing the CFPA Act for advocating broad applications without adequate evidentiary basis).

<sup>290</sup> Council for Economic Education, *Survey of the States: Economic and Personal Finance Education in Our Nation’s Schools*, at 1 (March 2012), available at <http://www.councilforeconed.org/wp/wp-content/uploads/2011/11/2011-Survey-of-the-States.pdf> (last accessed July 18, 2012) (quoting Annamaria Lusardi who is Director of the Financial Literacy Center).

<sup>291</sup> Financial Literacy and Education Commission, *2012 Research Priorities and Research Questions*, U.S. DEP’T OF TREASURY, 1-10, available at <http://www.treasury.gov/resource-center/financial-education/Documents/2012%20Research%20Priorities%20-%20May%202012.pdf>.

require a high school course in economics.<sup>292</sup> This is an improvement since 1998, but the trend toward providing public financial education in the schools is slowing under budgetary pressures and remains insufficient to address students' lack of preparation for survival in the marketplace.<sup>293</sup>

The CFPB at least has pursued efforts to promote financial literacy and consumer feedback mechanisms to direct future CFPB regulations and policies.<sup>294</sup> This has included the CFPB's partnership with the Financial Literacy & Education Commission in creating MyMoney.gov, which promotes financial education.<sup>295</sup> Furthermore, the CFPB's Office of Financial Empowerment is creating policies and programs to assist the poor and "traditionally underserved consumers" in making wise financial decisions.<sup>296</sup> This "vulnerable population" group includes women, as well as racial and ethnic minorities.<sup>297</sup> Dodd-Frank also encourages OWMIs to promote and report outreach and financial literacy programs for these groups.<sup>298</sup>

Following this charge, the FDIC reported that it maintains a website with resources aimed to help minorities and women seeking to contract with the FDIC or

<sup>292</sup> *Survey of the States*, *supra* note 290, at 1-5.

<sup>293</sup> *Id.* at 1-9 (providing statistics and charts regarding economics and personal finance classes in United States schools).

<sup>294</sup> Maggie Anderson, *Learning to Speak Financial Products and Services*, CFPB (Mar. 22, 2012), <http://www.consumerfinance.gov/blog/learning-to-speak-financial-products-and-services/> (setting forth CFPB initiatives aimed to help consumers navigate complicated terms and features of financial products and services); Dan Rutherford, *DFPB Promotes Financial Literacy Month*, CFPB (Apr. 2, 2012), <http://www.consumerfinance.gov/blog/cfpb-promotes-financial-literacy-month/> (discussing CFPB programs); Dan Rutherford, *Help the CFPB Solve the Most Common Consumer Mistakes*, CFPB (June 4, 2012), <http://www.consumerfinance.gov/blog/help-the-cfpb-solve-the-most-common-consumer-mistakes/> (summarizing CFPB feedback mechanisms).

<sup>295</sup> Richard Cordray, *Joining the Financial Literacy and Education Commission*, CFPB (Feb. 14, 2012), <http://www.consumerfinance.gov/blog/joining-the-financial-literacy-and-education-commission/>; *Financial Literacy and Education Commission*, U.S. DEP'T OF TREASURY (Jun. 6, 2012, 5:11 AM), <http://www.treasury.gov/resource-center/financial-education/Pages/commission-index.aspx>; *Know Before You Owe*, CFPB, <http://www.consumerfinance.gov/knowbeforeyouowe/> (last visited July 1, 2012) (all discussing initiatives).

<sup>296</sup> Cliff Rosenthal, *Empowering America's Consumers*, CFPB (May 18, 2012), <http://www.consumerfinance.gov/blog/empowering-americas-consumers/> (last accessed July 2, 2012). The SEC also has partnered with the National Academy Foundation ("NAF"), a non-profit organization dedicated to education, in order to hold an outreach event encouraging diverse students in NAF's Academy of Finance program to pursue careers with the SEC. *SEC Hosts Nationwide Shadowing Event for High School Finance Students*, SEC NEWS DIG. 2011-220, 2011 WL 5553532 (2011); *SEC Kicks Off Inaugural Shadowing Program with Academy of Finance Students*, THE EXCHANGE, at 2 (June 2011), available at [http://www1.pgcp.org/uploadedFiles/Schools\\_and\\_Centers/High\\_Schools/Charles\\_H\\_Flowers/Academics/Programs/Academy\\_Of\\_Finance/Securities%20and%20Exchange%20Commission%20Employee%20Newsletter-june-2011.pdf](http://www1.pgcp.org/uploadedFiles/Schools_and_Centers/High_Schools/Charles_H_Flowers/Academics/Programs/Academy_Of_Finance/Securities%20and%20Exchange%20Commission%20Employee%20Newsletter-june-2011.pdf) (discussing its shadowing program, and other resources geared to increase financial literacy among students in urban areas).

<sup>297</sup> See *Financial Literacy and Education Commission*, *supra* note 295, at 2 (including definition of "underserved").

<sup>298</sup> 12 U.S.C.A. § 5452(b-e) (2010) (requiring OMWI to gather information regarding usage of women and minority-owned businesses, make recommendations for improvements, and report related findings annually to Congress). See also *id.* § 5452(f) (calling for the OMWI to partner with organizations focused on developing career opportunities for women and minorities, and to establish or enhance financial literacy programs at high schools oriented toward women and minorities).

entities regulated by the FDIC.<sup>299</sup> Similarly, the Board of Governors of the Federal Reserve Bank uses its *FedEd Program* primarily to help minority and female students in the Washington D.C. area improve their understanding of personal finance, including budgeting, credit, and saving money.<sup>300</sup> Various regional Federal Reserve Banks throughout the nation also offer financial literacy and outreach programs targeting minorities and women.<sup>301</sup>

Other federal agencies have reported very little outreach pursuant to the Dodd-Frank OMWI provisions. For example, the National Credit Union Administration and Office of the Comptroller for the Currency did not highlight any outreach programs to encourage financial literacy for women in their recent OMWI reports to Congress.<sup>302</sup> OMWI reports, however, do not necessarily tell the full story. The Federal Housing Financing Agency did not mention in its report that it has partnered with organizations already providing financial education.<sup>303</sup> In addition, the Securities and Exchange Commission (“SEC”) said nothing in its report about its partnership with others in offering a program aimed to promote minority and women inclusion in agency activities.<sup>304</sup>

As noted above, the FINRA study concluded that financial literacy training would provide a start in mitigating gender differences in costly credit card

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<sup>299</sup> FED. DEP. INS. CORP., 2011 REPORT TO CONGRESS ON THE OFFICE OF MINORITY AND WOMEN INCLUSION, 1-6, available at <http://www.fdic.gov/about/diversity/sbrp/index.html> (last updated Nov. 11, 2011).

<sup>300</sup> BD. OF GOVERNORS OF THE FED. RES. SYS., REPORT TO THE CONGRESS ON THE OFFICE OF MINORITY AND WOMEN INCLUSION 1-11 (2012) available at <http://www.federalreserve.gov/publications/other-reports/files/omwi-report-20120402.pdf> (also noting how presentations mainly target these students in the Washington D.C. area).

<sup>301</sup> See, e.g., FED. RES. BANK OF ATLANTA, O.M.W.I., CONGRESSIONAL REPORT 2011: ANNUAL REVIEW 1-11 (2012) (noting program in Atlanta); FED. RES. BANK OF BOS., OFFICE OF DIVERSITY AND INCLUSION, 2011 ANNUAL REPORT TO CONGRESS 1-17 (2012) (discussing program teaching personal finance skills through six lessons during the course of a high-school Algebra class); FED. RES. BANK OF CHI., O.M.W.I., 2011 ANNUAL REPORT TO CONGRESS 1-24 (2012) (noting the Seventh District Bank’s partnership with Ford Motor Credit in holding workshops to educate primarily high-school students about financial success); FED. RES. BANK OF CLE., O.M.W.I., ANNUAL REPORT TO CONGRESS 2011, 1-18 (2012) (noting its distribution of a financial literacy workbook focused on reaching minorities and women); FED. RES. BANK OF DALL., O.M.W.I., 2011 CONGRESSIONAL REPORT 1-11 (2012) (noting its publication of a basic money managing booklet); FED. RES. BANK OF K.C., O.M.W.I., 2011 REPORT TO CONGRESS 1-20 (2012) (describing its *Student Board of Directors* which provides minority and female high-school students with an opportunity to learn about financial responsibility and potential careers in the financial sector); FED. RES. BANK OF MINN., O.M.W.I., 2011 CONGRESSIONAL ANNUAL REPORT 15-16 (2012) (noting its outreach website); FED. RES. BANK OF N.Y., O.M.W.I., 2011 ANNUAL REPORT TO CONGRESS (2012) (sponsoring a workshop targeting minorities and women).

<sup>302</sup> FED. HOUS. FIN. AGENCY, O.M.W.I., ANNUAL REPORT TO CONGRESS (2012); NAT’L CREDIT UNION ADMIN., O.M.W.I., 2011 REPORT TO CONGRESS (2012); O.C.C., O.M.W.I., 2011 ANNUAL REPORT TO CONGRESS (2012).

<sup>303</sup> See memo from David Bennett, Research Associate, to Amy J. Schmitz, July 13, 2012 (documenting interview with Lee Bowman, Director of the Federal Housing Finance Agency Office of Minorities and Women Inclusion (on file with author)) (also noting work to create standards for incentivizing entities to incorporate good faith practices, and indicating interest in ideas for educating entities about gender and ethnic bias in contracting).

<sup>304</sup> S.E.C., O.M.W.I., ANNUAL REPORT (2012). But see *SEC Hosts Nationwide Shadowing Event*, *supra* note 296.

behaviors.<sup>305</sup> Scholars at Dartmouth also have proposed financial literacy programs targeting women based on their finding that only twenty-nine percent of the women they surveyed—all over age fifty—answered these questions about finances correctly: one question on interest rates, one on inflation, and one on risk diversification.<sup>306</sup> Researchers found that the respondents mostly struggled with the risk diversification question, and highlighted need for further research on how to design financial literacy programs to serve women over fifty.<sup>307</sup>

Many charitable organizations, credit unions, and other public and private bodies also provide financial literacy resources that generally do not require public funding.<sup>308</sup> Some of these financial education programs also target women. For example, the Wi\$eUp program created under the Women's Bureau of the Department of Labor covers the following topics targeted to benefit women in financial decisions: Money for Life, Money Math, Money Basics, Credit in a Money World, Savings Basics, Insurance & Risk Management, Becoming an Investor, and Achieving Financial Security.<sup>309</sup> WISER is a similar program focused on improving "the long-term financial quality of life for women."<sup>310</sup> WISER educates women through publications and workshops covering topics including scam avoidance,<sup>311</sup> investments,<sup>312</sup> and retirement.<sup>313</sup>

Such programs may promote economically wise contracting, especially when borrowing and investing. However, they may do little to address subtle biases, stereotypes, and behaviors that may lead to the gender differences in contract and debt outcomes. It may be more important to educate women on how to overcome their reluctance to proactively negotiate on their own behalf for fear they will

<sup>305</sup> See Mottola, *supra* note 48 and accompanying text (discussing FINRA study).

<sup>306</sup> Annamaria Lusardi & Olivia S. Mitchell, *Planning and Financial Literacy: How Do Women Fare?*, 98 AM. ECON. REV.: PAPERS & PROC. 413, 413-15 (2008), available at <http://www.dartmouth.edu/~alusardi/Papers/AER-FinalPublishedVersion.pdf> (basing findings on survey asking three questions).

<sup>307</sup> *Id.* at 417.

<sup>308</sup> See, e.g., U.S. DEP'T OF TREASURY, O.M.W.I., TAKING STOCK & MAKING CHANGE: ANNUAL REPORT TO CONGRESS FISCAL YEAR 2011 (2012) (summarizing some of the partnerships and programs the Treasury has participated in to encourage all people to enter the financial profession).

<sup>309</sup> *About Wi\$eUp*, WISEUP, <http://wiseupwomen.tamu.edu/about-us.php> (last visited July 22, 2012). The program is hosted out of Texas A&M and it was created under the Women's Bureau of the Department of Labor. Wi\$eUp augments its online curriculum with in-classroom courses at facilities in seven regional hubs of the Women's Bureau. *Wi\$eUp Course Overview*, WISEUP, <http://wiseupwomen.tamu.edu/02-learning-center/lessons-catalog.php> (last visited July 22, 2012).

<sup>310</sup> *About Us*, WISER, [http://www.wiserwomen.org/index.php?id=8&page>About\\_Us](http://www.wiserwomen.org/index.php?id=8&page>About_Us) (last visited July 22, 2012).

<sup>311</sup> *WISER's "Too Good To Be True" Checklist*, WISER, <http://www.wiserwomen.org/index.php?id=147&page=WISER> (last visited July 22, 2012).

<sup>312</sup> *Investment Calculator*, WISER, [http://www.wiserwomen.org/index.php?id=731&page=Investment\\_Calculator](http://www.wiserwomen.org/index.php?id=731&page=Investment_Calculator) (last visited July 22, 2012).

<sup>313</sup> *Publications*, WISER, <http://www.wiserwomen.org/index.php?id=62&page=Publications> (last visited July 22, 2012). See also *Research*, WISER, <http://www.wiserwomen.org/index.php?id=47&page=Research> (last visited July 22, 2012) (providing a database of research on women & retirement issues) (distilling issues impacting women's financial futures).

contravene societal expectations.<sup>314</sup> Educators also advise women to be aware of their own gender “lens” and fight against belief in what is “gender appropriate.” They urge women to believe in their own self-worth, and collaborate with other women in improving their environments.<sup>315</sup>

Although such acknowledgement of gender differences and empowerment training may raise “political correctness” concerns, law and policy should not ignore studies that support its effectiveness. For example, male MBA students obtained economically superior contracts than the female students in a series of negotiation studies although all participants shared similar experience, education and inherent ability.<sup>316</sup> In addition, the men obtained even better contracts than the women when study facilitators subtly reinforced stereotypes by telling participants that “rational and assertive” individuals do better than “passive” individuals in negotiations, or that the exercise was diagnostic of their abilities.<sup>317</sup>

However, the female study participants achieved much better results in the contract negotiations when study facilitators were open and straightforward in acknowledging that men and women may differ in their contracting behaviors and performance.<sup>318</sup> The facilitators told the students that variations in gendered characteristics cause men and women to “differ in their performance.”<sup>319</sup> Researchers concluded that explicitly acknowledging gender differences led female students to reject and act against stereotypes.<sup>320</sup> Consequently, the female students were more assertive and achieved better results.

This suggests that improved awareness of gendered propensities and bargaining pitfalls may help level the playing field for women in contract negotiations.<sup>321</sup> Raising awareness of gender differences and stereotypes may have similarly helped the women in the FINRA study noted above to obtain credit card rates on par with their male counterparts who shared equal financial literacy.<sup>322</sup> Open discussion of gender stereotypes and differences also educates lenders and merchants to be more aware of subtle and subconscious biases that may

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<sup>314</sup> See Coleman & Weaver, *supra* note 84, at 15-18 (discussing research and anecdotes regarding female barriers in negotiations and suggesting how women can overcome those barriers to achieve better results in negotiations).

<sup>315</sup> *Id.*

<sup>316</sup> Laura Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCH. 942, 949-56 (2001) [hereinafter Kray, *Battle of the Sexes*].

<sup>317</sup> *Id.* at 942-47 (noting how such subtle bias is common in modern negotiations, and leads women to underperform while the men gain confidence from the stereotype reinforcement).

<sup>318</sup> *Id.* at 945-49.

<sup>319</sup> *Id.* at 949-51.

<sup>320</sup> *Id.* at 952-56. See also Laura J. Kray et al., *supra* note 10.

<sup>321</sup> Kray, *Battle of the Sexes*, *supra* note 316, at 954-56 (highlighting benefits of coaching and consultation)

<sup>322</sup> See *supra* note 48 and accompanying text (discussing FINRA’s finding that women paid higher rates, even controlling for measured financial literacy and demographic characteristics).

drive them to steer women toward less economically attractive loans and other contracts.

It also would be beneficial to empower all consumers by distilling how men and women can learn from each other's contracting strengths. Female contracting tendencies may not only hinder, but also help them in the marketplace. For example, the Workways program at New York University Law School helped boost female confidence in negotiations by stressing the importance of narrative skills and interpersonal abilities, which are often areas of strength for female negotiators.<sup>323</sup> Accordingly, women may benefit from becoming more assertive—a traditional male strength—while men may benefit from becoming more empathetic and expressive.

Nonetheless, it is tough to ignore societal realities, as evidenced by research regarding the double bind women face if they assert themselves in the same manner as men.<sup>324</sup> Educators and policymakers should raise awareness that it is “ok” for women to be properly assertive. At the same time, women may capitalize on society's expectations of the nurturing female by working within core stereotypes. For example, women may benefit from framing their assertive behavior as other-oriented rather than self-interested and emphasizing common goals and team affiliation.<sup>325</sup>

Again, acknowledgement of gender differences and biases should not reinforce stereotypes or rest on improper generalizations, and contract and financial education should be available to both men and women.<sup>326</sup> However, contract law and policy should recognize what research generally confirms and relational and behavioral theorists have long proposed: Individuals are not all economically rational actors with perfect information, and may instead fall prey to behavioral and psychological tendencies depending on contextual factors, including gender. Accordingly, it is important to be forthright in raising awareness regarding gender differences in contract behaviors and values. This not only sheds light on realities, but also should help guide training and education to address these differences.<sup>327</sup>

This training and education must nonetheless be careful to recognize that men and women do not fit any particular molds. Furthermore, financial and contracting education need not add to public costs or even be provided by the government. Instead, non-profit organizations could provide such resources alongside financial literacy courses they already offer. For example, the NAF's financial literacy program noted above could include discussion of gender and collaborative training.

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<sup>323</sup> Farber & Rickenberg, *supra* note 104, at 278 (explaining Workways program).

<sup>324</sup> See Schneider, *supra* note 122, and accompanying text (discussing research by Schneider and others noting the likeability versus competent double bind).

<sup>325</sup> *Id.* at 240-45 (also noting how women may benefit by enhancing multidimensionality in interactions with other parties to break out of the male/female dichotomy).

<sup>326</sup> *Id.* at 243-44 (emphasizing difficulty of even getting women to admit differences or biases).

<sup>327</sup> See also Stuhlmacher & Walters, *supra* note 39, at 653-54 (emphasizing need for awareness of gender differences in negotiation behaviors and values, and training to address these differences).

Its summer internships also could be offered on a larger scale, depending on financial contributions and company interest.<sup>328</sup> Such programs created in light of honest consideration of contextual data benefit everyone. The aim should be to raise awareness of gender differences in contracting while boosting financial and contracting literacy more generally.

#### CONCLUSION

Gender differences in contract outcomes, behaviors and interests persist despite advances women have made in the workplace and marketplace. However, there is a surprising silence regarding gender in contract law and literature. Instead, dominant voices in the field mainly reflect classical and economics-driven theories, which largely ignore gender. Furthermore, many mistakenly assume that market competition and antidiscrimination legislation address any improper biases in contracting. In reality, the consumer market is imperfect and legislation often is ineffective in addressing the subtle biases that persist in consumer contexts.

Accordingly, it is time to shed light on gender in contract and consumer law. All women are not alike and there is need for more research. However, the available data suggests that sex matters, empirically and practically, with respect to contracting. This Article therefore invites more research and open discussion about gender biases, stereotypes, and behavioral and outcome differences in contracting. Also, it suggests greater awareness of context in contract law, along with ideas for incorporating contextual considerations into creation of financial literacy and contract education programs that acknowledge gender while honoring individuality and avoiding stereotype reinforcement.

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<sup>328</sup> See *SEC Hosts Nationwide Shadowing Event*, *supra* note 296; see also *SEC Kicks Off Inaugural Shadowing Program*, *supra* note 296, at 2.



APPENDICES: SURVEY RESULTS RELATED TO GENDER AND  
CONTRACTING

APPENDIX A: DEMOGRAPHIC INFORMATION

**Age**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid 18-24 yrs old	19	6.2	6.2	6.2
25-29 yrs old	16	5.2	5.2	11.4
30-39 yrs old	40	13.1	13.1	24.5
40-49 yrs old	73	23.9	23.9	48.4
50-59 yrs old	81	26.5	26.5	74.8
60-69 yrs old	54	17.6	17.6	92.5
70 yrs or over	23	7.5	7.5	100.0
Total	306	100.0	100.0	

**Household Income**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid less than \$20k	43	14.1	17.1	17.1
\$20,000-\$29,999	33	10.8	13.1	30.3
\$30,000-\$39,999	43	14.1	17.1	47.4
\$40,000-\$49,999	32	10.5	12.7	60.2
\$50,000-\$59,999	22	7.2	8.8	68.9
\$60,000-\$74,999	26	8.5	10.4	79.3
\$75,000-\$99,999	24	7.8	9.6	88.8
\$100,000-\$149,999	23	7.5	9.2	98.0
\$150,00+	5	1.6	2.0	100.0
Total	251	82.0	100.0	
Missing System	55	18.0		
Total	306	100.0		

**Marital Status**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid single, never married	58	19.0	19.0	19.0
married	150	49.0	49.0	68.0
separated/divorced/widowed	75	24.5	24.5	92.5
domestic partnership	23	7.5	7.5	100.0
Total	306	100.0	100.0	

**Gender**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid male	103	33.7	33.7	33.7
female	203	66.3	66.3	100.0
Total	306	100.0	100.0	

**Employment Status**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid full-time	129	42.2	42.2	42.2
part-time	49	16.0	16.0	58.2
not employed	128	41.8	41.8	100.0
Total	306	100.0	100.0	

**Education Level**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid some HS	5	1.6	1.6	1.6
HS grad	34	11.1	11.1	12.7
some College	135	44.1	44.1	56.9
College degree	78	25.5	25.5	82.4
some postgrad	17	5.6	5.6	87.9
Master's degree	27	8.8	8.8	96.7
PhD/Law/Pro degree	10	3.3	3.3	100.0
Total	306	100.0	100.0	

**Respondent Occupation**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid exec/upper mgmt	12	3.9	4.5	4.5
IT/MIS professional	11	3.6	4.1	8.6
doctor/surgeon	2	.7	.7	9.4
educator	11	3.6	4.1	13.5
homemaker	33	10.8	12.4	25.8
student	13	4.2	4.9	30.7
none of above	168	54.9	62.9	93.6
small biz owner	17	5.6	6.4	100.0
Total	267	87.3	100.0	
Missing System	39	12.7		
Total	306	100.0		

**Racial/Ethnic Identification**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid unspecified	45	14.7	14.7	14.7
other	6	2.0	2.0	16.7
hispanic	6	2.0	2.0	18.6
multi: hispanic/other	2	.7	.7	19.3
pacific islander	2	.7	.7	19.9
indian	2	.7	.7	20.6
multi: hispanic indian	1	.3	.3	20.9
asian	3	1.0	1.0	21.9
black	2	.7	.7	22.5
white	228	74.5	74.5	97.1
multi: white/other	1	.3	.3	97.4
multi: white/hispanic	4	1.3	1.3	98.7
multi: white/pacific/hispanic	1	.3	.3	99.0
multi: white/indian	2	.7	.7	99.7
multi: white/indian/hispanic	1	.3	.3	100.0
Total	306	100.0	100.0	

APPENDIX B

Section 1, Question 3: When you do “shop around” or compare choices, what leads you to make final purchasing decisions? Think about the factors below, and indicate how important each of the factors generally is to you in deciding what to buy.

**Store Reputation**

		very important	somewhat important	minor importance	not important	Total
male	Count	26	53	19	4	102
	% within Gender	25.5%	52.0%	18.6%	3.9%	100.0%
	% within s1q3d purchase factors: store reputation	25.7%	34.6%	46.3%	57.1%	33.8%
	% of Total	8.6%	17.5%	6.3%	1.3%	33.8%
female	Count	75	100	22	3	200
	% within Gender	37.5%	50.0%	11.0%	1.5%	100.0%
	% within s1q3d purchase factors: store reputation	74.3%	65.4%	53.7%	42.9%	66.2%
	% of Total	24.8%	33.1%	7.3%	1.0%	66.2%
Total	Count	101	153	41	7	302
	% within Gender	33.4%	50.7%	13.6%	2.3%	100.0%
	% within s1q3d purchase factors: store reputation	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	33.4%	50.7%	13.6%	2.3%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.	
Ordinal by Ordinal Kendall's tau-b	-.121		.054	-2.240	.025
N of Valid Cases	304				

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

**Friend/Family Recommendation**

		very important	somewhat important	minor importance	not important	Total
male	Count	11	47	34	10	102
	% within Gender	10.8%	46.1%	33.3%	9.8%	100.0%
	% within s1q3h purchase factors: friend/family recommendation	25.6%	30.5%	39.1%	50.0%	33.6%
	% of Total	3.6%	15.5%	11.2%	3.3%	33.6%
	female	Count	32	107	53	10
% within Gender	15.8%	53.0%	26.2%	5.0%	100.0%	
% within s1q3h purchase factors: friend/family recommendation	74.4%	69.5%	60.9%	50.0%	66.4%	
% of Total	10.5%	35.2%	17.4%	3.3%	66.4%	
Total	Count	43	154	87	20	304
	% within Gender	14.1%	50.7%	28.6%	6.6%	100.0%
	% within s1q3h purchase factors: friend/family recommendation	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	14.1%	50.7%	28.6%	6.6%	100.0%

**Symmetric Measures**

		Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal	Kendall's tau-b	-.121	.054	-2.240	.025
N of Valid Cases		304			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

**Friendly Salesperson**

		very important	somewhat important	minor importance	not important	Total
male	Count	18	45	30	8	101
	% within Gender	17.8%	44.6%	29.7%	7.9%	100.0%
	% within s1q3L purchase factors: friendly salesperson	29.5%	30.2%	38.0%	57.1%	33.3%
	% of Total	5.9%	14.9%	9.9%	2.6%	33.3%
female	Count	43	104	49	6	202
	% within Gender	21.3%	51.5%	24.3%	3.0%	100.0%
	% within s1q3L purchase factors: friendly salesperson	70.5%	69.8%	62.0%	42.9%	66.7%
	% of Total	14.2%	34.3%	16.2%	2.0%	66.7%
Total	Count	61	149	79	14	303
	% within Gender	20.1%	49.2%	26.1%	4.6%	100.0%
	% within s1q3L purchase factors: friendly salesperson	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	20.1%	49.2%	26.1%	4.6%	100.0%

**Symmetric Measures**

		Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal	Kendall's tau-b	-.097	.055	-1.772	.076
N of Valid Cases		303			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

## APPENDIX C

*Section 1, Question 4 Car: You have decided that you would like to purchase a particular model of a new car with certain options. Two car dealerships in your area list this new car with the options you want at the same price. At one of the dealerships, you learn or experience the following, listed below. How important would each of these be in leading you toward purchasing at this dealership instead of the other?*

**Salesperson makes eye contact**

		very important	somewhat important	minor importance	not important	Total
male	Count	36	47	15	5	103
	% within Gender	35.0%	45.6%	14.6%	4.9%	100.0%
	% within s1q4i car: salesperson makes eye contact	24.0%	39.5%	53.6%	62.5%	33.8%
	% of Total	11.8%	15.4%	4.9%	1.6%	33.8%
female	Count	114	72	13	3	202
	% within Gender	56.4%	35.6%	6.4%	1.5%	100.0%
	% within s1q4i car: salesperson makes eye contact	76.0%	60.5%	46.4%	37.5%	66.2%
	% of Total	37.4%	23.6%	4.3%	1.0%	66.2%
Total	Count	150	119	28	8	305
	% within Gender	49.2%	39.0%	9.2%	2.6%	100.0%
	% within s1q4i car: salesperson makes eye contact	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	49.2%	39.0%	9.2%	2.6%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.215	.054	-3.952	.000
N of Valid Cases	305			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

**Other dealership sued for discrimination**

		very important	somewhat important	minor importance	not important	Total
male	Count	24	26	28	25	103
	% within Gender	23.3%	25.2%	27.2%	24.3%	100.0%
	% within s1q4o car: other dealership sued for discrimination	22.9%	27.7%	46.7%	54.3%	33.8%
	% of Total	7.9%	8.5%	9.2%	8.2%	33.8%
female	Count	81	68	32	21	202
	% within Gender	40.1%	33.7%	15.8%	10.4%	100.0%
	% within s1q4o car: other dealership sued for discrimination	77.1%	72.3%	53.3%	45.7%	66.2%
	% of Total	26.6%	22.3%	10.5%	6.9%	66.2%
Total	Count	105	94	60	46	305
	% within Gender	34.4%	30.8%	19.7%	15.1%	100.0%
	% within s1q4o car: other dealership sued for discrimination	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	34.4%	30.8%	19.7%	15.1%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.224	.051	-4.306	.000
N of Valid Cases	305			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.



**Dealership donates 5% to charity**

		very important	somewhat important	minor importance	not important	Total
male	Count	13	30	37	23	103
	% within Gender	12.6%	29.1%	35.9%	22.3%	100.0%
	% within s1q4p car: dealership donates %5 to charity	21.0%	26.1%	42.5%	59.0%	34.0%
	% of Total	4.3%	9.9%	12.2%	7.6%	34.0%
female	Count	49	85	50	16	200
	% within Gender	24.5%	42.5%	25.0%	8.0%	100.0%
	% within s1q4p car: dealership donates %5 to charity	79.0%	73.9%	57.5%	41.0%	66.0%
	% of Total	16.2%	28.1%	16.5%	5.3%	66.0%
Total	Count	62	115	87	39	303
	% within Gender	20.5%	38.0%	28.7%	12.9%	100.0%
	% within s1q4p car: dealership donates %5 to charity	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	20.5%	38.0%	28.7%	12.9%	100.0%

**Symmetric Measures**

		Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal	Kendall's tau-b	-.236	.051	-4.552	.000
N of Valid Cases		303			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

**Dealership is environmentally friendly**

		very important	somewhat important	minor importance	not important	Total
male	Count	17	42	30	14	103
	% within Gender	16.5%	40.8%	29.1%	13.6%	100.0%
	% within s1q4q car: dealership is environmentally friendly	21.5%	33.9%	39.5%	53.8%	33.8%
	% of Total	5.6%	13.8%	9.8%	4.6%	33.8%
female	Count	62	82	46	12	202
	% within Gender	30.7%	40.6%	22.8%	5.9%	100.0%
	% within s1q4q car: dealership is environmentally friendly	78.5%	66.1%	60.5%	46.2%	66.2%
	% of Total	20.3%	26.9%	15.1%	3.9%	66.2%
Total	Count	79	124	76	26	305
	% within Gender	25.9%	40.7%	24.9%	8.5%	100.0%
	% within s1q4q car: dealership is environmentally friendly	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	25.9%	40.7%	24.9%	8.5%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.170		-3.273	.001
N of Valid Cases	305			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

## APPENDIX D

Section 1, Question 5: Think about what would be important to you if you needed to purchase a new cellular phone service plan and a cellular phone to use with the new plan. Please indicate the importance of each of the following factors.

## Warranties

		very important	somewhat important	minor importance	not important	Total
male	Count	33	25	32	13	103
	% within Gender	32.0%	24.3%	31.1%	12.6%	100.0%
	% within s1q5e cell phone: warranty package you can buy	27.3%	29.8%	49.2%	39.4%	34.0%
	% of Total	10.9%	8.3%	10.6%	4.3%	34.0%
female	Count	88	59	33	20	200
	% within Gender	44.0%	29.5%	16.5%	10.0%	100.0%
	% within s1q5e cell phone: warranty package you can buy	72.7%	70.2%	50.8%	60.6%	66.0%
	% of Total	29.0%	19.5%	10.9%	6.6%	66.0%
Total	Count	121	84	65	33	303
	% within Gender	39.9%	27.7%	21.5%	10.9%	100.0%
	% within s1q5e cell phone: warranty package you can buy	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	39.9%	27.7%	21.5%	10.9%	100.0%

## Symmetric Measures

		Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal	Kendall's tau-b	-.139		-.2613	.009
N of Valid Cases		303			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

**Cancellation of Service Policy**

		very important	somewhat important	minor importance	not important	Total
male	Count	45	42	13	3	103
	% within Gender	43.7%	40.8%	12.6%	2.9%	100.0%
	% within s1q5f cell phone: cancellation of service policy	27.6%	40.4%	48.1%	33.3%	34.0%
	% of Total	14.9%	13.9%	4.3%	1.0%	34.0%
	female	Count	118	62	14	6
% within Gender	59.0%	31.0%	7.0%	3.0%	100.0%	
% within s1q5f cell phone: cancellation of service policy	72.4%	59.6%	51.9%	66.7%	66.0%	
% of Total	38.9%	20.5%	4.6%	2.0%	66.0%	
Total	Count	163	104	27	9	303
	% within Gender	53.8%	34.3%	8.9%	3.0%	100.0%
	% within s1q5f cell phone: cancellation-of service policy	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	53.8%	34.3%	8.9%	3.0%	100.0%

**Symmetric Measures**

		Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal	Kendall's tau-b	-.139	.055	-2.523	.012
N of Valid Cases		303			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

### Time Required on Contract

		very important	somewhat important	minor importance	not important	Total
male	Count	62	34	3	4	103
	% within Gender	60.2%	33.0%	2.9%	3.9%	100.0%
	% within s1q5h cell phone: time required on contract	29.8%	47.9%	27.3%	33.3%	34.1%
	% of Total	20.5%	11.3%	1.0%	1.3%	34.1%
female	Count	146	37	8	8	199
	% within Gender	73.4%	18.6%	4.0%	4.0%	100.0%
	% within s1q5h cell phone: time required on contract	70.2%	52.1%	72.7%	66.7%	65.9%
	% of Total	48.3%	12.3%	2.6%	2.6%	65.9%
TotalCount		208	71	11	12	302
% within Gender		68.9%	23.5%	3.6%	4.0%	100.0%
% within s1q5h cell phone: time required on contract		100.0%	100.0%	100.0%	100.0%	100.0%
% of Total		68.9%	23.5%	3.6%	4.0%	100.0%

### Symmetric Measures

		Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal	Kendall's tau-b	-.116	.057	-2.039	.041
N of Valid Cases		302			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

APPENDIX E

Section 2, Question 1: Did you read purchase terms *before* you bought [an electronic entertainmt item such as a television, DVD player, VCR, iPod, stereo, or stereo equipment]?

		no	yes	Total
male	Count	49	52	101
	% within Gender	48.5%	51.5%	100.0%
	% within s2q1C did you read purchase terms before bought item?	29.0%	43.0%	34.8%
	% of Total	16.9%	17.9%	34.8%
female	Count	120	69	189
	% within Gender	63.5%	36.5%	100.0%
	% within s2q1C did you read purchase terms before bought item?	71.0%	57.0%	65.2%
	% of Total	41.4%	23.8%	65.2%
Total	Count	169	121	290
	% within Gender	58.3%	41.7%	100.0%
	% within s2q1C did you read purchase terms before bought item?	100.0%	100.0%	100.0%
	% of Total	58.3%	41.7%	100.0%

Symmetric Measures

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.145	.059	-2.452	.014
N of Valid Cases	290			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

## APPENDIX F

Section 2, Question 2: *If you read the terms before you got the credit card, did you consider any terms important in deciding you wanted that card?*

		no	yes	Total
male	Count	7	38	45
	% within Gender	15.6%	84.4%	100.0%
	% within s2q2d if read, were terms important	23.3%	42.2%	37.5%
	% of Total	5.8%	31.7%	37.5%
female	Count	23	52	75
	% within Gender	30.7%	69.3%	100.0%
	% within s2q2d if read, were terms important	76.7%	57.8%	62.5%
	% of Total	19.2%	43.3%	62.5%
Total	Count	30	90	120
	% within Gender	25.0%	75.0%	100.0%
	% within s2q2d if read, were terms important	100.0%	100.0%	100.0%
	% of Total	25.0%	75.0%	100.0%

## Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	3.425 <sup>a</sup>	1	.064		
Continuity Correction <sup>b</sup>	2.667	1	.102		
Likelihood Ratio	3.599	1	.058		
Fisher's Exact Test				.082	.049
Linear-by-Linear Association	3.397	1	.065		
N of Valid Cases	120				

a. 0 cells (.0%) have expected count less than 5. The minimum expected count is 11.25.

b. Computed only for a 2x2 table

APPENDIX G

Section 2, Question 6 Form Terms: Think generally about purchase terms that sellers provide in a standard form. Again, as described at the start of Part II, these form terms may be provided at a store, in the mall, in or on product packaging, or on the seller's website or the Internet. With this in mind, indicate your level of agreement with the following statements about such form terms.

**I assume I cannot get a seller to change form terms**

		strongly agree	somewhat agree	neutral	somewhat disagree	strongly disagree	Total
male	Count	30	33	25	11	4	103
	% within Gender	29.1%	32.0%	24.3%	10.7%	3.9%	100.0%
	% within s2q6b	34.1%	28.9%	43.9%	34.4%	28.6%	33.8%
	form terms: assume cannot change						
	% of Total	9.8%	10.8%	8.2%	3.6%	1.3%	33.8%
female	Count	58	81	32	21	10	202
	% within Gender	28.7%	40.1%	15.8%	10.4%	5.0%	100.0%
	% within s2q6b	65.9%	71.1%	56.1%	65.6%	71.4%	66.2%
	form terms: assume cannot change						
	% of Total	19.0%	26.6%	10.5%	6.9%	3.3%	66.2%
Total	Count	88	114	57	32	14	305
	% within Gender	28.9%	37.4%	18.7%	10.5%	4.6%	100.0%
	% within s2q6b	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	form terms: assume cannot change						
	% of Total	28.9%	37.4%	18.7%	10.5%	4.6%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.028	.053	-.536	.592
N of Valid Cases	305			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.



**I believe it is a waste of time to read form terms**

		strongly agree	somewhat agree	neutral	somewhat disagree	strongly disagree	Total
male	Count	2	8	26	27	40	103
	% within Gender	1.9%	7.8%	25.2%	26.2%	38.8%	100.0%
	% within s2q6h form terms: waste of time to read	50.0%	36.4%	41.9%	32.9%	29.9%	33.9%
	% of Total	.7%	2.6%	8.6%	8.9%	13.2%	33.9%
female	Count	2	14	36	55	94	201
	% within Gender	1.0%	7.0%	17.9%	27.4%	46.8%	100.0%
	% within s2q6h form terms: waste of time to read	50.0%	63.6%	58.1%	67.1%	70.1%	66.1%
	% of Total	.7%	4.6%	11.8%	18.1%	30.9%	66.1%
Total	Count	4	22	62	82	134	304
	% within Gender	1.3%	7.2%	20.4%	27.0%	44.1%	100.0%
	% within s2q6h form terms: waste of time to read	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	1.3%	7.2%	20.4%	27.0%	44.1%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	.085		1.587	.113
N of Valid Cases	304			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

**I think it is very important to read contract terms**

		strongly agree	somewhat agree	neutral	somewhat disagree	strongly disagree	Total
male	Count	44	33	22	2	1	102
	% within Gender	43.1%	32.4%	21.6%	2.0%	1.0%	100.0%
	% within s2q6i	31.7%	32.4%	44.0%	22.2%	25.0%	33.6%
	form terms: very important to read						
	% of Total	14.5%	10.9%	7.2%	.7%	.3%	33.6%
female	Count	95	69	28	7	3	202
	% within Gender	47.0%	34.2%	13.9%	3.5%	1.5%	100.0%
	% within s2q6i	68.3%	67.6%	56.0%	77.8%	75.0%	66.4%
	form terms: very important to read						
	% of Total	31.3%	22.7%	9.2%	2.3%	1.0%	66.4%
Total	Count	139	102	50	9	4	304
	% within Gender	45.7%	33.6%	16.4%	3.0%	1.3%	100.0%
	% within s2q6i	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	form terms: very important to read						
	% of Total	45.7%	33.6%	16.4%	3.0%	1.3%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.046	.054	-.843	.399
N of Valid Cases	304			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

**I do not see why I should read form terms**

		strongly agree	somewhat agree	neutral	somewhat disagree	strongly disagree	Total
male	Count	1	7	23	30	42	103
	% within Gender	1.0%	6.8%	22.3%	29.1%	40.8%	100.0%
	% within s2q6j	33.3%	41.2%	39.7%	33.7%	30.7%	33.9%
	form terms: don't see why I should read						
	% of Total	.3%	2.3%	7.6%	9.9%	13.8%	33.9%
female	Count	2	10	35	59	95	201
	% within Gender	1.0%	5.0%	17.4%	29.4%	47.3%	100.0%
	% within s2q6j	66.7%	58.8%	60.3%	66.3%	69.3%	66.1%
	form terms: don't see why I should read						
	% of Total	.7%	3.3%	11.5%	19.4%	31.3%	66.1%
Total	Count	3	17	58	89	137	304
	% within Gender	1.0%	5.6%	19.1%	29.3%	45.1%	100.0%
	% within s2q6j	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	form terms: don't see why I should read						
	% of Total	1.0%	5.6%	19.1%	29.3%	45.1%	100.0%

**Symmetric Measures**

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	.070	.054	1.291	.197
N of Valid Cases	304			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

## APPENDIX H

Section 2, Question 70(f) Important terms: Think generally about the times when you have looked at contract terms at any point with respect to your purchase of products or services. Were any of the terms important to you? Indicate how you generally view the importance of the following types of terms.

## Warranties

		very important	somewhat important	minor importance	not important	Total
male	Count	72	29	2	0	103
	% within Gender	69.9%	28.2%	1.9%	.0%	100.0%
	% within s2q7b imp terms: warranties	30.5%	47.5%	40.0%	.0%	34.0%
	% of Total	23.8%	9.6%	.7%	.0%	34.0%
female	Count	164	32	3	1	200
	% within Gender	82.0%	16.0%	1.5%	.5%	100.0%
	% within s2q7b imp terms: warranties	69.5%	52.5%	60.0%	100.0%	66.0%
	% of Total	54.1%	10.6%	1.0%	.3%	66.0%
Total	Count	236	61	5	1	303
	% within Gender	77.9%	20.1%	1.7%	.3%	100.0%
	% within s2q7b imp terms: warranties	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	77.9%	20.1%	1.7%	.3%	100.0%

## Symmetric Measures

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.	
Ordinal by Ordinal Kendall's tau-b	-.134		.059	-2.236	.025
N of Valid Cases	303				

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

## APPENDIX I

Section 3, Question 1b: What types of terms have you been able to get changed in form contracts?

## Warranties

		no	yes	Total
Gender male	Count	82	21	103
	% within Gender	79.6%	20.4%	100.0%
	% within s3q1Bb changed: warranties	30.9%	51.2%	33.7%
	% of Total	26.8%	6.9%	33.7%
female	Count	183	20	203
	% within Gender	90.1%	9.9%	100.0%
	% within s3q1Bb changed: warranties	69.1%	48.8%	66.3%
	% of Total	59.8%	6.5%	66.3%
Total	Count	265	41	306
	% within Gender	86.6%	13.4%	100.0%
	% within s3q1Bb changed: warranties	100.0%	100.0%	100.0%
	% of Total	86.6%	13.4%	100.0%

## Chi-Square Tests

Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
6.537 <sup>a</sup>	1	.011		
5.661	1	.017		
6.222	1	.013		
6.516	1	.011	.013	.010
306				

a. 0 cells (.0%) have expected count less than 5. The minimum expected count is 13.80.

b. Computed only for a 2x2 table

**Interest rate for credit payment**

		no	yes	Total
male	Count	82	21	103
	% within Gender	79.6%	20.4%	100.0%
	% within s3q1Bd changed: interest rate for credit payment	31.5%	45.7%	33.7%
	% of Total	26.8%	6.9%	33.7%
female	Count	178	25	203
	% within Gender	87.7%	12.3%	100.0%
	% within s3q1Bd changed: interest rate for credit payment	68.5%	54.3%	66.3%
	% of Total	58.2%	8.2%	66.3%
Total	Count	260	46	306
	% within Gender	85.0%	15.0%	100.0%
	% within s3q1Bd changed: interest rate for credit payment	100.0%	100.0%	100.0%

**Chi-Square Tests**

	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	3.487 <sup>a</sup>	1	.062		
Continuity Correction <sup>b</sup>	2.883	1	.090		
Likelihood Ratio	3.359	1	.067		
Fisher's Exact Test				.065	.047
Linear-by-Linear Association	3.475	1	.062		
N of Valid Cases	306				

a. 0 cells (.0%) have expected count less than 5. The minimum expected count is 15.48.

b. Computed only for a 2×2 table

## APPENDIX J

Section 3, Question 1: Focus on your consumer purchases and the form contracts or purchase terms you encounter when buying consumer products and services. Roughly, how often do you try to negotiate or change such form contracts or terms when you purchase consumer products or services?

		never	rarely	sometimes	half the time	frequently	nearly all the time	Total
male	Count	26	28	31	6	7	3	101
	% within Gender	25.7%	27.7%	30.7%	5.9%	6.9%	3.0%	100.0%
	% within s3q1 how often change contracts or terms	22.6%	33.7%	47.7%	42.9%	36.8%	42.9%	33.3%
	% of Total	8.6%	9.2%	10.2%	2.0%	2.3%	1.0%	33.3%
female	Count	89	55	34	8	12	4	202
	% within Gender	44.1%	27.2%	16.8%	4.0%	5.9%	2.0%	100.0%
	% within s3q1 how often change contracts or terms	77.4%	66.3%	52.3%	57.1%	63.2%	57.1%	66.7%
	% of Total	29.4%	18.2%	11.2%	2.6%	4.0%	1.3%	66.7%
Total	Count	115	83	65	14	19	7	303
	% within Gender	38.0%	27.4%	21.5%	4.6%	6.3%	2.3%	100.0%
	% within s3q1 how often change contracts or terms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	% of Total	38.0%	27.4%	21.5%	4.6%	6.3%	2.3%	100.0%

## Symmetric Measures

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.172		-3.350	.001
N of Valid Cases	303			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

APPENDIX K

Section 3, Question 2Be: Which of the following best describes how you felt about these experiences?

**I did not learn anything I did not already know**

		no	yes	Total
male	Count	94	9	103
	% within Gender	91.3%	8.7%	100.0%
	% within s3q2Be feelings: did not learn anything new	32.4%	56.3%	33.7%
	% of Total	30.7%	2.9%	33.7%
female	Count	196	7	203
	% within Gender	96.6%	3.4%	100.0%
	% within s3q2Be feelings: did not learn anything new	67.6%	43.8%	66.3%
	% of Total	64.1%	2.3%	66.3%
Total	Count	290	16	306
	% within Gender	94.8%	5.2%	100.0%
	% within s3q2Be feelings: did not learn anything new	100.0%	100.0%	100.0%
	% of Total	94.8%	5.2%	100.0%

**Chi-Square Tests**

	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	3.858 <sup>a</sup>	1	.050		
Continuity Correction <sup>b</sup>	2.865	1	.091		
Likelihood Ratio	3.618	1	.057		
Fisher's Exact Test				.060	.048
Linear-by-Linear Association	3.846	1	.050		
N of Valid Cases	306				

a. 0 cells (.0%) have expected count less than 5. The minimum expected count is 5.39.

b. Computed only for a 2x2 table



## APPENDIX L

Section 4, Question 1: How often do you confront or deal with contracts through work or other channels outside of your role as a consumer purchasing goods and services for your personal, household or family needs? Check the best estimate.

		never	very rarely	sporadic thru year	few times a month	almost daily	Total
male	Count	20	32	25	19	7	103
	% within Gender	19.4%	31.1%	24.3%	18.4%	6.8%	100.0%
	% within s4q1	25.6%	30.8%	35.7%	55.9%	35.0%	33.7%
	frequency encounter contracts outside consumer role						
	% of Total	6.5%	10.5%	8.2%	6.2%	2.3%	33.7%
female	Count	58	72	45	15	13	203
	% within Gender	28.6%	35.5%	22.2%	7.4%	6.4%	100.0%
	% within s4q1	74.4%	69.2%	64.3%	44.1%	65.0%	66.3%
	frequency encounter contracts outside consumer role						
	% of Total	19.0%	23.5%	14.7%	4.9%	4.2%	66.3%
Total	Count	78	104	70	34	20	306
	% within Gender	25.5%	34.0%	22.9%	11.1%	6.5%	100.0%
	% within s4q1	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	frequency encounter contracts outside consumer role						
	% of Total	25.5%	34.0%	22.9%	11.1%	6.5%	100.0%

## Symmetric Measures

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.132	.051	-2.553	.011
N of Valid Cases	306			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

APPENDIX M

Section 4, Question 2: Which of the following best describes your experience, background or knowledge with respect to contracts outside of your role as a consumer?

	very uncomfortable	less than avg person	average	more than avg person	expert	Total
male Count	2	4	59	35	3	103
% within Gender	1.9%	3.9%	57.3%	34.0%	2.9%	100.0%
% within s4q2 contract experience background knowledge	22.2%	13.8%	34.1%	40.2%	37.5%	33.7%
% of Total	.7%	1.3%	19.3%	11.4%	1.0%	33.7%
female Count	7	25	114	52	5	203
% within Gender	3.4%	12.3%	56.2%	25.6%	2.5%	100.0%
% within s4q2 contract experience background knowledge	77.8%	86.2%	65.9%	59.8%	62.5%	66.3%
% of Total	2.3%	8.2%	37.3%	17.0%	1.6%	66.3%
Total Count	9	29	173	87	8	306
% within Gender	2.9%	9.5%	56.5%	28.4%	2.6%	100.0%
% within s4q2 contract experience background knowledge	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
% of Total	2.9%	9.5%	56.5%	28.4%	2.6%	100.0%

Symmetric Measures

	Value	Asymp. Std. Error <sup>a</sup>	Approx. T <sup>b</sup>	Approx. Sig.
Ordinal by Ordinal Kendall's tau-b	-.125	.052	-2.391	.017
N of Valid Cases	306			

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

