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OPTING OUT OR COPPING OUT? AN ARGUMENT FOR STRICT SCRUTINY OF INDIVIDUAL CONTRACTS

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Recently I attended the Fiftieth Anniversary Reunion of my college class, Denison University 1956. After a busy weekend, I came away with new memories and renewed friendships, and was greatly impressed with the energy and vitality of my classmates. Many, perhaps most of my cohorts appear to be settling into—perhaps more accurately, plunging into—a host of new activities, freed by retirement from continued immersion in whatever career they pursued for most of their adult lives. At least so far, however, I, like many teaching colleagues past and present, have chosen to keep at the teaching/writing game well past a respectable retirement age. The invitation to take part in this symposium provides an opportunity for me to share my reflections on the state of contract law from the vantage point of some forty-plus years in the classroom.

Along with my Depression-Baby classmates, I find myself in the somewhat bittersweet position of having survived not only many of my contemporaries, but even my century. We were born early enough to remember World War II, but late enough to avoid having to fight it. Not Tom Brokaw's "Greatest Generation," we were in some ways the Luckiest Generation. Raised during the war and post-war period; young adults in the prosperous (for most of us) "Eisenhower years"; early acolytes, many of us, at the Kennedy shrine. We have seen war, famine, pestilence and death, but, for the most part, at a comfortable remove. Having witnessed decades of violent, even revolutionary change (and often counter-change) in the political and social arena, we now find ourselves also surrounded by technological advances well beyond what most of us could have

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imagined in our college years. Besides "Twentieth Century Fox," that puzzlingly persistent corporate logo, what else remains of our Twentieth Century? In my case, and in this context, the question is a more focused one: What remains of Twentieth Century contract law? Does that particular institution make it into Century 21? Or does it fail to make the cut, along with the Nehru jacket, the eight-track tape, and the Oldsmobile?

Obituaries for Contract Law are nothing new; they have been coming for some time now. From Macaulay[1] to Gilmore[2] to Scott,[3] the details differ, but the thrust remains the same: contract law as imagined by Langdell, Williston and Corbin is, if not dead, at least irrelevant to those for whom it purportedly exists, along with Article 2, the crown jewel of Llewellyn's Uniform Commercial Code.[4] Of course, there have also been denials.[5] But even Mark Twain, reports of whose death indeed had been greatly exaggerated, eventually gave up the ghost, and garnered some accurate obituaries. Are we reaching that point with the contract law system?

A few years ago, I sounded a brief warning about what I perceived as a potential threat to our common law of contract, posed by what I and many others have referred to as "mandatory arbitration"—the judicial enforcement of pre-dispute contractual arbitration clauses, particularly in situations where the clause was imposed by one party and assented to only weakly, if at all, by the other.[6] The threat I wrote about then appears no less real today. What I propose to do here, however, is to take a somewhat wider perspective and consider a collection of other developments that have the real potential of finally finishing off modern contract law, at least the Twentieth Century variety. Some of these are as new as the Ipod, but some are older than the Victrola. Taken together, they

1. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

2. GRANT GILMORE, THE DEATH OF CONTRACT (1974).

3. Robert E. Scott, *The Death of Contract Law*, 4 U. TORONTO L.J. 369 (2004).

4. Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009 (2002); *see also* Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 (2000).

5. *E.g.*, Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254 (1995) (the concluding piece in a symposium devoted to reconsideration of Gilmore's *Death of Contract*, *supra* note 2).

6. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2002) [hereinafter Knapp, *Taking Contracts Private*].

present the grim prospect of a new Medieval era of contract—a legal regime in which the institution of contract becomes not a liberating force, but an enslaving one.

In the discussion that follows, after some preliminary observations, I will offer my own broad-brush view of the development of American contract law, first over the Twentieth Century generally, and then with an eye to developments around the turn of the Twenty-First Century. At each point, I will consider specifically the ways in which the power of form-contract drafters has grown, both in their ability to impose their forms on other contracting parties, and in the substantive devices available to them. In the course of those discussions I will offer some reasons why the contract law system might appropriately differentiate between business organizations and individuals, in approaching the resolution of disputes. I will then attempt to make a case for greater judicial scrutiny than today is customarily brought to bear on mass contracts, especially those between business organizations—(principally corporations) on the one hand, and individuals (consumers or workers)—on the other. It is my thesis that courts have not only the opportunity, but also the obligation, to bring their power to bear in situations where individual parties are otherwise virtually (no pun intended, this time) powerless in the contract marketplace.

I. PRELIMINARY CONSIDERATIONS

In order to talk about the operation of contract law, we should probably begin by defining our subject matter. By contract law, I mean simply that body of mostly common law rules, which, in the Anglo-American legal system, governs the potential enforcement of the voluntarily expressed promise (or "commitment"). This promise is either exchanged, as part of an agreement to exchange performances, or relied on in a foreseeable and substantial manner by the person to whom the promise was made.[7] This working definition is narrower than some other definitions that one might imagine.[8] It does not speak to the question of why such a legal regime should exist and what purposes it should serve, but it does identify the

7. RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 2, 17, 90 (1981).

8. *E.g.*, IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980).

voluntary expression of commitment as the linchpin of contractual enforcement.

A related issue is the nature of the actors capable of making and enforcing these commitments. Clearly they might be individuals—flesh and blood human beings. But in our legal system they may also be "persons" who are not individuals but legal constructs—abstract entities created for various reasons (usually to engage in commercial activity, but for other reasons as well), such as corporations, partnerships, and the like. These entities have the capacity to incur and to enforce legal obligations, particularly contractual ones. They necessarily act through human agents, but have an independent legal existence apart from the agents they employ. Although the rules of classical contract law were traditionally articulated and applied without any overt regard to the nature of the actors,[9] courts and writers have become used to differentiating, at least between "merchants"[10] (professional sellers of goods in the Article 2 sense and also other large commercial enterprises) and those whom we ordinarily refer to as "consumers."[11] Less well-established, but equally useful, it seems to me, is a more refined, tripartite categorization: individuals (flesh and blood people), small businesses (sometimes individual proprietorships and sometimes closely held corporations), and large corporate entities. Individuals, as distinguished from the other two categories, are sellers in any substantial sense only of their own labor, and in that role we might refer to them as "workers." Otherwise they are typically "consumers"—buyers of goods and services for personal, family or household use.[12] Of course, business enterprises large and small are buyers as well as sellers, and they buy not only for resale but also as consumers in the "end-user" sense. Still, the three categories can be useful not only to differentiate the types of activities engaged in by

9. The Restatement's rules often do not distinguish between individuals and business entities; its illustrations typically characterize the parties only as A, B, etc. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 illus. 15.

10. *See* U.C.C. § 2-104(1) (2003).

11. *See Id.* § 2-103(1)(c) (defining "consumer" as one who buys goods that are intended to be used for "personal, family or household purposes"); § 9-102(a)(23) (defining "consumer goods"). Under the UCC scheme, a business entity can be a "buyer in ordinary course," *id.* § 1-201(b)(9), but not a "consumer" under either Article 2 or 9. *See generally* U.C.C. arts. 2, 9.

12. This usage is slightly broader than the UCC's, which refers to buyers of goods. *See* U.C.C. § 2-103(1)(a).

various actors, but also to describe the degrees of market power. Large business enterprises generally have the most power; ordinary individuals have the least; small businesses fall somewhere in between, depending on the degree to which they resemble either individual enterprises or corporate organizations.[13]

Writers, recent and not so recent, have argued that business enterprises generally prefer to make their own rules. To the extent they are able to do so, they either ignore the legal regime governing their contractual relations, or opt out of that regime into some other body of law they regard as preferable for a variety of reasons.[14] Maybe so. And if so, then "contract law," to that extent, can be considered, if not exactly "dead," at least as being irrelevant to the way that our society does business. But there is a threshold issue here: Since neither individuals nor corporations can unilaterally declare themselves free of the constraints of the legal system, "opting out" essentially means making agreements to do so—agreements between contracting partners that, as between them, their transaction will be subject to some other set of rules, or some other set of legal institutions. But since such an opt-out agreement is itself a contract, it must necessarily be subject initially to regulation by the regime it seeks to displace, if only to know whether and to what extent that opting-out agreement will be enforced in the event that one of the parties later attempts to avoid its effects. If two large-scale enterprises with the desire and the resources to engage in planning mutually agree to opt out of some aspect of a legal regime when dealing with each other, there is no obvious reason of public policy why that choice should be second-guessed, unless it has external negative effects. However, when one such large-scale enterprise adopts the practice of insisting on imposing opt-out agreements on others—small businesses or individuals (workers or consumers)—as the price of doing business at all, then the contract law system has a legitimate claim to play an oversight role.

13. *See generally* Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295 (2005); Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233 (2003).

14. *See, e.g.*, Macaulay, *supra* note 1, at 60; Scott, *supra* note 3, at 377–80; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

II. TWENTIETH CENTURY CONTRACT LAW

In a brief contribution to another contracts symposium, I recently suggested that it might be useful to employ the label "Modern Contract Law" to refer specifically to contract law as it developed over the course of the mid-Twentieth Century (before Law-and-Economics, the New Conceptualism/Formalism and various other post-modern developments) rather than as meaning simply "whatever is current at the moment"—particularly since it is not clear whether "at the moment" there is indeed a There there in terms of a present-day consensus.[15] But even though "Modern Contract Law," in the narrower sense, represents a significant shift away from the earlier classical vision of Professor Williston and his contemporaries,[16] it retains or even elaborates many aspects of the classical system, which together have serious implications for the law's handling of agreements that result from the application of unequal bargaining power. These would include the following: dominance of the document, dominance of the drafter, and ascendance of the firm.

A. Dominance of the Document

As every first-year law student soon discovers, it is not true that an agreement must be in writing to be enforceable. Many types of common agreements are not subject to any statute of frauds at all. Even those that are might still be enforced in the absence of a writing, at least to a limited extent, where restitutionary or reliance principles make that appropriate.[17] But any agreement of any significance, particularly where at least one of the parties is a substantial commercial enterprise, is almost certain to be memorialized in some sort of "record" ("written" or otherwise) anyway.[18] Of much more practical importance are the legal rules that make it harder to establish and enforce any terms of agreement that are not included in the writing when a written agreement does exist. Application of the parol evidence rule—applying to agreements prior to or contemporaneous with the creation of the

15. Charles L. Knapp, *An Offer You Can't Revoke*, 2004 WIS. L. REV. 309, 316–17.

16. *See generally id.* at 316–19.

17. *See generally* RESTATEMENT (SECOND) OF CONTRACTS, §§ 110, 129, 139, 375 (1981).

18. *See* U.C.C. §§ 1-201(b)(31), (43) (2003) (defining "record" and "writing").

writing[19]—and inclusion in the written agreement of a "no-oral-modifications" clause—applying to agreements made afterwards[20]—together will make it impossible, in many cases, for the proponent of an express term not contained in the writing to present evidence of its existence.[21] Modern Contract Law in theory loosened up contract law's approach to interpretation and the parol evidence rule, making the latter somewhat easier to circumvent.[22] But despite the clear antipathy of many writers and judges over the years, that rule has persisted, and, if anything, has regained strength in recent years.[23]

Dominance of the document in this sense is not necessarily problematic in terms of the parties' intentions; indeed, it may be what both parties want, at least at the point when their written agreement is created, because each hopes to avoid costly arguments later about the terms of their agreement. But that assumes that two parties, each with substantial bargaining power, are actively negotiating terms. When the agreement is embodied in a standardized form, created by one party and acceded to by the other, different considerations come into play. If one party controls the drafting and presents the other party with a form contract, nearly all of which is boilerplate and offered on a take-it-or-leave-it basis, the resulting product may be what we have come to call a contract of adhesion.[24] The "adhering" party is not required, or even expected, to read the form, and may well not have the resources (in time and in

19. *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 209–217 (1981); U.C.C. § 2-202.

20. U.C.C. § 2-209(2).

21. *See* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1303–07 (1998) (discussing the interaction of the parol evidence rule and the "no-oral-modification" clause device).

22. *See generally* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS, §§ 3.9–3.17 (5th ed. 2003).

23. Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 14–29 (2004); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1170–72 (1995).

24. *See generally* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) (the essential modern article on this subject). Professor Rakoff defines "contract of adhesion" as a printed form that purports to be a contract, drafted by one party and presented to the other on the explicit understanding that few terms will be open to negotiation, and adhered to by the other after dickering over whatever terms are open to bargaining. *Id.* at 1177. Additionally, the drafter enters into many such contracts and the adherent into comparatively few. *Id.* Rakoff does not limit his definition to cases where the adhering party is an individual, but he does confine it to transactions in which the adhering party's principal obligation is the payment of money, thus excluding employment contracts. *Id.*

expertise) fully to analyze and evaluate it anyway. Indeed, the contracting agent of the drafting party may well have no authority to vary the terms of the form in any event. And yet the adhering party is presumptively bound by whatever terms that agreement contains, by the "duty to read" principle.[25] Added to the other rules noted above, the duty to read produces a situation in which one party to an agreement has bound herself to a writing she has not read or understood in full, but to which she is legally and completely bound. Everything in the document is binding on her, and nothing that's *not* in the document can ameliorate that.

B. Dominance of the Drafter

I have described this state of affairs as one of dominance of the document, but of course what it really is, is dominance of the drafter. In some cases, the adhering party may have a defense to the legal effectiveness of the written agreement on some ground such as duress or fraud. These will be aberrational cases, however. Bargaining on a take-it-or-leave-it basis could be the starting point of a successful defense of duress, but the ordinary business deal—even where one party accedes to a bargain on terms it otherwise would resist because business necessity leaves it no acceptable alternative—will not rise (or fall) to that level.[26] Similarly, fraud "in the factum,"[27] or in some cases even "in the inducement,"[28] may be grounds for avoiding a contract. Evidence of such fraud may even get past the procedural barrier of the parol evidence rule. But unless the drafting party has actively misrepresented the contents of the form, this too is likely to provide no basis for avoidance.[29] So the adhering party in the ordinary case is stuck with whatever terms the written agreement may contain, plus any legal default rules that apply in the circumstances. Is that a problem?

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25. *See, e.g.*, Ray v. William G. Eurice & Bros., Inc., 93 A.2d 272, 278 (Md. 1952) ("One who . . . manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation." (quoting RESTATEMENT (FIRST) OF CONTRACTS § 70 (1932))). The Second Restatement has a somewhat watered-down version that attempts to give the court some leeway where standardized forms are concerned. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); *see generally* PERILLO, *supra* note 22, §§ 9.41–9.45.

26. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 175–176.

27. *Id.* §§ 162–163.

28. *Id.* §§ 164, 167.

29. And maybe not even then. *See id.* § 166 cmt. a.

Maybe not. Maybe everything will go well, each party will perform as the other hoped and expected, and both of them (and the rest of us, too, probably) will be better off as a result. Agreements facilitate exchange, and commercial exchanges in the long run should benefit not only the immediate parties but society in general. But if a dispute does develop, it may be crucial to know if any terms of the writing are potentially unenforceable, or if any term of agreement not in the writing may nevertheless be part of the package of enforceable rights and duties. For instance, the writing may, in some respects, define the performance obligations of either party in ways that the adhering party did not anticipate. The writing may contain unexpected exceptions to the duty to perform, or disclaimers of warranties of quality that the law would otherwise imply. It may limit or exclude the drafting party's liability for consequential or other types of damages that would otherwise be available as a matter of law, or put a monetary cap on the adhering party's potential damage recovery. On the other hand, it may impose on the adhering party the obligation of paying liquidated damages greater than those that the law would otherwise assess in the event of her breach. Does the adhering party have any recourse against the enforcement of such terms?

In addition to the possible defenses already noted, there are some legal doctrines that the adhering party may invoke to temper the effect of the document as drafted. Depending on the skill of the drafter (some documents are more ironclad than others), the adhering party may be able to persuade a sympathetic judge that the document has at least some ambiguity (perhaps patent, perhaps latent) that justifies its interpretation in a way more favorable to the adherent.[30] Invoking a legal maxim that imposes on the drafter the risk of ambiguity in the writing, the adhering party may thereby get past the parol evidence rule to present evidence that the writing does not mean what at first blush it may have appeared to mean.[31] And, at least where contracts of insurance are involved and possibly with respect to other contracts of adhesion, the adhering party may persuade the court that a particular term in the writing, if interpreted as the drafter desires, would so substantially fail to meet the adhering

30. *See* PERILLO, *supra* note 22, §§ 3.10, 3.13.

31. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206.

party's reasonable expectations that it should not be enforced.[32]

If all else fails, the adhering party can fall back on the defense of unconscionability. Ancient in its origins but resuscitated as part of Karl Llewellyn's version of Modern Contract Law, this doctrine was incorporated in Article 2 of the U.C.C.[33] and later in the Restatement (Second) of Contracts[34] with the expressed aim of giving the courts permission to do overtly what they would otherwise often strive to do covertly—avoid the enforcement of contracts or terms which were so egregiously one-sided as to be shocking to the conscience of the court. This is especially true in situations where the imposition of such terms seems to be the result of more than the ordinary imbalance of bargaining power to be expected in a free-market economy.[35] This principle has been often invoked, with varying degrees of success, usually in consumer/merchant transactions,[36] but occasionally is used in situations where both parties are commercial enterprises.[37] For a period of time in the Twentieth Century it appeared to play an important role in tandem with state and federal legislatures, in reining in some of the most exploitative practices affecting consumers.[38] In more recent years, however, it has been relatively little used, although, as we shall see, that may be changing.

C. Ascendance of the Firm

Although not ordinarily thought of as aspects of contract law, there are other features of the legal environment that have an important impact on the way that contracts come into being, and on their legal effects. These developed in different ways and for different reasons, but together they have the effect of increasing substantially the disadvantages that individuals face in the

32. *E.g.*, C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975); *see generally* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 376–81 (Aspen 5th ed. 2003) [hereinafter KNAPP, KCP].

33. U.C.C. § 2-302 (2003).

34. RESTATEMENT (SECOND) OF CONTRACTS § 208.

35. Karl N. Llewellyn, *Book Reviews*, 52 HARV. L. REV. 700, 702–05 (1939).

36. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (the leading case); *see also* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (the leading article). For a recent commentary on the *Walker-Thomas* case, see Russell Korobkin's *A "Traditional" and "Behavioral" Law-and-Economics Analysis of* Williams v. Walker-Thomas Furniture Company, 26 U. HAW. L. REV. 441 (2004).

37. *See generally* KNAPP, KCP, *supra* note 32, at 595–98.

38. *See generally id.* at 576–78.

contracting arena

Well before the dawn of the Twentieth Century, the law of agency enabled individuals to employ others to act for them in the conduct of transactions. Empowered with authority conferred by their principals, agents could buy, sell, and enter into contracts for the buying and selling of all kinds of goods and services, binding their principals in the process.[39] Thus, one dealing with the agent of another could ordinarily expect that the promises and representations made by the agent would be binding on the principal, committing him to enforceable legal obligations.[40] On the other hand, one dealing with the agent of another would run the risk that representations and promises made by the agent—particularly if not incorporated in whatever written agreement resulted from their dealings—would not be honored by the principal, nor enforced by the law.[41] So even at this level, the notion of a contract as a personal exchange of commitments between individuals has been attenuated by the presence of intermediaries—actors who are understood to be speaking for someone else who is not directly engaged in the agreement-making process.

This process of attenuation has also been furthered by the development over time of the twin concepts of assignment and delegation. Although originally requiring the personal participation of those who undertake contractual obligations, the law, in most cases, came to accept the proposition that the duties imposed by a contract could be enforced by persons to whom the right to receive performance had been assigned, and conversely, that performance by persons to whom the actual rendering of performance had been delegated would be regarded as sufficient.[42] Granted, some contractual duties continue to be regarded as so inherently personal that their performance may not effectively be delegated to others,[43] or perhaps even demanded by others,[44] but by and large the weight of the law—both common law and statute—had by the mid-Twentieth Century swung behind the proposition that most ordinary contracts

39. RESTATEMENT (SECOND) OF AGENCY § 144 (1958).

40. *Id.* §§ 145, 146.

41. *See id.* §§ 256–260.

42. RESTATEMENT (SECOND) OF CONTRACTS ch. 15, introductory note.

43. *See id.* § 318(2); U.C.C. § 2-210(1).

44. RESTATEMENT (SECOND) OF CONTRACTS § 317(2); U.C.C. § 2-210(2).

were assignable as a matter of law—certainly if the initial agreement did not provide otherwise, and quite possibly even if it did.[45]

The preceding observations apply to contractual transactions between individuals, of course—individual contracting parties can and do act through agents, and they can and do assign and delegate the rights and duties created by their contracts. But now add to the mix another legal innovation: the limited-liability corporation. This device is by far the most important of the "legal persons" we spoke of earlier (the non-flesh-and-blood actors in the legal realm). The concept of a limited-liability corporation is hardly novel; such enterprises were major forces before the dawn of the Twentieth Century, and they are not going away any time soon.[46] Simultaneously superhuman and subhuman—like computers, in that regard—corporations bestride our society like so many colossi. Our modern economic order has grown from and depends on their presence, and the law welcomes and accommodates them. But the presence of the corporation as a legal actor continues the process of depersonalizing contractual relations in a host of ways, and to an incalculable degree.

To begin with, the impersonality of the corporation carries to a logical conclusion the depersonalization process that began with the recognition of a principal's ability to deal through agents. Assume that you are—as in real life you have been, countless times, and will be again—the adhering party to a standard-form contract. Not only is the individual with whom you originally dealt in all probability not the one whom you expect to render the promised performance, there may in fact be no individual obligated to perform at all. Individual agents report to other individuals, and so-on up the line of authority. But at the end of that line may be only a corporation—an abstract entity, dedicated solely to the maximization of profit for its shareholders. To the extent that you did deal with an individual agent, can you expect that this individual's promises and representations to you will be honored by his principal? The duty to read and the parol evidence rule, together with the rules of agency law, make it likely that a corporate principal with impunity can, and

45. RESTATEMENT (SECOND) OF CONTRACTS § 322; U.C.C. §§ 2-210(2)–(4), 9-406(d), (f), 9-408.

46. *See generally* JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 1–9, 31–44 (Aspen 2d. ed. 2003).

in many cases will, deny that any promises beyond those expressed in the writing were made at all, or that even if made are binding on it. Agents can be and are replaced by other agents, so the one you dealt with in making your agreement may be long gone by the time a dispute arises, and in his place you may find someone who neither knows nor cares what unwritten assurances you might have received earlier.[47] And ultimately, the rights and duties created by your original contract may be assigned and delegated to another entity—another corporate entity, of course—with which you have not dealt, about which you may know nothing at all, and from which you can expect recognition of your rights only to the extent expressly provided in your written agreement. Even though the original contracting party ordinarily remains liable for the performance of duties that it has delegated to another,[48] as a practical matter your ability to pursue it is likely to be sharply limited once your contract has been assigned.[49]

Besides accommodating them in many ways in the formation process, the substantive law of contracts tends to protect and reward commercial entities more fully than individuals, both in what the law aspires to do, and in what it does not. To protect the expectation interest of the aggrieved plaintiff, contract law ordinarily attempts, if feasible, to award as damages the economic gain that would have been realized by performance on both sides.[50] In the case of a business enterprise, this may be lost profit—the profit that the plaintiff expected to make on this transaction, or in some cases from another transaction which has now been prevented by this defendant's breach.[51] Economic injury, whether quantifiable or not, is of course ultimately the only injury that a business corporation can

47. *E.g.*, Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (upholding jury verdict against Shell Oil where a change in management at Shell Oil's mainland headquarters led to Shell's repudiation of a long-standing practice of "price protection" in selling asphalt to the plaintiff paving company).

48. RESTATEMENT (SECOND) OF CONTRACTS § 318(3); U.C.C. § 2-210(1).

49. Before a right is assigned, the obligor may enjoy the right of setoff for claims it has against the assignor. Once assignment has taken place, however, that right may be limited. *See* U.C.C. §§ 2-717, 9-404. The obligor may thus find itself fighting a two-front war against the assignee and the assignor (defending against the former; attempting to assert rights against the latter). And if the assignor has essentially gone out of business, even a valid claim against it may have little real value.

50. RESTATEMENT (SECOND) OF CONTRACTS §§ 344(a), 347.

51. *E.g.*, Florafax Int'l, Inc. v. GTE Mkt. Res., Inc., 933 P.2d 282, 292 (Okla. 1997).

sustain. On the other hand, individual consumers do not enter into contracts to make a profit; they do so to obtain necessary or desirable goods and services. The kinds of economic losses suffered by individual consumers fall more in the realm of injury to person or property, or perhaps incidental damages in the form of money spent on mitigation.[52] But individuals also can and do sustain other kinds of injury that are not quantifiable nor even economic in nature: emotional distress, pain, and suffering. Sometimes these latter types of injury are the result of tortious conduct, in which case they may be comprehended and remedied by the law of torts. To the extent, however, that such injuries flow from conduct which is in breach of a contract, they may go uncompensated, even if the defendant's conduct would also qualify as a tort.[53] Emotional distress, pain, and suffering: these are harms that an individual can suffer, but not a business corporation. I suggested earlier that the corporation, like the computer, is both superhuman and subhuman, and here is one example of the latter point: Like the Tin Man, a corporation has no heart, and no feelings either. (To be sure, a corporation may suffer a compensable reputational injury, but only because ultimately such an injury may lower its profits, not because its feelings were hurt.) And since a corporation cannot feel non-monetary pain, it is perhaps not surprising that, with few and grudging exceptions, the law of contracts does not deem such pain of *individual* plaintiffs worthy of compensation.[54]

There is still another advantage the corporate enterprise enjoys over the individual (consumer or worker) in the realm of contract remedies. All plaintiffs seeking compensation for breach of contract are subject to the general principle of avoidable consequences, often referred to as the duty to mitigate.[55] Yet this burden falls differently on individuals than on business corporations. The individual worker has only her own labor to sell. If she is wrongfully discharged from a fixed-term employment, her recovery of lost salary will be reduced

52. The Second Restatement describes these as consequential or incidental damages. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. c.

53. *Id.* § 353.

54. *E.g.*, Erlich v. Menezes, 981 P.2d 978 (Cal. 1999) (no recovery for emotional distress for homeowners whose house was constructed in almost unbelievably incompetent fashion; plaintiffs' actual harm apparently grossly undercompensated by damages allowed). *See generally* KNAPP, KCP, *supra* note 32, at 882–84.

55. RESTATEMENT (SECOND) OF CONTRACTS § 350.

to the extent that she either does or reasonably might have obtained comparable gainful employment during the remainder of the term.[56] A corporation, on the other hand, is presumed to be capable of rendering an infinite number of performances at one time, or, at the least, one more in addition to the one called for by its contract with the breaching defendant. The mere existence of a potentially profitable other opportunity thus will not serve to mitigate the corporate plaintiff's recovery of lost profits unless the defendant can show that the plaintiff's performance of both contracts was impossible or at best highly unlikely.[57] Similarly, the "lost volume seller" of goods or services can often establish its right to recover for the profit lost on its contract with the defendant buyer, even where other opportunities for profit were plentiful, and indeed were taken.[58] The logic in each case may be impeccable, but the collective effect of these rules illustrates the superhuman side of the business corporation—because it can and does employ a multitude of individuals to do its bidding, it can in theory not only leap a tall building at a single bound, it can leap any number of them simultaneously.

III. TURN-OF-THE-CENTURY CONTRACT LAW

For those of us who are accustomed to using the term "Turn-of-the-Century Contract Law" to refer to the Gay Nineties or the

56. *Id.* § 350 cmt. c, illus. 8.

57. When the contract in question does not require personal performance, the law will presume that the party obligated to perform could have acted through agents and performed other contracts simultaneously. *E.g.*, Koplin v. Faulkner, 293 S.W.2d 467 (Ky. 1956); *see* RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. d, illus. 10. The principle illustrated here is not limited to corporate plaintiffs, but since most business organizations with significant economic power are corporations, the point in the text seems to me to be essentially accurate. Since a sole proprietorship is somewhat more likely than a corporation to be a "one-person show," it may in practice be a little easier to rebut the presumption of non-mitigation where a non-corporate business entity is the plaintiff. On the other hand, an individual employee contracting to render personal service will always be subject to the mitigation principle, at least where both employments were essentially full-time jobs. Moreover, she will also be subject to the rule that even a non-"mitigating" opportunity for employment, if accepted, will be treated as "gain made possible" by the breach, and be an offset against damages. *E.g.*, Marshall Sch. Dist. v. Hill, 939 S.W.2d 319 (Ark. Ct. App. 1997) (reducing wrongfully discharged teacher's recovery by income from other jobs, including work in shirt factory). So an employee with little economic power may have no practical alternative than to take whatever work she can get, even though this will reduce her potential claim for salary lost through wrongful discharge.

58. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. d, illus. 9; U.C.C. § 2-708(2) cmt. 5 (2003).

Edwardian Age, it is a little startling to realize that "turn-of-the-century" today means the turn of the Twenty-*First* Century—and describes a lot of things that are only just now starting to be visible in our rear view mirror. The preceding description of contract law seems to me to be reasonably accurate as of circa 1980. But in the latter years of the Twentieth Century, two developments can be observed which substantially aggravated the imbalances of contracting power as they had existed up to that time. The modes of contract-formation proliferated, and so did the ways in which drafting parties attempted to take advantage of their bargaining power.

A Dominance of the Document II

As sales law developed in the Nineteenth Century and into the Twentieth, courts gradually came around to the notion that the seller-protective notion of caveat emptor ought to be tempered, to some extent, by a willingness to imply warranties of quality, at least in the case of a merchant seller. In addition, courts began holding that the law should be somewhat less tolerant of the sort of borderline fraud that often passed as the mere "puffing" of wares. This was codified first by the Uniform Sales Act and then with more vigor in Article 2 of the U.C.C., which provides for the enforcement of warranties both express and implied, including warranties of merchantability and of fitness.[59] Those in the Code were somewhat broader and harder to disclaim, but in both cases the parties, if they so agreed, could negate some or all implied warranties, as well as limit the seller's damage liability.[60] So an important feature of the standard contract form offered by merchant sellers would likely be one or more provisions attempting to do just that. Many legal issues were raised by contracts of this sort. Sometimes the question would be whether the language of the disclaimer or limitation was sufficient to meet this statutory requirement; sometimes it was whether disclaimers of warranty and limitations of liability set forth on the package or the label of the goods would bind a buyer who did not actually sign any contract

59. U.C.C. §§ 2-313, 2-314, 2-315. The Uniform Sales Act provisions are discussed in PATRICIA F. FONSECA & JOHN R. FONSECA, 2 WILLISTON ON SALES §§ 15:1–15:37 (5th ed. 2005).

60. U.C.C. § 2-316; FONSECA & FONSECA, *supra* note 59, §§ 15:27, 15:28.

expressly agreeing to those terms.[61] In cases like these, the language that the seller wanted to incorporate would at least be available for the buyer to read, if she chose to do so, before making the decision to purchase.

But other cases have tested the ability of sellers to control the content of the contract with terms contained inside the box, terms which the buyer does not even have a chance to read before the goods have been delivered to her. Earlier decisions had recognized that terms more favorable to the buyer in many ways—express warranties and provisions for remedies, for instance—might be included along with an "owner's manual," a "warranty registration," or some other document packaged with the goods, and that those terms might be enforceable by the buyer on a theory of implied modification.[62] Modifications under U.C.C. Article 2 do not require fresh consideration, so the buyer's assent to a modification favorable to her might reasonably be implied where such a change in terms was proposed by the seller.[63] More recent cases, however, have considered whether the seller can add to the contract terms that are unfavorable to the buyer, or at least terms that she later resists in the context of a dispute with the seller. Two of the best known of these cases were both decided by the Seventh Circuit Court of Appeals in opinions written by Judge Frank Easterbrook. One involved a "shrinkwrap" license contained in a package of computer software;[64] the other tested the validity of an arbitration clause contained, along with other printed material, inside a box delivered to the buyer's home in response to a telephoned order to buy a computer.[65] In both cases, the court concluded that because the buyers, at least in theory, had an opportunity to read the contested language and then withdraw from the contract of purchase, they were bound by the terms of the seller's form. Courts and writers have taken to using the term

61. *E.g.*, Gold Kist, Inc. v. Citizens & S. Nat'l Bank, 333 S.E.2d 67, 71 (S.C. Ct. App. 1985).

62. *E.g.*, Harris v. Ford Motor Co., 845 F. Supp. 1511 (M.D. Ala. 1994) (warranty in glove compartment of new car); Perfetti v. McGhan Med., 662 P.2d 646 (N.M. Ct. App. 1983) (statements in package insert). *See generally* GREGORY M. TRAVALIO, ROBERT J. NORDSTROM & ALBERT L. CLOVIS, NORDSTROM ON SALES & LEASES OF GOODS § 4.05[F][2] (2d ed. 2000).

63. *See* U.C.C. § 2-313 cmt. 7. *See generally* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-5 (5th ed. 2000).

64. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

65. Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

"rolling contracts" to refer to such a situation where buyers contract to purchase goods or services knowing (or arguably having "reason to know") that additional terms would be forthcoming, terms which the seller would expect to be binding on the buyer unless in some prescribed fashion she opted out of the new terms, or perhaps out of the contract entirely.[66]

Such rolling contracts may push the notion of "assent" in standardized-form contracting to—or perhaps past—the breaking point, but the leading cases just described at least involved transactions conducted with some interaction between individuals. Other recent cases go even farther in reducing the human element. Back in the days when mailboxes were real, not virtual, contract law developed a "mailbox rule" to ameliorate some of the problems resulting from negotiations between parties separated by distance. These negotiations were conducted through a medium that necessarily involved some delay in transmission. Physical pieces of mail had to be trucked and trekked from the sender to the addressee, and in the meantime each party was uncertain about the state of their negotiations. The mailbox (or "deposited acceptance") rule was devised to make an acceptance binding when deposited in the mail, thus concluding the bargain at an earlier point in time.[67] As newer and quicker modes of communication came into general use—the telegraph, for instance—they were assimilated into the existing mailbox rule paradigm.[68] But by the end of the Twentieth Century it was clear that most commercial correspondence of any urgency was going to be communicated by some mode involving no significant delay at all, other than the recipient's procrastination in attending to it. The telephone and the telegraph were early advances over what we now derisively refer to as "snail mail," but the telex, the fax, and now e-mail and the Internet are arguably even more significant innovations. Far more important today than any mailbox rule is the prospect of important contracts being formed using these new modes of communication that are not only instant, but involve no direct, real time communication between human beings *at all*.[69] Web sites

66. *See* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743 (2002).

67. *See* RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a (1981).

68. *Id.* § 63 illus. 1.

69. *E.g.*, Specht v. Netscape Comm. Corp., 306 F.3d 17 (2d Cir. 2002). *See generally* Valerie Watnick, *The Electronic Formation of Contracts and the Common Law "Mailbox Rule"*,

present the prospective buyer of goods or services with the opportunity to express assent to a contract merely by clicking through a series of screens, making product choices, perhaps adding them to a virtual shopping cart, and checking "I assent" or even just "submit" whenever requested to do so. At the end of this process an individual may be bound to a contract, the detailed terms of which she has not read or even seen, and of which she probably does not have a copy.[70] Whatever may be the weakness of the assent expressed by one who physically signs her name to a standardized form printed on paper, that act of signing seems to me to have a far more cautionary aspect than the mere clicking of a box on a computer screen.[71] Standardized forms on steroids, electronic contracts seem nevertheless to be viewed so far by many courts that have considered the question as just another acceptable and "efficient" mode of mass-contracting.[72]

A few more developments should be noted here. Mass-market sellers of services such as banks and credit-card issuers, telecommunications providers, and the like, customarily include with the monthly statements sent to their customers other pieces of paper called "bill-stuffers." Sometimes these are statements required by law or regulation to be so promulgated; sometimes they are simply

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56 BAYLOR L. REV. 175 (2004).

70. *E.g.*, Forrest v. Verizon Comm., Inc., 805 A.2d 1007 (D.C. Cir. 2002) (enforcing forum selection clause in electronic contract on general contract principles); *cf.* Comb v. PayPal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002) (recognizing general validity of online agreements but invalidating on ground of unconscionability).

71. Professor Randy Barnett has expressed a contrary view. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002). After discussing the general proposition that by signing an agreement one manifests in general her consent to be legally bound to its terms, Barnett observes: "Clicking the button that says 'I agree' [to a 'click-through' agreement], no less than signing one's name on the dotted line, indicates unambiguously: I agree to be legally bound by the terms in this agreement." *Id.* at 635. But typically the signing of a written agreement, even if accompanied by a series of "initialings" as well, is a one-time action, with substantial "cautionary" as well as "channeling" aspects. (Recall the well-worn phrase: "Sign on the dotted line.") *Cf.* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–03 (1941). In contrast, on-line transactions typically involve a whole series of clickings and typings to get from start to finish; whether any particular one of those has the kind of symbolic significance equal to the signing of one's name on a document seems to me to be extremely dubious.

72. *E.g.*, Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004) (defendant's repetitive conduct bound it to plaintiff's terms and conditions of use). *But see* Specht v. Netscape Comm. Corp., 306 F.3d 17 (2d Cir. 2002) (arbitration clause in defendant's terms of use not binding on plaintiff not shown to have notice of their existence). *See generally* Jennifer Femminella, *Online Terms and Conditions Agreements: Bound by the Web*, 17 ST. JOHN'S J. LEGAL COMMENT. 87 (2003); Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003).

offers of other products or services. Their sheer number and often lack of easy readability make it likely that many go straight from the bill envelope to the "circular file." But occasionally these enclosures purport to restate and modify the terms of whatever agreement the customer might earlier have signed (literally or virtually). Such communications typically permit the customer to avoid the alteration in the terms of her relationship with the service provider only by terminating the relationship within a certain period of time, and/or perhaps before entering into another transaction (e.g., before using the credit card to make a purchase or obtain an advance). Of course, calling them "communications" at all concedes a disputable point, since they may in fact have been designed not to be read, but to be ignored. Some notable judicial decisions have declined to endorse this tactic,[73] but others seem to view this as yet another situation where the consumer has at least an opportunity to read and react, and therefore fails to do so at her peril.[74]

The final—at least for now—step in this process, the *reductio ad absurdum* of contract, seems to be the blanket unilateral-modification clause. In this case, a standardized form—perhaps on paper, perhaps merely clicked-through on a screen—includes a clause that literally permits the drafting party to modify the contract between it and the customer whenever and however it wants, simply by notifying the customer to that effect.[75] This takes Llewellyn's famous "blanket assent" one giant step farther.[76] Not only does the adhering consumer give a blanket assent to any terms contained in the seller's form, but by the terms of that form she also agrees, in advance, to whatever other changes or new terms the seller may wish to impose in the future. To call this a "contract" is to do considerable violence to the notion of contract-as-assent as it existed through most of the Twentieth Century. A somewhat similar situation obtains where employers, that have earlier bound themselves in some fashion to worker-protective rules, may claim the

73. *E.g.*, Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003); Stone v. Golden Wexler & Sarnese P.C., 341 F. Supp. 2d 189 (E.D.N.Y. 2004).

74. *See generally* William J. Condon, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433 (2004).

75. *E.g.*, Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886 (Ill. App. Ct. 2003).

76. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

right later to unilaterally change those rules by simply promulgating new ones. This situation puts employees in the position of choosing between acceptance of the new rules and giving up their jobs.[77]

B. Dominance of the Drafter II

Our discussion earlier described a number of ways in which the creators of contract documents could use their control over the formation process to include terms favorable to themselves. In the preceding section, we noted that new modes of contracting have magnified, to a considerable degree, the drafter's power to impose terms. This would be a matter of some concern even if drafters today were simply making the kinds of contracts that they have been making and that society has been living with for years. This is not the case, however. New modes of contracting are going hand in hand with new types of contracts, with even more problematic results.

In every transaction, a principal function of the drafting of a contract is to cover matters that the law does not address at all by defining the performance that the parties are agreeing to exchange. Every transaction type has aspects peculiar to it, and where the drafter is an enterprise that enters into dozens, perhaps hundreds or thousands of similar transactions, standardized forms are not merely useful, but are an indispensable means of providing the necessary content. A second function of contract drafting is to modify or displace specific default rules, either common law or statutory. Both the common law and U.C.C. Article 2 contain many default rules from which the parties are free to depart by mutual agreement. The mere fact that an agreement departs from the default rules does not, by itself, render that agreement improper or invalid. We have come to call such rules "defaults" for just that reason; they state rules that apply only if the parties have not agreed otherwise.[78] Default rules can represent more than just the law's attempt to provide off the rack

77. *E.g.*, Asmus v. Pac. Bell, 999 P.2d 71 (Cal. 2000). This area of case law is surveyed in W. David Slawson's *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9 (2003). *See also* Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33 (2003).

78. The area of default rules has received much attention from contracts theorists in recent years. *E.g.*, *Symposium on Default Rules and Contractual Consent*, 3 SO. CAL. INTERDISC. L.J. 1 (1993).

terms that mirror those that the parties would otherwise most likely have hand-tailored for themselves. Such rules may reflect policy choices aimed at protecting one party from overreaching or oppression by the other.[79] To the extent that they serve this function, any displacement of such default rules should be subject to the scrutiny of contract law, both procedurally and substantively.

When it comes to displacing rules of law, however, turn-of-the-century form contracts go well beyond their Modern Contract Law predecessors. For a variety of reasons, the present-day mass contract is likely to include terms that in one way or another represent a kind of opting-out, not just from a particular legal rule, but from contract law itself. The fact that Americans have a federal system with fifty-plus legal jurisdictions and a contract law regime that is similarly federalized means that the rules governing contract enforcement vary from state to state—not only the substantive rules, (including the nature and extent of remedies for breach), but also the procedural rules, including the availability and nature of jury trials and of class actions. Furthermore, some states will have enacted legislation that attempts to protect contracting parties, particularly consumers or workers, from various kinds of perceived abuse. This multiplicity of legal regimes creates the possibility that the legal rules of one jurisdiction will be more favorable to the mass contract drafter than the rules of another. For standard-form contracts to pay attention to matters of procedure, as well as substance, is not a new development, of course. The law has traditionally regulated some such terms, such as confession-of-judgment (cognovit) clauses,[80] for instance, and jury waivers.[81] Today's form contract is likely to go farther in several respects including: Choice of law, choice of venue, and agreement to arbitration.

Each of these three devices is a kind of opting-out, to different

79. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (proposing the notion of "penalty defaults").

80. Pursuant to its authority under the FTC Act, the Federal Trade Commission has made it an Unfair Act for a bank to enter into a consumer credit agreement that contains a confession of judgment, or "cognovit" clause. 12 C.F.R. § 227.13 (2006).

81. *See generally* Andrew M. Kepper, *Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine to Justify a Higher Standard of Waiver for Jury-Waiver Clauses than for Arbitration Clauses*, 91 IOWA L. REV. 1345 (2006); Wayne Klomp, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L.J. 545 (2005–2006); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004).

degrees. With a choice of law clause, the drafter attempts to insure that no matter where any litigation involving the contract should take place, the substantive rules applicable to resolution of the dispute will be those of a particular jurisdiction, one whose laws, in at least some respects, are presumably more favorable to the drafter than other jurisdictions' are likely to be.[82] With a choice of venue clause, the drafter attempts to assure itself of a favorable court system as well.[83] To some extent a choice of venue provision may be just a means of buttoning down the choice of law, and the two clauses may well go hand-in-hand. But the choice of venue clause also has a practical aspect. It represents an attempt to make sure that any litigation resulting from the transaction will necessarily take place only at a location convenient for the drafter and quite possibly—and perhaps not incidentally—*inconvenient* for the other party.[84]

An arbitration clause, the third of this trilogy of opting-out devices, goes well beyond the first two. By choosing a method of dispute-resolution that only tangentially involves the court system and need not employ any particular set of legal rules, the drafter is opting out of the legal system almost completely. Only "almost completely," however, because both the contract law system and the public court system may be involved, at least peripherally. The proponent of arbitration must initially resort to the court system for enforcement of the arbitration clause if the other party resists. Judicial aid may also be required to enforce the arbitrators' award

82. Recent developments in this area exhibit a fascinating interplay between legal institutions: The American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") on the one hand, and state legislatures on the other. The recently revised Official Article 1 of the UCC contains a revised choice of law provision, § 1-301(c), that would permit contracting parties (in non-consumer cases) to choose any jurisdiction's law as applicable, while restricting choice of law in consumer contracts to jurisdictions that have a "reasonable relation" to the transaction. U.C.C. § 1-301(e) (2003). State legislatures of nearly half the states have approved the new Article 1, but so far every one of them has rejected this particular change, hewing instead to the former § 1-105(1), which imposed the "reasonable relation" restriction on choice of law clauses generally, without regard to whether they were in "consumer contracts" or not. U.C.C. § 1-105(1) (1995) (amended 2003).

83. *See generally* William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1 (2005).

84. *E.g.*, Bolter v. Superior Court, 104 Cal. Rptr. 2d. 888, 895 (Ct. App. 2001) (holding franchisor's contractual "prohibition against consolidation, limitation on damages and forum selection provisions have no justification other than as a means of maximizing an advantage . . . effectively preclud[ing] franchisees from ever raising any claims against it"). *See generally* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 214 (2004).

once it has been rendered. Contract law potentially comes into play at the first of those two points; the question whether to enforce an arbitration clause necessarily entails deciding whether the parties have entered into a valid agreement that arbitration should be required in the event of a dispute between them.[85] Choice of law and choice of venue clauses must also pass muster with at least one court, and perhaps more than one, in the course of the resolution of the parties' dispute.[86] Because of the way the law has developed in this area, however, the mandatory arbitration clause has the potential of avoiding judicial scrutiny entirely.[87] In situations where a challenge to the validity of the arbitration agreement is deemed by the court to be one which the arbitrators, rather than the court, must decide, the dispute may disappear into the darkness of an arbitration proceeding, never again to see the light of judicial day. Little wonder, indeed, that the compulsory arbitration clause has become a darling of the drafters.

IV. THE TASK FOR CONTRACT LAW

In this section of my discussion, I will argue the following three related propositions:

1) A healthy legal system requires a suitable process by which competing interests may be balanced. This is true of the interests governed by contract law. In the case of individual contracts, the

85. The Federal Arbitration Act ("FAA") provides that to be enforceable an arbitration clause must be part of an enforceable contract. 9 U.S.C. § 2 (2000). State statutes are to the same effect. *See generally* Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069 (1998). See also Knapp, *Taking Contracts Private*, *supra* note 6, at 763 n.7, for a collection of articles on mandatory arbitration.

86. *See generally* Woodward, Jr., *supra* note 83.

87. This is the legacy of the notorious case, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), in which the Supreme Court held that when fraudulent inducement is asserted as the ground for avoiding the effect of an arbitration clause, that issue must be left to the arbitrators for decision unless the asserted fraud was directed at the arbitration clause itself rather than at the contract as a whole. The history and effect of *Prima Paint* is critically examined in Richard C. Reuben's article, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819 (2003) (viewing some more recent decisions as perhaps heralding the demise of *Prima Paint*'s doctrine of "separability"). A more favorable view of that doctrine is expressed in Alan Scott Rau's *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1 (2003). Professor Reuben's hope was apparently unfounded. *See* Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006) (holding that because the contract at issue contains an arbitration clause, arbitrators, not courts, must decide whether the usurious nature of a contract renders it void under Florida law).

legal system is not presently providing such a process.

2) The parties to these individual contracts are more in need of an adequate legal process than are parties to other kinds of contracts. They are also, if anything, more deserving of one.

3) In order to provide individual contracting parties with an adequate process, the courts can and must play a more critical and assertive role where individual contracts are concerned.

A. The Legal System for Individual Contracts is Inadequate.

Whatever its strengths and weaknesses may be in comparison with other systems one might imagine, the Anglo-American legal system by and large has always had as its core an adversarial model. Each party—acting on its own behalf or through a zealous advocate—vigorously presents a claim. In the case of the criminal law system, the competing claims are presented to an impartial tribunal which adjudicates the competing claims and decides whether the guilt of the accused has been sufficiently proven. The tort system is similar, although both the interests at stake and the possible outcomes are substantially different. In both criminal and tort cases, the adversaries present evidence and argue their respective cases, and an independent public tribunal decides the outcome.

In the case of contract law, the picture is more complicated. Since this area of law exists primarily to enforce commercial agreements, and since it presumes generally that parties are able to bargain vigorously in whatever market they are dealing, the initial legal process is, in theory at least, one in which the legal outcome (a negotiated contract, having the force of law) is the product of vigorous and self-interested bargaining by the two adversaries. After their bargain has been struck, and an agreement reached on its terms, a period of mutually beneficial cooperative activity may follow, and indeed may continue through to full performance. But before that point is reached, a dispute may arise between them. Here again, vigorous self-interested bargaining may produce a settlement, based perhaps on the perceived application of rules of law, perhaps on other considerations, or some mix of the two. If a settlement is reached, no third-party adjudication is necessary. Only if the dispute cannot be resolved by the parties themselves will it be referred to some other body for adjudication. This may be a court of law, in which case the court will find facts and apply rules of law as dictated

by the legal regime in which it operates. This picture of American contract law reveals an adversarial system in which two institutions, although acting independently, together mediate the interests of the parties: the market and the courts.

The above description of the contract law process may be simplified and a bit idealized, but not to the point of inaccuracy, I think, at least where two business enterprises are concerned. We can call such a contract a "commercial contract." In the initial contract-making process and in the later resolution of their dispute, each party to a commercial contract will have available to it various kinds of expertise, business as well as legal, and will be able to present its own viewpoint vigorously and potentially persuasively. The more successful the enterprise, the stronger its bargaining power may be, but both parties come to the table knowing they are in an adversarial process in which they are expected to, and potentially can, take care of their own interests.

Now consider the parties to what I choose to refer to here as an "individual contract." By this I mean not a contract between individuals, but a contract between a flesh-and-blood individual, on the one hand, and a commercial enterprise on the other. We are used to calling these "consumer contracts," and I employ a broader term here so as to include contracts in which the individual is not a buyer of goods or services, but rather a seller of her labor. We think of these latter relationships as "employment contracts," but for our purposes here the contract of an individual worker (as contrasted with a collectively bargained labor contract) has enough in common with the ordinary consumer contract to treat them together.[88]

88. In a recent article, Professors Alan Schwartz and Robert E. Scott explored the use of default rules and mandatory terms in commercial contracts, concluding that much present-day contract law is unduly restrictive of parties' freedom to contract as they wish. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003). They confined their observations, however, to what they called "Category 1 contracts," in which firms contract with each other. Contracts between individuals (their "Category 2") they saw as regulated primarily by family law. Contracts in which firms sell to individuals (their "Category 3") they characterized as regulated primarily by consumer protection law, real property law and securities laws, while individual sales to firms (their "Category 4") they relegated to the sphere of employment law. *Id.* at 544. Others have seen contracts as divided into three types: Type (1)—person-to-person; Type (2)—person-to-organization; and Type (3)—organization-to-organization. *See, e.g.*, Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1, 2 (2005) (commenting on Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004)). My discussion here is directed exclusively toward Schwartz & Scott's Categories 3 and 4, which together make up Leib's Type (2); these are the contracts I have referred to above as "individual contracts." My suggestion is

So how does the contract law system treat the individual contract as compared to the commercial contract? Assume, as we did earlier, that the vast number of consumer contracts are standardized forms. Individual workers may not even have written contracts, of course. If they do, however, those contracts will probably be on standardized forms as well. Each form contract will have inserted in it some terms particular to that deal, including what is being purchased, the price to be paid, and perhaps a few other specifics such as time and mode of delivery. Those terms will be more or less transparent—they will be discussed, and, in broad terms at least, understood by both parties. The drafter or its agents will at some point have either created or at least read and understood both the principal terms and the boilerplate (the "fine print") of the form. As a general matter, will the *individuals* who enter into those contracts have available to them the time or the expertise to study and evaluate the boilerplate terms in the contracts they are offered? Will they even read them? If they were to do so, would they understand fully the effects, both legal and practical, that the terms are intended to have? If not, would they retain an attorney to do this job for them? And suppose they did: would they be able to negotiate for, and get, better terms than those offered? Or could they effectively comparison-shop for better terms from competing providers of goods and services? If you answered yes to all or even one of the foregoing questions, then what follows below may be less than persuasive to you—but if you did, you are also not living in the same world as I am. If you are still on board, however, then perhaps you will agree that most of the terms of the ordinary individual contract do not represent the product of a vigorous adversarial bargaining process.[89] This does not necessarily mean that those terms are unfairly balanced in favor of the drafter. If they are not, however, this is because the drafter has voluntarily restrained itself, not because the bargaining power of the individual has produced that result.

If consumers were organized, so that consumer contracts could be collectively bargained, then the combination of market and legal

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that instead of regarding such contracts as specialized and of little interest, the general law of contract should if anything regard them as being in need of more attention rather than less.

89. See the excellent discussion of standardized-form contracting in Rakoff, *supra* note 24, at 1220–29.

institutions could protect the interests of individual consumers, the same way that collectively bargained union contracts protect the interests of individual workers. Ordinary individuals and non-unionized workers, however, take whatever contracts they are offered because they know that realistically they have no choice. In addition, corporate agents they deal with, if questioned about a particular term, may well say truthfully, "Oh, that's not something we can change. That's something the lawyers make us put in."

At the second stage, if and when a contractual dispute arises, can the individual adequately protect her interests? To do so, she must be able to obtain legal advice, and to have access either to a court of law or to an alternate legal process that will offer a sufficiently accessible and neutral adjudicating body. Although a criminal defendant will usually be entitled to legal representation in one form or another if she cannot afford to provide it for herself,[90] the same is not true for parties to civil litigation. The individual plaintiff's ability to obtain legal counsel will depend on her own resources and/or the apparent value of her claim. The ordinary business corporation necessarily has and uses legal counsel at least at the commencement of its activities, and probably from time to time thereafter, so it either has counsel already or knows how and where to obtain it, if and when the need arises. The ordinary consumer or worker neither retains nor has easy access to legal counsel, however, at either the bargaining or the dispute stage. So in an adversarial system, she is at a distinct disadvantage from the outset and remains so throughout. This is not to say that every individual labors under these disadvantages, of course—rich folks who have lawyers also buy things for personal use. (And more and better things, too.) Conversely, not every business enterprise habitually uses or has readily available to it legal counsel. The smaller the enterprise—especially if not in corporate form—the less likely that will be. But we know from our experience in the real world, do we not, that the above generalizations are essentially accurate? *Most* consumers and

90. *E.g.*, Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) (right to counsel in state felony proceeding); Argersinger v. Hamlin, 407 U.S. 25, 27 (1972) (criminal trial in which imprisonment is potential penalty); Ala. v. Shelton, 535 U.S. 654, 658 (2002) (suspended sentence invalid unless defendant given counsel). *See generally* Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835 (2004). The *Gideon* case is the subject of the classic book *Gideon's Trumpet*. ANTHONY LEWIS, GIDEON'S TRUMPET (Random House 1964).

workers do not have legal counsel in the agreement-making process, and *most* will have difficulty obtaining it if a dispute does later arise. On the other hand, *most* business corporations have previously employed lawyers, use forms drafted by lawyers, and are prepared to resort to legal process if necessary to resolve a dispute.

The ability to obtain effective counsel—already chancy at best, for most individuals—may be further impaired by the contractual devices we have discussed above. Limitations and exclusions of warranties, limitations on seller liability, shortened time periods for notice, and the like, are all likely to reduce the value of a plaintiff's claim below what it would be under the default legal rules, and thus also to reduce the likelihood of effective representation. Choice of law provisions may also reduce the value of a claim, and choice of venue provisions may directly increase the cost, financial and otherwise, of bringing one. And an effective arbitration clause, broadly drafted, may have the effect not only of depriving the individual of her right to a jury trial, but also of eliminating the possibility of a class action—the kind of action which for many consumer claims may be the only viable one.[91] Indeed, an effective arbitration clause in an individual contract may have the result of completely deterring any successful legal action by the individual: legal counsel is unavailable and a court of law is inaccessible. It would, I think, be naive in the extreme not to assume that for the drafter of the form contract, this is the ultimate measure of success.[92] "Opting out" in this sense thus becomes not only an intransitive verb, but a transitive one as well, as in "I had a potentially valid claim, but I was opted out."

The previous argument depends in part on the proposition that the agreement-making process should be regarded as an integral part of the contract law system. This seems to go against the conventional common law wisdom that there is little, if any,

91. *See generally* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004). Recent federal legislation will sharply restrict consumer class actions. *See* Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1453, 1711–1715 (West 1994 & Supp. 2006). Regardless of whether one considers this latest development a true "reform" or merely further evidence that business interests presently hold sway over Congress, it nevertheless does represent the appropriate way to implement such changes in procedural law, as opposed to the imposition of opt-out provisions in adhesive individual contracts.

92. *See* Bolter v. Superior Court, 104 Cal. Rptr. 2d 888, 896 (Ct. App. 2001) (franchisor continually modified agreement to constrict the rights of franchisees).

constraint on the bargaining process—no duty (unless specifically assumed) to bargain in good faith, or otherwise to do anything but pursue one's own unbridled self-interest at the bargaining table.[93] In this view the legal system plays a role only later, if and when enforcement is sought. But the making of a contract is not a purely personal act, with which only the immediate parties are concerned. By this I do not mean merely that many important contracts have impacts on those who are not a party to them—externalities, if you will. They do, of course, but my point here is a different one. My agreement to have lunch with my friend tomorrow may meet every requirement of a contract (offer, acceptance, consideration, lawful objective, competent parties, etc.), but commentators have concluded that because it is so purely personal, it is still not a *contract*—not an agreement that the law will enforce.[94] Fine; no problem. But the individual contracts we have been speaking of in this discussion are not personal, in that sense; they have, *and are intended to have*, the potential of legal enforceability.[95] "Agreement" making may be a purely private affair; who I agree to lunch with is nobody's business but mine and his. But "contract" making is a public function, because it creates publicly enforceable rights. To say that an arbitration clause must be enforced because it is part of a valid contract is to beg the question of why that contract—or any other—is enforceable at all. Enforceability of any agreement is a function not just of private assent, but of the body of public law—the law of "contract"—that enables contracting parties to invoke the power of the state. If a business enterprise really wants to opt out of the legal system, then let it rely entirely on extra-legal (but not *illegal*) means

93. *See generally* Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

94. *See* E. ALLAN FARNSWORTH, CONTRACTS § 3.7 at 119 (4th ed. 2004) (citing *Mitzel v. Hauck*, 105 N.W.2d 378 (S.D. 1960) (holding agreement to go on hunting trip not contract for purpose of applying automobile guest statute)).

95. Conventional contract theory says that a subjective intent to be legally bound is not necessary to the formation of a binding contract. RESTATEMENT (SECOND) OF CONTRACTS § 21 ("Neither real nor apparent intention that a promise be binding is essential to the formation of a contract . . . ."). Agreements between individuals may sometimes not be the product of an intention to be legally bound, and sometimes agreements between firms are also intended to be extra-legal. *See* Macaulay, *supra* note 1; *see also* Scott, *supra* note 3; Bernstein, *supra* note 14. But contracts between firms and individuals—the "individual contracts" that are the subject of this discussion—are probably always intended by their drafters to have legal effect, and are so understood by their adherents.

of enforcement, and hope that its contracting partners will feel the same way. But an entity that seeks the aid of the law to enforce any agreement—even an "opting out" one—is necessarily subjecting itself to a public process, where public interests may be at stake.

B Individuals Who Enter into Contracts Need and Deserve the Law's Protection

One might grant every point which the preceding section tries to make, and yet be unconvinced. Why should it matter, you may well ask, if individuals are at a disadvantage when it comes to making and enforcing contracts, if the result is nevertheless a mass-contracting system that gets goods and services to consumers and moves the labor supply around efficiently? These are difficult and important questions, and they deserve a more comprehensive response than I can provide here. My partial, personal response is basically a normative one. These individuals, not the business corporations from whom they buy their goods and services, and to whom they sell their labor—these *individuals* are the polity. *They* are the citizens; *they* are the voters; *they* are the ones created equal, with certain inalienable rights. Should our legal system say to those individuals, "You folks have no legal rights other than those which business corporations choose to give you, and no recourse to the courts if those corporations choose to deny it?" This seems to me to be fundamentally antithetic to a democratic society.[96] To have no ability to bargain effectively over the transactions you enter into, and then to be bound not only to whatever terms the other party may insist on at the outset, but also to whatever terms it may later choose to impose, is simply a denial of your basic humanity—of your citizenhood, if you will. At the start of this discussion, I posited the imminent arrival of a new Medieval era, where the institution of contract becomes not a liberating force, but an enslaving one. Freedom of contract, freedom *to* contract, even freedom *from* contract, each in its way is a kind of freedom. But the freedom to make only contracts which take away your rights is a poor kind of

96. *See generally* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (2004); *see also* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). *But cf.* Sternlight & Jensen *supra* note 91.

freedom indeed.[97]

A related but distinct point, I think, is that justice for individuals simply matters more to them and to the state. Business enterprises are founded for the purpose of making a profit. Some enterprises will prosper and others will languish; indeed, some will become mighty and others will disappear completely. This is not only tolerated by a capitalist economy, it is expected. The stronger and better managed enterprises will survive, and the weaker will fail. Not that the failure of an enterprise does not present a lot of problems for all concerned, but a system of private enterprise assumes that possibility as part of a necessary, and ultimately socially beneficial, process. The demise of a corporation is perhaps a sad occasion, but it is not an actual death. The death of an individual *is*. Individuals must consume to live, and must work to survive. Must we say that individuals who have effectively no choice but to enter into a marketplace where they have little or no legal power are nevertheless to be treated by the law with less solicitude than the powerful corporations with whom those individuals must deal? To do so is to deny the humanity of the former, and falsely reify the latter.

C. Courts Must Play a More Active Role in Adjudicating Individual Contracts

Maybe Twenty-First Century contract law is not in fact actually dead, but it does seem to be, at best, in failing health. Our discussion has arrived at the point of actually attempting to prescribe some medicine for what ails it. There are a variety of different measures that one might consider. Some are legislative, some extra-legal; some may be practical and others probably utopian.[98] But in the short run, the development most likely to stem the tide of drafter dominance would be a recognition on the part of the courts that the individual contract simply does not fit the conventional bargained-for assent model of traditional contract law, and should not be judged by it. Years ago, Professor Arthur Leff famously pointed out that

97. See Todd D. Rakoff's *Is "Freedom from Contract" Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, for a thoughtful and provocative discussion exploring "the possibility that extending the regime of contract may sometimes reduce freedom." *Id.* at 493.

98. *Cf.* Knapp, *Taking Contracts Private*, *supra* note 6, at 790–97 (discussing various approaches to mandatory arbitration).

litigation was an extremely inefficient mode of consumer protection, as compared to legislative and/or administrative regulation of various types.[99] True then and true now, but the problems with the alternatives are today, if anything, greater than they were when Leff wrote. For the time being, pending a change of heart or personnel in our other legal institutions, the courts are the front line here. So how should the courts approach evaluating and enforcing the individual contract?

Long ago, in a legal galaxy far away, Karl Llewellyn considered the problem of the standardized contract. His solution was to regard the adherent to a standard form as giving express assent to the "dickered" terms, plus a "blanket assent" to whatever else the form might contain, subject to the qualification that no assent was to be presumed for "unreasonable or indecent terms."[100] This is not in any sense a true "assent" to each and every term in the form. At most, as Randy Barnett has put it, it amounts to a generalized "consent to be legally bound."[101] This insight may have widespread acceptance among commentators, but the courts have yet to fully appreciate the distinction. For years, judges have issued condescending admonitions that parties who fail to read contracts before signing them are necessarily negligent or unreasonable, and not deserving of the law's protection.[102] Adoption of such an imperial perspective is not only undeserved, but almost surely hypocritical. If ever there was a "duty to read," there surely cannot be one today, at least not where standardized individual contracts are concerned. A few years ago, discussing today's mass-contracting practices, I wrote the following: "Imposing a general duty to read is one thing; imposing such a duty in circumstances *where we know it cannot or will not be performed* is Catch-22 with a vengeance."[103] Where a standardized individual contract is at issue, strict scrutiny of that contract by the courts is not only appropriate, but necessary. Assuming that insight were to be generally accepted, what are its implications for contract law? What should "strict scrutiny" mean, where contracts are

99. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970).

100. LLEWELLYN, *supra* note 76.

101. Barnett, *supra* note 71, at 634–35.

102. *E.g.*, Parrish v. Jackson W. Jones, 629 S.E.2d 468 (Ga. Ct. App. 2006).

103. Knapp, *Taking Contracts Private*, *supra* note 6, at 770.

concerned?

To begin with, every standardized individual contract should be regarded, presumptively at least, as procedurally unconscionable.[104] This terminology can be off-putting, because it seems to assume that the way in which the contract was formed is to be regarded as somehow shockingly unfair. Not at all. A declaration of procedural unconscionability is merely contract law's way of sorting—of identifying contracts that were formed in a fashion that permits their drafters virtually unchecked latitude, making it appropriate for their contents to be subject to judicial review if and when legal enforceability is at issue. Standardized individual contracts by their very nature fall into that category, and should therefore be so treated. Since this presumption is based on generalities about contracting practices, it should of course be a rebuttable one, but here again a kind of strict scrutiny is appropriate. First of all, the burden should be on the drafter to rebut it, not the other way around. To require an individual consumer to show, as a predicate for judicial examination of the terms of her contract, that she shopped around for better terms elsewhere and could not find them is absurd. It is precisely because individuals generally do not and cannot engage in this kind of self-protective activity that a presumption of procedural unconscionability is justified in the first place.[105] What could rebut it? A showing that the term in question was understandingly and willingly assented to. Otherwise, the mere fact that an individual might have had alternatives had she the time, the resources, and the knowledge to shop for them is simply irrelevant.

A related issue of assent arises with rolling contracts, and with forms that purport to give their drafters more or less unlimited power to revise the contract in the future, with or without some effective

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104. The notions of "procedural" and "substantive" unconscionability were originated by Professor Leff in his seminal article, and have become standard in the case law and the literature. Leff, *supra* note 36, at 489–528.

105. In a paper written for a seminar course at Hastings, one of my students observed:

> Proving procedural unconscionability in the form of oppression presents a vexing problem for consumers seeking to claim some aspect of their purchase agreement is unconscionable . . . . Such proof often requires the buyer to possess extensive legal knowledge prior to initiating the transaction and almost always requires the buyer to engage in unrealistically diligent bargaining efforts.

Thom Neale, Unconscionability Doctrine Revisited: Leff's "Functional Pathology" with a Perverse New Twist 23 (March 5, 2006) (unpublished paper, U.C. Hastings College of Law) (on file with author).

opportunity on the part of the adherent then to resist or withdraw. I have argued above that any terms that the individual is unable or unlikely to access before being bound must necessarily fall into the procedurally unconscionable category. What about those that come after? Assuming that the adhering party knows, or should know (no, I mean *really* should know), that additional or changing terms will be forthcoming later, it is certainly possible to argue persuasively, as Randy Barnett has done, that the adherent's "consent to be legally bound" can apply to the later terms as well as those on the table at the outset.[106] But even if we concede as a general matter that there can be implied a consent to be legally bound by later terms, those later terms should surely have no greater legitimacy in terms of "actual assent" than the original ones did. If anything, they should have less. Bill-stuffers are not going to be read at all;[107] booklets in the box are going to be read only to the extent that they contain operating instructions.[108] Yes, one might sit down and study the terms of the insurance policy that came in the mail,[109] and yes, one might read through the boilerplate of a cruise ticket to see if there is anything scary there.[110] But one does not, unless and until some circumstance makes it seem necessary to do so. Otherwise, life is too short. I know it, you know it, and whether they will admit it or not, judges know it too. No presumed consent to be bound by rolling or later-added terms should preclude the court from treating any such rolling contract as procedurally unconscionable, and therefore subject to substantive judicial review.

Before going on to address the topic of substantive unconscionability, we should spend a little more ink on the notion of understanding and willing assent. It is not uncommon for an employee to be asked by her employer to agree to a contract, on the pain of otherwise being fired from her job. Maybe this is a non-compete agreement;[111] maybe it provides for arbitration of any

106. Barnett, *supra* note 71, at 642–43.

107. *E.g.*, Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).

108. *E.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

109. *E.g.*, C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975).

110. *E.g.*, Carnival Cruise Lines v. Shute, Inc. 499 U.S. 585 (1991).

111. *See generally* M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137 (2003) (exploring the current state of the law on non-compete contracts).

dispute arising out of her work relationship.[112] Whether it involves a standard form or a hand-tailored agreement, in either case this need not be a situation where the employee is ignorant of the content and meaning of the terms to which her agreement is sought; quite the contrary. Assuming such knowledge on her part, should a worker's agreement made under the threat of being fired be necessarily enforceable? The common law of contract permits avoidance of a contract made under duress; this usually entails the making of an improper threat which leaves the other party no reasonable alternative.[113] The employer's argument here is that a threat to fire an at-will employee cannot be an improper one, because at-will employees can generally be discharged for, as it is traditionally put, "a good reason, a bad reason, or no reason at all," and that in any event the employee always has a reasonable alternative—she can quit. But this argument goes too far. First, it is not generally true that the discharge of an at-will employee can never be wrongful; the law in most jurisdictions permits some exceptions.[114] And apart from that, even though a statement of intention simply to discharge someone who has no general legal protection against discharge may not ordinarily be a "wrongful" act, the threat to fire an employee whom you would not otherwise fire, *solely to get her to enter into a substantively unconscionable agreement*, ought to be regarded as a wrongful one.[115] Of course that leaves open the question of whether the agreement really *is* substantively unconscionable, but the court cannot even address that issue unless it gets past the roadblock of what we may, I think, fairly regard as an extorted "assent." Does the worker have a reasonable alternative? It is, again, condescending in the extreme to proclaim that a worker who depends on her job to feed her family and provide health insurance for them necessarily has

112. *See generally* Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 79 (2003) (stating that the average employee "has little power to refuse when the arbitration agreement is offered as a condition of employment").

113. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

114. *E.g.*, Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (discharge in order to deprive employee of earned commission); Schuster v. Derocili, 775 A.2d 1029 (Del. 2001) (discharge for resistance to sexual harassment). *See generally* KNAPP, KCP, *supra* note 32, at 472–77.

115. *E.g.*, D'Sa v. Playhut, Inc., 102 Cal. Rptr. 2d 495 (Cal. Ct. App. 2000) (employee fired for refusing to sign agreement containing illegal covenant not to compete).

a "reasonable" alternative to her present employment.[116] It may be argued in opposition that such an approach would make it impossible for employers to enter into binding contracts with their employees, but of course that is not the case; it would simply inhibit the making of *substantively unconscionable* ones.

Another situation in which the individual might arguably have knowledge of the terms of the contract she later seeks to avoid is where she claims fraud in the inducement by the drafter's agent.[117] One may well understand, in general, the terms of the bargain to which she is agreeing, and yet be induced to enter into that bargain by fraudulent or material misrepresentations. Form contracts commonly contain a combination of provisions aimed at staving off such claims: a strong merger clause; a clause stating that no representations or warranties have been made other than those expressed in the form; a clause disclaiming any reliance by the adherent on any other representations; or a statement that no agent of the drafting party is authorized to make any representations other than those in the writing. These terms are designed to enable the drafter to invoke the parol evidence rule, so as to prevent any showing that oral representations or promises were made at all; to preclude the adherent from claiming that she relied on any oral representations, to the extent that any were actually made; and to allow the drafter to disclaim responsibility for any representations that were made and actually relied on, on the theory that in any event they were outside the scope of the selling agent's authority. Such drafting devices are often successful, and, as between commercial parties, that may often be the right result.[118] But each one of those arguments is persuasive only if one assumes that the individual read,

116. *See generally* Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415 (2006); Sara Lingafelter, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U.L. REV. 803 (2005).

117. See the comments to section 163 of the Second Restatement of Contracts, which describe "fraud in the factum" as fraud which prevents formation of any contract at all (such as deceiving the other party into believing she is signing something other than a contract), as opposed to "fraud in the inducement," misrepresentations made to persuade the other party that the contract is a desirable one. RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. a. This is the same distinction made by UCC Sections 3-305(a)(1) and (2) in defining the enforcement rights of the holder in due course of a negotiable instrument. *See* U.C.C. § 3-305 cmt. 1, para. 5.

118. *See, e.g.*, Danann Realty Corp. v. Harris, 157 N.E.2d 597 (N.Y. 1959) (holding that a disclaimer of representations clause in a commercial real estate contract precluded the buyer's claim of fraudulent inducement, despite the traditional rule that the parol evidence rule does not prevent proof of fraud).

and understood, and assented to, *those particular terms*. In the case of an individual contract, we cannot and should not assume that to be the case. If the adherent makes a prima facie case of fraud in the inducement, on the usual standard of clear and convincing evidence, the burden should then be on the drafter to rebut that case, either by meeting her factual showing of fraud with credible evidence to the contrary, or by showing not merely that she signed the form, but that she did in fact understand and agree that the agent's representation would not bind his principal.[119] If this puts more of a burden on the drafter than the traditional rule, then so be it. This is a burden that the drafter *should* bear, as part of its cost of doing business. Under this approach, enterprises would have an appropriate incentive to better train and supervise their agents, or else to effectively communicate to adhering parties the *non*-reliability of their agents' representations.

Constraints of both time and space preclude our discussing in detail here the numerous contractual clauses that might be tested against the standard of substantive unconscionability. That's a topic for another article—as of course it already has been, countless times.[120] I want merely to suggest here that in many cases the courts' approach to this question has also been flawed where individual contracts are concerned. In the early heyday of unconscionability jurisprudence, many courts reacted vigorously against commercial practices that they regarded as unduly exploitive, particularly of low-

119. I have suggested above that terms providing for choice of law, choice of forum, and mandatory arbitration are qualitatively different from garden-variety terms because in various ways they limit adhering parties' access to the legal system that would otherwise resolve their disputes. In somewhat similar fashion, it seems to me that terms like the merger clause, the no-oral-modifications clause and the no-oral-representations clause are also qualitatively different from terms that merely define the performance (how many, what quality, when delivered, etc.) or the available remedy (damage limitations, etc.). These devices are intended to limit the court's ability to find and enforce the agreement-in-fact between the parties. Hence my suggestion that where the adhering party has made a sufficient prima facie case for fraud in the inducement, a mere general "consent to be bound" by the written agreement should not be seen as a relinquishment of the right to make that case.

120. In addition to Professor Leff's article, *supra* note 36, some notable examples include Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459 (1995); and Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359 (2001) (discussing the effect of the recent revision of Article 2 on the unconscionability rule).

income consumers. To some extent the legislatures and the agencies took up that task, and judicial activity along this line abated. With the ascent of Reaganomics' dynamic duo of privatization and deregulation, interest in consumer protection reached a low point across the board.[121] The recent renascence of unconscionability as a doctrine that can actually decide cases is traceable mostly to historical accident. As the Supreme Court and lower federal courts have developed the jurisprudence of the Federal Arbitration Act, there is almost no way that a trial court—federal or state—can play any role in adjudicating the effect of an adhesion contract with an arbitration clause, other than by invoking the notion of unconscionability.[122] The Supreme Court's sustained effort to overcome any lingering vestige of anti-arbitration sentiment on the courts' part, however, has produced a situation where it is simply legally impossible to argue that an arbitration clause is unconscionable merely because it shunts the parties' disputes into arbitration; there must be a showing that the arbitration process called for by the particular agreement would be substantively unconscionable in one or more respects. The result has been a ballooning of present-day cases in which the notion of unconscionability is not only argued, but argued successfully ("Unconscionability II").[123] In this new line of decisions, the standardized contract is characterized as a contract of adhesion, and for that reason as being procedurally unconscionable. The court then examines the arbitration clause in detail, and explains what aspects of its operation would be substantively so unfair to the adherent as to be deemed legally unconscionable.[124] The Supreme Court may yet clamp down on this safety valve, requiring even the issue of

121. The various stages in the development and application of unconscionability jurisprudence are admirably set forth by Professor Jeffrey W. Stempel in his article, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 812–40. (2004).

122. *See id.* at 792–812.

123. *See id.* at 803–12; *see also* cases cited in Knapp, *Taking Contracts Private*, *supra* note 6, at 796 nn.118–19.

124. *E.g.*, Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669 (Cal. 2000); *see also* Dunham v. Envt'l Chem. Corp. No. C06-03389JSW, 2006 WL 2374703 (N.D. Cal. Aug 16, 2006); Higgins v. Superior Court, 140 Cal. App. 4th 1238 (Ct. App. 2006). For a critical analysis of the California courts' approach to unconscionability analysis in arbitration cases, see Michael G. McGuinness and Adam J. Karr's *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61.

unconscionability to be resolved by arbitrators and not by judges,[125] but for the time being many courts clearly regard this issue as still within their purview. One long-term result of these new decisions may well be an increased tendency to regard standardized, adhesive forms in general as procedurally unconscionable, and therefore subject to the kind of strict scrutiny suggested above. That of course would have implications across the board for all manner of individual contracts.[126] The immediate result of Unconscionability II is that we now have a fresh spate of decisions addressing claims of *substantive* unconscionability. In one sense, these decisions are peculiar to the ongoing and unresolved battle over mandatory arbitration, but in a larger sense, they may represent a growing willingness on the courts' part to examine carefully the effect of a challenged contractual provision *on the adhering party.*

Here, it seems to me, is the heart of the matter. Since free-market economics became the reigning philosophy of not only economists but many legislators and judges as well, it has seemed that virtually any contract term one can imagine—"indentured servitude" may be an exception—can be viewed as "efficient," and therefore beyond challenge, merely because it may reduce operating costs, make business more flexible, and generally be good for profits. But this is hardly strict scrutiny; at most it's a kind of rational basis test—could the drafter have had a legitimate business reason for imposing this term? To ask the question is to answer it; the desire to reduce costs and maximize profit is *always* a rational basis for a corporate action. This approach is buttressed by the argument that otherwise businesses will just pass their expenses on to consumers, and then we will all be worse off.[127] Whether increases in the

125. The Supreme Court is still apparently bent on pursuing its expansive pro-arbitration course. *See* Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006).

126. *See* Stempel, *supra* note 121, at 808–12.

127. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), Mr. Justice Blackmun, writing for the court, declared that the defendant's choice of forum clause requiring trial in Florida should be upheld and applied against the plaintiffs, Washington state residents, and added the following observation: "*it stands to reason* that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." *Id.* at 594 (emphasis added). In contrast, in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), the court declined to accept the defendant's invitation to rule that long-distance carriers automatically pass on to their customers any cost savings realized from substituting arbitration for litigation; noting that the case came up with specific findings of fact that the arbitration provision at issue did not in fact affect AT&T's costs, the court declared that it need not reach that issue. *Id.* at 1147.

corporate cost of doing business will invariably be passed on to consumers may be doubted; it seems at least barely possible that in some cases market constraints will be such that the result could instead be lower profits, or even lower executive salaries. (Okay, we are fantasizing a little there.) In any event, what is missing in that approach is a consideration of the impact of the contract or the particular clause on the other party, the consumer or worker. Individuals who enter into standardized contracts should at least be entitled, when the enforceability of those contracts is called into question, to have their interests balanced against those of the drafters, instead of being ignored on the tacit assumption that whatever helps business helps everybody. Calvin Coolidge once famously said, in a dictum which for many years a lot of us thought was amusingly dated, "The business of America is business."[128] Well, that wasn't true in the Twenties, and it's not true today. The business of *business* is business, to be sure. And maybe the business of business *lawyers* is business, too. But the business of America's legal system is protecting the life, liberty, and pursuit of happiness of its people.

V. CONCLUSION

The problem of mass-produced contracts of adhesion was a Twentieth Century problem for contract law, which Twentieth Century contract law never really solved. This was, of course, partly because not everyone considered it a problem. But even those who did were not able to come up with a principled approach that worked, in the sense that courts would adopt and put it to general use. My suggestion in this article represents my own good faith effort to steer a course between the anything-goes, rational-basis Scylla of automatic enforceability, and the somewhat scary Charybdis of presumed invalidity. Leaving for another day the question of how to deal with contracts between business enterprises having great inequality of bargaining power,[129] I have stressed the particular

128. That is indeed what President Coolidge is famous for saying, as a quick Googling will demonstrate. What he actually said was: "[T]he chief business of the American people is business." CLAUDE M. FUESS, CALVIN COOLIDGE—THE MAN FROM VERMONT 358 (1940). Fuess goes on to quote the longer passage from which this excerpt is taken, which does read a bit better than the simplified sound-bite version, but Coolidge was clearly a trickle-down economics enthusiast—to the extent that he was enthusiastic about anything. *See generally* DONALD R. MCCOY, CALVIN COOLIDGE—THE QUIET PRESIDENT 314–21 (1967).

129. *See generally* Garvin, *supra* note 13; Morant, *supra* note 13 (exploring that question at

vulnerability of individuals in a corporation-dominated marketplace, where the individual's ability to understand and bargain over any but the most basic terms is simply lacking, albeit for a host of perfectly understandable reasons.[130] And I have here joined my voice with others who have over the years lamented the misuse of contract law that follows when the power of the State is employed to reinforce the power of those private interests who already wield great economic power, and are prepared to use it against those who have virtually no economic *or* legal power, public or private.[131]

When I began teaching contracts, some forty-odd years ago, fresh from a good law school and a few years at a top-drawer law firm, it simply did not occur to me that there were significant public policy issues involved in that task. The duty of a contracts professor seemed to me to be merely that of training effective attorneys, and possibly skillful and sensible judges. This limited field of vision may be traceable to aspects of my own background and training, but I think it also reflects those earlier times, times when "public" law seemed on course to move steadily and predictably toward a vision of political and economic justice for all, while "private" law just did its own thing. That was Then, though, and this is Now. Twenty-First Century contracts teachers understand, I hope, that whatever legal bells are tolling must necessarily be tolling for them as well—that they are part of the ongoing dialogue in which *all* law teachers, *all* lawyers, and *all* judges are engaged. Like so many Clark Kents, mild-mannered and bespectacled, we nevertheless are called upon to use whatever powers we possess in the search for Truth *and* Justice. Because indeed that also is—or should be—The American Way.

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length).

130. *See* Rakoff, *supra* note 24; *see also* Barnett, *supra* note 71 (suggesting that hostility towards form contracts stems partly from an implicit adoption of a promise-based conception of contractual obligation).

131. *See* Reuben, *supra* note 96 (recognizing that the relationship between democracy and mandatory arbitration is a problematic one); *see also* Slawson, *supra* note 96 (advocating an "administrative law" of contracts to keep form contracts consistent and fair to both parties).