

FREEDOM FROM CONTRACT: SOLUTIONS IN SEARCH OF A PROBLEM?

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INTRODUCTION

The phrase "freedom of contract" carries philosophical, ideological, and symbolic baggage. Thus, when we contrast the idea of "freedom *from* contract," we at least hint at irony or paradox. It is hard to imagine much freedom from contract if we translate "contract" to mean all of the relationships of human existence. Most papers in this collection consider freedom from legally enforceable contracts. Parties have decided that they will rely on relational norms and sanctions rather than the law or the law has decided that the world will go around better if we turn some people away from courts who want to complain of a breach.

Do we need freedom from contract? Are scholars' papers about such a beastie "solutions in search of a problem?" Let me stress the question mark at the end of my title. It is at least worth some thought about whether there is a problem, what it is and how important it may be. It seems appropriate in a symposium at Wisconsin to look to the law in action. If we do this, we will find there is a great deal of freedom from legally enforceable contracts. Sometimes it is a good thing; sometimes it is not. However, once we leave the land of appellate opinions, it is not easy to draw firm conclusions. The necessary data are lacking, and getting the data would not be easy.

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I. COST BARRIERS TO LITIGATION CREATE A FREEDOM FROM CONTRACT

A. *The Vanishing Contracts Trial*

In an important sense, there is a great deal of freedom from contract. Many, and probably most, parties to contracts disputes do not litigate or even threaten to do so. Some know that if they went to court, they would lose. However, many who might or almost certainly would win do not litigate. We know that there were more contracts trials and appeals in the late-nineteenth and early-twentieth centuries than there are today. While authors of casebooks can still find specimens for class dissection, recent trends show fewer contracts filings and contracts cases litigated.

For example, Lawrence Friedman and Robert Percival studied the work of trial courts in Alameda and San Benito counties in California between 1890 and 1970.¹ The percentage of family and tort cases filed in both courts rose dramatically, but property and contracts cases fell just as drastically. Robert Kagan tells us "[i]n eighteenth- and nineteenth-century American courts, debt collection cases . . . seem to have dominated the judicial process. . . . In the twentieth century, however, there has been a dramatic decline, both proportionally and in absolute numbers, in debtor protection/creditors' rights opinions by state supreme courts"²

Marc Galanter has sketched the more recent picture in filings of contracts cases in federal courts where jurisdiction is based on diversity of citizenship.

Diversity contract filings in the federal district courts rose steadily from less than five thousand cases in 1960 to over thirty-two thousand cases in 1988. From 1982 to 1990, often regarded as the very core years of the litigation explosion, diversity contracts filings actually outnumbered tort filings. Contracts filings declined precipitously when the jurisdictional amount was raised from \$10,000 to \$50,000 in 1989 and have since been relatively flat in the low twenty thousands.³

1. See generally Lawrence M. Friedman & Robert Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267 (1975).

2. Robert Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 LAW & SOC'Y REV. 323, 324-26 (1984).

3. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 583 [hereinafter Galanter, *Contract in Court*].

The National Center for State Courts' data for nineteen states show that population-adjusted contracts filings declined by 14% after 1987, the peak year for such filings.⁴ The center shows that from 1992 to 2001, there were major declines in contracts filings in many states. For example, the declines in Colorado were 31%, Minnesota were 28%, New York were 22%, and Wisconsin were 37%.

Also, there were fewer trials. From 1988 to 1999, the number of federal diversity contract jury trials fell from 1014 trials to 422.⁵ All contracts jury trials over the same period fell from 1126 trials to 466, and bench trials fell from 1381 trials to 436.⁶ Researchers found that in the 75 largest counties in 1996, the number of contract jury trials had fallen from 2205 trials in 1992 to 1740 in 1996.⁷

Contract cases are only part of a more general trend. The American Bar Association (ABA) issued a report called *The Vanishing Trial*. It says that the percentage of all civil cases going to trial in federal courts has dropped from 11% in 1962 to 1.8% in 2002.⁸

These data suggest that there is a great deal of freedom from contract litigation. Sometimes, contracts problems have been resolved without turning to law. Sometimes, all a party can do is accept his or her losses and hope to do better in the future.

There are many explanations for these statistics. To some unknown and unknowable extent, it is possible that the number of contracts disputes is falling because less litigation reflects a happier world. Contracts provisions that provoke litigation can be redrafted. People learn whom to deal with and whom to avoid. Disputes may be prompted by disruptions such as the increase in oil prices caused by OPEC, the introduction of computers or the terrorist attacks of September 11. Parties cope with the shocks to their assumptions caused by such events and plan for similar problems in the future.⁹ Parties can

4. BUREAU OF JUST. STAT. ET AL., EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 30-31 (Brian J. Ostrom et al. eds., 2002), at http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Front_Matter.pdf.

5. Galanter, *Contract in Court*, *supra* note 3, at 597.

6. *Id.* at 598.

7. *Id.* at 597.

8. MARC GALANTER, THE VANISHING TRIAL: AN EXAMINATION OF TRIALS AND RELATED MATTERS IN FEDERAL AND STATE COURTS 2-3 (2004), available at <http://www.abanet.org/litigation/taskforces/cji/nosearch/home.html>; see Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1; Patti Waldmeir, *The Decline and Fall of the American Trial*, FIN. TIMES, Jan. 5, 2004, at 7.

9. A California lawyer, talking about the disruption of contracts caused by the September 11 attacks in New York and Washington, said: "The pattern has always been that people address these things with general language . . . [W]hen some unexpected permutation occurs, they all rush to address that specifically." Lisa Girion, *Businesses Seek a Legal Escape from Terrorism*, L.A. TIMES, Oct. 14, 2001, at C1 (internal

renegotiate their deal, and one side can give up its rights when the letter of the deal would burden the other. This may not please the one surrendering rights, but it may be the best solution available.¹⁰ Kagan suggests that the decline in debt collection cases coming before the courts can be explained in part by what he calls "systemic stabilization."¹¹ This involves "the development of large-scale economic and social institutions that ameliorate the conditions that cause individual conflicts or that provide collective, administrative remedies (as contrasted to case-by-case legal remedies)."¹² We can look for such institutions that cope with potential contracts cases.

Nonetheless, the explanation for the decline in contracts filings and trials may be only that they do not pay in light of their costs. Samuel Gross and Kent Syverud say that the "main function" of trials in our system is not dispute resolution, but rather, it is to deter other trials, and this function is carried out very successfully.¹³ "The major elements of the system . . . all fit together to make trial the dangerous event we need to drive nearly everyone to settle."¹⁴ Trials are costly and risky. In contracts cases, very often the available remedies are not worth taking the risk of the needed investment.¹⁵ Mitigation,¹⁶ proof of damages with

quotations omitted). He expected more contracts clauses to deal with the consequences of terrorism explicitly. *Id.*

10. See Jeswald W. Salacuse, *Renegotiating Existing Agreements: How to Deal with "Life Struggling Against Form,"* 17 NEGOTIATION J. 311, 323 (2001) ("Long-term agreements . . . are 'obsolescing bargains.'"); Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT'L L.J. 1319, 1366-67 (2001) [hereinafter Salacuse, *Renegotiating International Project Agreements*]. Salacuse stated:

In an extra-deal renegotiation, the general tendency of the party who feels it has been forced into renegotiation is to fight a rear guard action, to raise recriminations, to see the process as the worse kind of win/lose activity in which anything gained by the one side is an automatic loss to the other party. The challenge for both sides in a renegotiation is to create a win/win process, an atmosphere of problem-solving, joint gains negotiation. Even if a party feels forced into an extra-deal renegotiation, it should approach the process as an opportunity to create value, to make the pie bigger.

Salacuse, *Renegotiating International Project Agreements*, *supra*, at 323, at 1366-67.

11. See Kagan, *supra* note 2, at 352-63.

12. *Id.* at 352.

13. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 63 (1996).

14. *Id.* at 64.

15. Some lawyers are experts at inflicting costs on the other side. Mike Jordan, a lawyer with Womble, Carlyle, Sandridge & Rice of Winston-Salem, North Carolina, served as an outside attorney for R.J. Reynolds Tobacco Company in California litigation involving the tobacco industry. He wrote:

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending

reasonable certainty,¹⁷ *Hadley v. Baxendale*,¹⁸ and the difference in value rule of *Peevyhouse v. Garland Coal & Mining Co.*¹⁹ all undercut recovery of very real but unquantifiable intangible losses. Also, a major reason a party does not perform a contract is that he or she or it is broke. A judgment may give you only a worthless claim in bankruptcy. Thus, the contract cases worth litigating form only a very limited subset of all the contracts disputes, and even a victory in court may produce no more than a settlement. Of course, to call being priced out of the market for a contracts trial a form of freedom from contract may strike many of us as ironic. In that sense, I also have a freedom from contract to buy \$100,000 automobiles or multimillion dollar houses. I confess that I had never before thought of the salaries at the University of Wisconsin Law School as benefiting me in these terms.

We should think of freedom from contractual litigation as something that comes in degrees rather than something that does or does not exist. A contract to supply illegal drugs offers almost no chance of prompting civil litigation in the public courts. Contracts to supply legal products may, as a practical matter, be almost as unlikely to provoke the filing of a complaint. For example, suing on a contract might end a beneficial long-term continuing relationship. Contract doctrine, such as the Statute of Frauds or the requirement of certainty of obligation, may bar judicial remedies for a breach of what the parties saw as a binding deal. Yet, even when the parties do not sue, what might happen in contractual litigation can influence the way they resolve their dispute. They may "bargain in the shadow of the law."²⁰ The buyer's settlement

all of Reynolds' money, but by making that other son of a bitch spend all his.

Available at http://www.kazanlaw.com/verdicts/images/exb_d_sob.gif (last visited Aug. 15, 2004).

16. See, e.g., *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689, 694 (Cal. 1970).

17. Compare *Evergreen Amusement Corp. v. Milstead*, 112 A.2d 901, 904 (Md. Ct. App. 1956) (finding that the profits for the first year of operation of a drive-in theater were not sufficiently reasonably certain despite a clear track record for the second year of operation because it takes time to establish a new business), with *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1365 (7th Cir. 1996) (holding that in a breach of contract involving the manufacture of china with holiday patterns, the specialty stores statements that in their opinion such china would have sold was sufficient to satisfy the reasonable certainty rule and get to the jury, even though the buyer had never previously marketed such a product to those stores).

18. 156 Eng. Rep. 145 (1854)

19. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962), *cert denied*, 375 U.S. 906 (1963).

20. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); see also HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 73-75, 103-04, 132-33 (1991) (arguing that we must be careful

offer can reflect a careful appraisal of the seller's legal position. Other settlements, however, involve great freedom from contract. Instead of looking to respective rights and duties created in the past, the parties, or their lawyers, may seek a new solution to the problem that now confronts them. The seller may redesign the product. The price may be modified. The term of the deal can be limited or extended. Sometimes, we can talk about these settlements as being implicit in the parties' relationship, but they usually go far beyond what even the most expansive reading of the law of impossibility or frustration would ever yield. They are well toward the freedom end of the freedom from contract scale.

Matters may be even more complex. What begins as contract litigation may provoke a settlement that is forward-looking and not merely an implementation of the rights and duties created when a contract was formed. For example, AK Steel is General Motors' (GM) largest supplier of steel, and GM's business is about twenty percent of AK's sales.²¹ In late 2002, there was a dispute over their long-term contracts that prompted actions brought in Michigan and Ohio courts by the two corporations. The *New York Times* reported:

Under the terms of the contracts, the price paid by G.M. declines over time. But AK Steel contends in court filings that new inspection, testing and quality control systems requested by G.M. increased its costs and that it was not compensated, as required by the contract.

"There's a clause in our contract that stipulates if we incur higher costs to supply steel as a result of increased testing and other changed requirements, that we recoup those increased costs," Mr. McCoy of AK said. "General Motors has another view of that."

Renee Rashid-Merem, a spokeswoman for G.M., said: "We're expecting them to meet the quality requirements that are part of the contract and we expect them to deliver the steel in accordance with our contract. Whether they've had to incur

with the "bargaining in the shadow of the law" metaphor). Kritzer notes that little back and forth negotiation may take place. The lawyers may just know the going rate for settlement. The law in this phrase means more than the rules. The bargaining, such as it is, takes place in the shadow of the ongoing legal system with its costs and delays. See generally Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585 (1987); Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565 (1992).

21. *AK, GM Settle Suits Over Steel*, CINCINNATI POST, June 18, 2003, at <http://www.cincypost.com> ("GM accounted for 20 percent of AK's 2002 net sales").

new processes or additional costs to meet the quality requirements, that's their issue to manage."

. . . .

Wayne Atwell, an analyst at Morgan Stanley, said that in previous years "the auto industry was the eight-foot gorilla and would force the steel industry to go along with what was necessary."

"Frequently, you wouldn't get paid for extras or different inspections or specs," he said. "You had to swallow those higher costs."

Now supply is tight, he added, and it would be difficult for G.M. to replace its supply from AK easily. "It would be hard," Mr. Atwell said.²²

Five months later, GM and AK withdrew their suits. AK's spokesman confirmed this much, but he refused to disclose any details.²³ We do not know the terms of the settlement, but it seems likely that more was involved than one party's acceptance of the other's interpretation of the language of the original contract. Litigation may have put the problem on the agendas of people in the two corporations who had greater power to give up possible contract rights and move to a new arrangement. If the two corporations reworked their relationship this way, we could view the situation as one where filing a law suit caused a movement from contract litigation to a kind of freedom from contract.²⁴

22. Danny Hakim, *Steel Supplier is Threatening to Terminate G.M. Shipments*, N.Y. TIMES, Feb. 7, 2003, at C1.

23. Len Boselovic, *Post-Wardrop May Be Even Tougher on AK's Workers*, PITTSBURGH POST-GAZETTE, Sept. 22, 2003, at B1; see also John Byczkowski, *AK Steel Criticizes Governor*, CINCINNATI ENQUIRER, June 17, 2003, at B8.

24. Cf. Robert M. Smith, *Saving Ourselves from Being Lawyered to Death*, WASH. POST, Dec. 23, 1996, at C4 ("Ninety-five percent of lawsuits settle. The problem is when that settlement takes place. If they settle—as so many of them do—in the last 20 percent of the life of the suit, most of the fees, psychic distress and diversion of management time and attention have already taken place."). GM has continued to sue suppliers of steel and auto parts that try to pass on the rising price of steel. See Paul Glader, *GM Yields to Higher Steel Prices*, WALL ST. J., Mar. 23, 2004, at A3; *GM Sues Textron*, *Steel Dynamics*, L.A. TIMES, Mar. 24, 2004, at C3. These cases may or may not be settled. However, in Professor Robert Ackerman's words:

It is, for better or worse, the availability of a leviathan that can force petulant parties into the courtroom, make a decision and then make it stick (through judicial enforcement mechanisms) that force parties to consider

B. ADR: Big Corporations Take the Pledge

Another likely explanation for the decline in contracts case filings and trials is the rise of alternative dispute resolution (ADR).²⁵ ADR refers to a wide variety of processes and institutions, and they are very hard to study in any depth because privacy and secrecy are one of the attractions of many types. There are many forms of court-annexed ADR that are now common place, but there are a wide variety of institutions that exist very much apart from the courts. Some kinds of arbitration are just contracts litigation with another name, but some other forms of ADR do not involve the assertion of rights established in the past but instead are attempts to solve problems looking toward the future. Some examples of ADR show a freedom from contract, in the sense of the stuff taught under the name "contract" in American law schools. Instead of attempting to vindicate rights, ADR can prompt parties to move to new solutions of the problems involved in performing their contracts. Here, I will focus on the CPR pledge. It may be very significant in creating some freedom from contractual liability when major corporations are involved on both sides of a dispute.²⁶

Since 1979, the CPR Institute for Dispute Resolution (formerly the Center for Public Resources) has promoted its pledge and supplied "Distinguished Neutrals" to assist in working out solutions when needed. These "Distinguished Neutrals" are "global leaders of the legal

other process choices that may be more suitable to the occasion. Some forced unions ripen into happy marriages.

Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 57 (2002). Fulbright & Jaworski, a U.S. law firm, surveyed a number of corporate law departments, and received 300 responses across 41 states. The survey:

found that companies with revenues of more than Dollars 1 bn (Euros 832m) report the median number of legal actions they face has climbed from 79 in 2001 to 86 today. . . . The biggest area of litigation concern among the corporations was labour and employment actions, with 62 percent of respondents citing it as the chief cause of action. . . . The second most troublesome area was contract disputes

Bob Sherwood, *Lawsuits Increase for Bigger US Companies*, FIN. TIMES, Aug. 2, 2004, at 7.

25. See generally Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PA. ST. L. REV. 165 (2003).

26. See Diana Bentley, *Survey of International Legal Services*, FIN. TIMES, Jan. 25, 1994, at 15 ("Experts say that parties must be willing to seek an agreed solution for ADR to be effective—but the spectre of full litigation is a spur. 'ADR nearly always works better in conjunction with traditional means of adjudicative dispute resolution, or at least with their availability,' says Mr. Willis," the managing partner for litigation at a British law firm.).

bar and business world," and they include retired judges, former CEOs of major corporations, and former cabinet officers.²⁷

Thomas Stipanowich, the head of CPR, describes a process of dispute resolution that is very different from the enforcement of contract rights:

Instead of receiving evidence and arguments and judging disputes, [the CPR Distinguished Neutrals] actively facilitate discussions of issues by the parties themselves, often meeting privately with individual parties in the interest of encouraging full and frank discussion of the issues and the parties' needs and goals. The interplay may move far beyond legal or factual issues to encompass business, relational or personal issues, needs and goals. . . . Solutions are limited only by the willingness and the imagination of the participants, and may encompass anything from better communications to monetary settlements to unique forward-looking business arrangements.²⁸

This procedure moves toward a freedom from contract, as I have used the phrase.

The chief executive officer and the chief legal officer of a corporation willing to participate in the program sign the CPR pledge and send a copy to CPR. The pledge provides:

In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.²⁹

27. See CPR Inst. for Disp. Resol., About CPR Neutrals, at <http://www.cpradr.org/neutrals1.htm> (last visited Aug. 15, 2004).

28. Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 849. See generally Stacy Burns, "Think Your Blackest Thoughts and Darken Them:" *Judicial Mediation of Large Money Damage Disputes*, 24 HUM. STUD. 227 (2001) (studying mediation by acting and former judges). Judges tend to evaluate each side's legal arguments and what would likely happen in litigation. Burns, *supra*, at 229-30. Their experience and the legal culture that they bring with them may limit how far judges would go beyond legal or factual issues "to encompass business, relational or personal issues." Stipanowich, *supra*, at 849.

29. CPR Inst. for Disp. Resol., Corporate Pledge, at <http://www.cpradr.org/corppol.htm> (last visited Aug. 15, 2004).

Some initial resistance to the pledge was overcome when the companies realized that it did not involve arbitration, which many view as expensive and time consuming as litigation. Some lawyers question the nonbinding nature of the pledge, but many business people see that as part of its virtue. CPR's theory is that the pledge works because "no one loses face or suggests weakness by first proposing mediation."³⁰

About 800 major corporations and 3200 of their subsidiaries have signed the pledge. These are the most famous and largest corporations from all sectors of the economy. The CPR website has a list of the signers. If we just look at those whose names begin with the letter "A," we see, for example, A.B. Dick, A.O. Smith, Abbott Laboratories, ALCOA, American Express, AMF, AMOCO, Anheuser-Busch, Apple Computer, Archer-Daniels-Midland, AT&T, and Atlantic Richfield.³¹ In addition, about 1500 law firms also have signed a pledge that they will counsel their clients about ADR options.

Has the pledge had any impact? The CPR pledge was called to my attention almost ten years ago when I was interviewing house counsel for the major American automobile manufacturers. One lawyer, who worked for one of the world's largest corporations, described the pledge and said that he thought it tremendously significant in explaining the response to actual or potential business disputes in his industry. He said that occasionally his firm finds another signatory that threatens litigation. "The [auto] manufacturer points out the pledge. The other firm always has apologized and started talking."³² Much the same thing was reported by a deputy general counsel of CPC International who said that his firm had avoided litigation in a half-dozen disputes in which competitors' lawyers initially were unwilling even to talk. "All we had to do was remind them that their senior people had signed this."³³

It is very hard to study the operation of the CPR pledge because secrecy is one of the important things that it offers. There are,

30. Margaret A. Jacobs, *Industry Giants Join Movement to Mediate*, WALL ST. J., July 21, 1997, at B1.

31. See CPR Inst. for Disp. Resol., CPR Member Corporations, at <http://www.cpradr.org> (last visited Aug. 15, 2004) (listing the firms that have signed the CPR Pledge).

32. Lane Kenworthy et al., *"The More Things Change . . .": Business Litigation and Governance in the American Automobile Industry*, 21 LAW & SOC. INQUIRY 631, 653 (1996). Another informant said:

Most [auto] executives . . . think that turning a problem over to any third party shows a failure on the part of the business people involved. . . . Litigation with a supplier represents a situation where both sides have fumbled the ball. Those involved just didn't have the guts to sit down and solve a problem.

Id. at 652 (internal quotations omitted).

33. Jacobs, *supra* note 30, at B1 (internal quotations omitted); see also Tamar Lewin, *An Alternative to Litigation*, N.Y. TIMES, Mar. 4, 1986, at D2.

however, some rough estimates. CPR studied 291 corporations between 1990 and 1992. The corporations collectively saved \$153 million on court costs, including legal fees, by settling through private mediation in lawsuits where more than \$5 billion was at stake.³⁴ More recently, CPR reports that in the five-year period ending in 1999:

430 of the companies using CPR Panelists estimated legal cost savings totaling over \$65 million, with an average cost savings of more than \$152,000 per company. Although these figures are substantial, they are likely a fraction of overall cost savings resulting from CPR Panels activity because they represent only those cases where CPR was requested to assist in the selection of a neutral.³⁵

Robert Layton, a lawyer with the firm of Beller & Keller, pointed out:

If there is a \$5 million claim against a company, with legal fees it adds up With ADR, the company may lose and pay \$200,000, but it will eliminate the claim from the books. ADR lends itself best to large corporations because they are willing to take risks in return for certainty.³⁶

But the pledge does not always work. James Henry, the founder of CPR, recognized this: "If a party is looking for a precedent or it believed that an opposing party is 'a hotbed of ill will,' then ADR would be unsuitable" ³⁷ He also said that some companies view the pledge as a sign of weakness. Others think that their economic might over smaller adversaries, such as suppliers, gives them an interest in hanging tough. Still others have only an unsophisticated sense of litigation's true costs in management time and broken relationships.³⁸ A lawyer with a major firm commented: "the version we hear [about ADR and the pledge] is only the nice-nice world."³⁹ In some cases, one party

34. Kirk Johnson, *Public Judges as Private Contractors: A Legal Frontier*, N.Y. TIMES, Dec. 10, 1993, at D20; see also Scott Allan Stevens, *Out-of-Court Mediation Takes Off*, CHRISTIAN SCI. MONITOR, Nov. 26, 1991, at 12 ("CPR claims to have saved 142 participating companies more than \$100 million in legal costs for disputes resolved in 1990.").

35. CPR Inst. for Disp. Resol., *The Unique Advantages of the CPR Panel Process*, at http://www.cpradr.org/PanelC2_5.htm (last visited Aug. 15, 2004).

36. Milton G. Allimadi, *Alternative Conflict Resolution Gaining Popularity with Firms*, J. COMM., Nov. 23, 1992, at 4A (internal quotations omitted).

37. *Id.* (internal quotations omitted).

38. John Riley, *Attacking One Side of the Litigation Equation*, NEWSDAY, Feb. 19, 1988, at 45.

39. Allimadi, *supra* note 36, at 4A (internal quotations omitted).

is clearly wrong and litigation may be warranted. ADR involves giving up your rights.⁴⁰

The CPR pledge means that when a major player in American, if not international, capitalism faces a potential dispute with another major player, there is a process in place that can provide a wide freedom from legally enforceable contract. Of course, the potential for contracts litigation remains if creative solutions cannot be found, but potential litigation often acts as an incentive to find a solution to problems rather than a vindication of rights. As Bryant Garth tells us: "the elite have a full array of alternatives, including the federal courts, which they can use for tactical and other reasons."⁴¹ And we must remember that a dispute between these parties often would be the kind of case that we embalm in our casebooks. These are the major firms who have complex contracts and who have access to lawyers. These are the repeat players. In short, this kind of freedom from contract will keep a major group of cases from being seen by those who rely on appellate cases as their data.

II. PROFESSOR SCOTT'S FORMALISM: REQUIRED BY A RELATIONAL APPROACH TO CONTRACT?

The work of Professor Robert Scott has made salient the idea of freedom from contract. In a series of articles, he has challenged many of the ideas Karl Llewellyn planted in Article 2 of the Uniform Commercial Code (the "Code").⁴² Instead of Llewellyn's advocacy of judging in the grand style, Scott would have judges create clear default rules. Instead of legal realism, Scott would welcome formalism, literal interpretation, and a strict parol evidence rule. If contracts are uncertain, Scott would have courts refrain from filling gaps. This would leave parties free from contractual liability. They would not have to risk courts reaching results to which they never would have agreed. Scott accepts the ideas of relational contract theory. Long-term continuing relations have their own norms and sanctions that will serve

40. *Id.*

41. Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 932 (2002).

42. See generally Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 149-92 (Jody S. Kraus & Steven D. Walt eds., 2000); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009 (2002); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 102 COLUM. L. REV. 1641 (2003). See also Clayton P. Gillette, *The Perils of Article 2: Strategies of Interpretation*, 6 VA. J. 38 (2003) (article is part of a festschrift to Charles J. Goetz and Robert E. Scott).

to get almost all contracts carried out in an acceptable fashion if not precisely to the letter of the contract documents. When relationships collapse, often it would be better to leave the parties where they are rather than to engage in costly and time consuming litigation.⁴³ Moreover, Professors Scott and Stephan in their article in this Symposium point to experiments in social psychology that suggest:

Without coercive enforcement, reciprocal fairness generates high levels of performance. But once the interaction is based by coercion, reciprocity declines and overall performance is reduced. These experimental results suggest that self-enforcing motivations based on reciprocity and explicit, coercive incentives may indeed be in conflict with each other. In particular, coercive enforcement may "crowd out" behavior based on reciprocal fairness."⁴⁴

Scott and Stephan raise another problem common to both international agreements and private contracts:

International agreements as much as private contracts involve predictions about future states in the face of uncertainty. When these predictions prove incorrect, rigid commitments make the parties worse off. Knowing this, parties rationally should specify the conditions under which the obligations contained in an agreement should not apply, rather than insist on the necessity of the commitment in all possible future states. Absent complete prescience, states rationally must balance commitment with flexibility by limiting both the scope of their commitments and the extent of the sanctions that a violation will trigger.⁴⁵

43. Scott could note that this is exactly what happens in many transactions even after the passage of Article 2 of the Code. Sometimes the reason the other party defaults is that she or he is insolvent, and there is little prospect that any judgment ever could be satisfied. Sometimes contracts remedies offer far less than the cost of pretrial procedure, litigation and appeals, and one seldom can be sure that she or he will win the case. Article 2, as is true of any law, only can be used in a limited subset of the cases that technically fall within its boundaries.

44. Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 Wis. L. Rev. 551, 557.

45. *Id.* at 615-16.

As I have detailed elsewhere,⁴⁶ I admire Scott's work greatly, and I learned much from Scott and Stephan's article about international agreements.⁴⁷ Scott draws on the ideas of relational contract theory. He looks to empirical work and social science beyond economics. He recognizes that his approach might have significant costs in certain types of cases. He is suggestive rather than dogmatic. However, as I have said before,⁴⁸ I am not totally convinced. As I read Scott and Stephan, I kept saying "yes, but . . ." I also kept reflecting that they may be right.⁴⁹

46. See Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 50 (2003), reprinted in *IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL & NETWORK CONTRACTS* 51 (David Campbell, Hugh Collins & John Wightman eds., 2003) [hereinafter Macaulay, *The Real and the Paper Deal*].

47. I must apologize to Professor Paul Stephan. Neither I nor anyone else at the Symposium or in these papers says much about all of the analysis of international agreements in the Scott and Stephan article. I think that I speak for most participants in the this Symposium in expressing admiration for his work, but recognizing that it is the product of a specialist in a field that is entirely new to me and probably most of us. Thus, we retreat to the contract aspects of the article where we feel that we are standing on better-known ground.

48. See Macaulay, *The Real and the Paper Deal*, *supra* note 46.

49. Much of the problem turns on the specific situations one is thinking about as she confronts Scott and Stephan's argument. Professor Avery Katz tries to move our focus from the appellate judge to the influence of formal and substantive approaches on parties planning transactions and drafting written contracts. He says:

[S]mall and infrequent traders will tend to benefit from a more substantive interpretative regime for a variety of reasons: they are relatively less well-placed to undertake the fixed cost of detailed ex ante negotiation; they have relatively poor access to reputational networks ex post; they are likely to do their own contract negotiation but to contract out when acquiring legal services; they are less likely to be able to recover specific investments in other exchanges; and they are possible less likely to face bias in ex post judicial tribunals. Conversely, large and experienced mercantile traders should prefer their contracts to be governed by relatively formalistic rules of interpretation—and this prediction is consonant with the observation that, in general, it is such traders whom we observe contracting into relatively formal enforcement regimes through devices such as arbitration, choice of law, and forum selection clauses. Such preference could stem from such traders' ability to amortize the fixed cost of detailed ex ante negotiation over a series of transactions, from their relatively good access to nonlegal enforcement via reputational networks, from the fact that their large size weakens their control over their sales and purchasing agents, but strengthens their control over their lawyers, from their greater ability to recover specific investments in substitute exchanges, and from their greater wariness of biased tribunals and juries.

Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 537 (2004). In the text that follows, I suggest variables other than small and large size that might influence judgments about the appropriateness of formal or substantive approaches to questions such as interpretation. I very much admire Katz's article. However, as is my practice, I find matters a little more messy

I can find examples that support their arguments, up to a point, in my own research.⁵⁰ For example, I reported:

Even where agreement can be reached at the negotiation stage, carefully planned arrangements may create undesirable exchange relationships between business units. Some businessmen object that in such a carefully worked out relationship one gets performance only to the letter of the contract. Such planning indicates a lack of trust and blunts the demands of friendship, turning a cooperative venture into an antagonistic horse trade. Yet the greater danger perceived by some businessmen is that one would have to perform his side of the bargain to its letter and thus lose what is called "flexibility." Businessmen may welcome a measure of vagueness in the obligations they assume so that they may negotiate matters in light of the actual circumstances.⁵¹

This can be read as saying that the business people wanted to rely on Scott and Stephan's "reciprocal fairness." The business people, unlike many lawyers, were concerned that "once the interaction is backed by coercion, reciprocity declines and overall performance is reduced."⁵²

than he does. Often the question is whether a court should recognize what the lawyer for a large and experienced mercantile trade has written or what its sales people, purchasing agents, or engineer staff has said and done. See Katz's discussion of this problem, *supra*, at 533-34.

50. See Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977) [hereinafter Macaulay, *Elegant Models*]; Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) [hereinafter Macaulay, *Non-Contractual Relations in Business*]. See also Scott & Stephan, *supra* note 44, at 564 n.32, where they recognize this point. Scott & Stephan kindly cite my work and say that it is "antecedent work with different methodological commitments that provides rich insights into self enforcement . . ." *Id.*

For a recent study that, largely, reinforces and develops themes in my 1963 paper, see Tommy Roxenhall & Pervez Ghauri, *Use of the Written Contract in Long-Lasting Business Relationships*, 33 INDUS. MKTG. MGMT. 261 (2004) ("Our study confirms that contracts are rarely used in connection with disputes. Business people probably feel that contracts should remain in the drawer because they strive for good relations with their customers and suppliers. They solve disputes informally without resorting to contracts or the legal profession."); and see also P. Lewis, *Small Firms and their Difficulties with Contractual Relationships: Implications for Legal Policy*, 33 COMMON L. WORLD REV. 81 (2004) (reporting a study conducted in the United Kingdom reaching generally similar results).

51. Macaulay, *Non-Contractual Relations in Business*, *supra* note 50, at 64.

52. Scott & Stephan, *supra* note 44, at 579.

Another of my informants expressed his views about coercion when matters reached the stage of dispute resolution:

[I]f something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently.⁵³

Still another businessman said that "customers had better not rely on legal rights or threaten to bring a breach of contract law suit against him since he 'would not be treated like a criminal' and would fight back with every means available."⁵⁴

Niklas Luhmann, making a similar point, noted that there are different normative vocabularies, and when I speak in a particular one, it calls for an appropriate response in kind from you.⁵⁵ The legal theme asserts that I am right and you are wrong, and it threatens to mobilize the power of the state. One who claims to be in the right "no longer needs to rely on a local suspension of doubt, no longer needs to present himself as being prepared to take up and respond to the other's communication; he is not even willing to argue."⁵⁶

Scott and Stephan talk about the need for flexibility to adjust agreements in light of changed circumstances. Again my research speaks to that in certain kinds of transactions:

[A]ll ten of the purchasing agents asked about cancellation of orders once placed indicated that they expected to be able to cancel orders freely subject only to an obligation to pay for the seller's major expenses such as scrapped steel. All 17 sales personnel asked reported that they often had to accept cancellation. One said, "You can't ask a man to eat paper [the

53. Macaulay, *Non-Contractual Relations in Business*, *supra* note 50, at 61 (internal quotations omitted).

54. *Id.* at 64.

55. Niklas Luhmann, *Communication About Law in Interaction Systems*, in *ADVANCES IN SOCIAL THEORY AND METHODOLOGY* 237-38 (K. Knorr-Cetina & A.V. Cicourel eds., 1981). Scott and Stephan note:

Parties rarely shirk by directly announcing their unwillingness to perform as promised. They typically affirm solidarity, protest helplessness in the face of intractable problems, or act in subtle ways that are difficult to evaluate. In other words, nonperformance is a *noisy* signal and systematic misperception of the other's actions may cause inappropriate responses.

Scott & Stephan, *supra* note 44, at 568.

56. Luhmann, *supra* note 55, at 244; see also Stewart Macaulay, *Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building*, 1996 Wis. L. REV. 75, 114 ("Turning to a legal discussion initiates a chain of events out of the control of the parties and introduces uncertainty.").

firm's product] when he has no use for it." A lawyer with many large industrial clients said,

Often businessmen do not feel they have "a contract"—rather they have "an order." They speak of "cancelling the order" rather than "breaching our contract." When I began practice I referred to order cancellation as breaches of contract, but my clients objected since they do not think of cancellation as wrong. Most clients, in heavy industry at least, believe that there is a right to cancel as part of the buyer-seller relationship. There is a widespread attitude that one can back out of any deal within some very vague limits. Lawyers are often surprised by this attitude.⁵⁷

Undoubtedly, it is true that threats and coercion often are the enemy of cooperation and trust. However, there are social rituals that, to some extent, let us have our cake and eat it too.⁵⁸ I can offer a few examples from my interviews. I think it would be worth a detailed study of how business people make threats without being seen as making them. Most business is carried out by corporations, and the people who work for them have different roles and vocabularies. Purchasing agents, sales people, and engineers often treat a written contract with provisions designed to affect litigation as a mere formality or something the lawyers insist on.⁵⁹

57. Macaulay, *Non-Contractual Relations in Business*, *supra* note at 50, at 61.

58. In a sense, I am suggesting that in addition to the social psychology cited by Scott, we need to look to some sociology and anthropology too. In part, both fields tell us much about how humans convince themselves that they can have their cake and eat it too. Katz cautions: "[B]ecause of the difficulties of generalizing about the costs and benefits of formality, scholars should be more restrained about recommending formal regimes of interpretation beyond their ability to be certain that the resulting net benefits are really positives." Avery Weiner Katz, *The Relative Costs of Incorporating Trade Usage into Domestic versus International Sales Contracts: Comments on Clayton Gillette, Institutional Design and International Usages under the CISG*, 5 CHI. J. INT'L L. 181, 190 (2004).

59. Often engineers and sales people have to submit proposed contracts to the legal department for review, and often they do not welcome this step in company procedures. This is captured in a Dilbert cartoon. Dilbert asks the company lawyer to review the contract and says, "I need it today." The lawyer says that he cannot approve it because "somebody might sue us for no good reason." Dilbert points out that that is true of any contract. Dogbert saves the day by threatening to sue the lawyer "for obstruction of dogs!!" Scott Adams, *Dilbert*, Sept. 24, 1995, available at <http://www.comics.com/comics/dilbert/archives/>. In another strip, Dilbert complains to the representative of a vendor that his contract document is in "incomprehensible 'weaseleze.'" He says: "My only choice is to sign something I don't understand or get my lawyer involved and miss my deadline!" Adams, *supra*, Sept. 15, 2001.

Even the chairmen, chief executives, and biggest shareholders of Daimler-Benz and Chrysler did not read the 102-page agreement that merged the two corporations. They relied on personal contacts, reciprocity, and trust. The *Financial Times* reported:

Kirk Kerkorian, the billionaire casino magnate, said he had only "browsed" the papers before signing over his 13.7 per cent stake in Chrysler. . . .

Hilmar Kopper, chairman of Daimler-Benz, DaimlerChrysler and Deutsche Bank, its biggest shareholder, admitted he did not look at a word of the . . . agreement. . . .

Even Jürgen Schrempp, the chief executive of Daimler and the merged group, said he relied on experts to "cascade up" the important parts.

Bob Eaton, the chairman and chief executive officer of Chrysler, . . . said he reviewed drafts "on more than one occasion." But he said: "Did I read every single page and make sure that every single thing was included in every possible place it could be referred to? No, sir, I didn't."⁶⁰

Formal documents may be signed by those with power to make contracts, but these documents then are filed away out of the view of those who perform the transaction. Often this is reflected in the battle of the forms.⁶¹ You want to use your proposal form with your terms and conditions buried on the back side. I want to use my purchase order with my terms and conditions that are hidden in the same way. Everyone is kept happy if we execute both documents without ever resolving the conflicting provisions. Contract litigation is rare, and few business people have any direct experience with it. Most brides and grooms probably are aware of the possibility of divorce, but usually this is repressed as they proceed from proposal, to ring and to ceremony. Airplanes do crash, but most of us do not dwell on this and continue to fly for business or pleasure. I have argued:

60. James Mackintosh & James Politi, *Car Chiefs Failed to Read Details of Merger*, FIN. TIMES, Dec. 17, 2003, at 21; see also James Politi, *A Window into DaimlerChrysler's World*, FIN. TIMES, Dec. 8, 2003, at 18. This all came to light when Kerkorian sued Daimler-Benz for fraud based on what was said rather than what was in the printed agreement. Politi, *supra*, at 18.

61. See U.C.C. § 2-207 (2001).

The contract litigation process may also maintain a vague sense of threat that keeps everyone reasonably reliable For this process to operate, it is not necessary that business managers understand contract norms and the realities of the litigation process. Perhaps all that is needed is a sense that breach may entail disagreeable legal problems.⁶²

We can know at some level that we face a threat of unpleasant consequences, but we can put this aside and focus on the positive possibilities.

When trouble comes, business people can complain without threatening to sue. One technique is to have a purchasing agent and a lawyer together write a letter. Most of the language sings of a desire to cooperate and an appreciation of the other's problems. However, the letter also contains a soft mention of the provisions of the written contract and some statement about hoping that it will not be necessary to take action that will not be in either of our interests. Softly, a skilled drafter of such a letter slips in the idea that a lack of cooperation may mean trouble. Of course, the letter is never sent on the lawyer's letterhead. That would be a declaration of war. It also might trigger that law of legal physics: lawyers attract lawyers. Even after complaints are filed and litigation is underway, there is another tactic to reestablish cooperation: the parties can throw out the lawyers. In *Copylease Corp. of America v. Memorex Corp.*,⁶³ the parties argued heatedly and each side saw the other as behaving unreasonably. After two opinions by the trial judge left the outcome uncertain, Memorex executives suggested negotiations. They blamed the lawyers for both sides for having behaved badly. The executives made a show of throwing out the lawyers, and then they worked out a settlement and continued to do business amicably.⁶⁴

Having said all this, sometimes parties may want the coercive power of a breach of contract lawsuit even when they have left matters open and were relying primarily on relational norms and sanctions. If the other guy backs out after I have made an investment that I cannot salvage, at least some parties would say "no more Mr. Nice Guy" and want to fight. Professor William Whitford points out that Scott "in an unemphasized footnote, . . . allows for restitution and reliance damages

62. Stewart Macaulay, *Elegant Models*, *supra* note 50, at 519 (citation omitted).

63. 403 F. Supp. 625 (S.D.N.Y. 1975), *modified*, 408 F. Supp. 758 (S.D.N.Y. 1976).

64. See 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 87-88 (2d ed. 2003).

remedies”⁶⁵ when idiosyncratic investment creates incentives for opportunistic behavior. Whitford continues: “A legal realist might argue that a judge armed with promissory estoppel and quantum meruit remedies can do almost anything she could with expectation damages.”⁶⁶ This is particularly true in situations where such doctrines as mitigation, *Hadley v. Baxendale*,⁶⁷ or proof with reasonable certainty limit consequential damages.

Scott has called for a very different approach to contracts cases than we find in Article 2 of the Code. He criticizes the uncertainty involved in the present law, and he studied decisions under this statute and found that they did not work out problems and create certain default rules. In short, he found that every case turns on its facts. When we add in the costs of litigation and the delay often involved, I have suggested, however, that the present situation may be the best of a collection of bad options. The doctrine and the way it is delivered is something to be avoided. “My judgment is that in all but unusual situations, flexible doctrine will provoke settlements. . . . Unless money is no object and there is a point of principle, rational business people will salvage what they can by settlement and avoid throwing good money after bad in the litigation game.”⁶⁸ Of course, settlements are not necessarily a good thing. Sometimes a party may have to buy his or her way out of litigation of questionable merit to avoid the costs of defending the case. Yet, I think that the threat of litigation, at least in some cases, may prompt one party to try to accommodate the other's reliance losses when a transaction is collapsing.

Professor Omri Ben-Shahar's article offers a new approach to situations where the parties intend to sidestep difficult issues over which consensus could not be reached. They make what looks like a complete contract but leave some issues “to be agreed.” He argues that sometimes it is appropriate for a court to try to mimic the parties' will and impose terms upon which reasonable parties would have agreed. Sometimes it is appropriate to impose penalty default rules to give incentives for the informed party to write a complete contract with no gaps. Sometimes, it is appropriate for a court to refuse to act when there is a gap in the contract. However, he sees a need for an in-between approach in some situations. Here, “a party who seeks enforcement of a deliberately incomplete agreement would be granted an

65. William C. Whitford, *Relational Contracts and the New Formalism*, 2004 WIS. L. REV. 631, 641 n.37.

66. *Id.*

67. 156 Eng. Rep. 145.

68. Stewart Macaulay, *The Real and the Paper Deal*, *supra* note 46, at 79 (2003); see also Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 257 (1995) (explaining that “bargaining may be more efficient under a blurry balancing test than under a certain rule”).

option to enforce the transaction under the agreed-upon terms supplemented with terms that are the *most favorable* (within reason) to the defendant."⁶⁹ He offers an example where a landlord and tenant leave the amount of the rent to be agreed. He then says: "[i]magine that the reasonable monthly rent for such property varies from \$3000 to \$5000."⁷⁰ He says that if the landlord sought enforcement, the price would be \$3000; if the tenant were the plaintiff, the price would be \$5000. While I like Ben-Shahar's argument, I think that determining the most favorable (within reason) terms for each parties often will be difficult.⁷¹ At the least, this uncertainty may support my case that we are providing incentives to settle rather than litigate in many situations. If courts were to follow Ben-Shahar's proposal, many would rather buy their way out than invest in the uncertain task of finding the most favorable term for the other side. Of course, some would be unable to afford to litigate or seek a settlement and would just have to drop the matter.

Professor Juliet Kostritsky offers a taxonomy justifying judicial intervention to impose some precontractual liability and fill gaps in incomplete contracts.⁷² She offers a justification for an interference with freedom from contract. Three factors, explained below, call for action to "attenuate opportunism and otherwise infuse confidence."⁷³ Kostritsky argues:

Bounded rationality will mean that the contract will contain gaps as parties will not be able to foresee all contingencies . . . and provide for them by express contract. . . . The presence of *opportunism* means that even a general clause promising to act fairly will not be effective as a

69. Omri Ben-Shahar, "Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts, 2004 WIS. L. REV. 389, 390.

70. *Id.* at 391.

71. I tried imagining Ben-Shahar's approach in the context of *Bethlehem Steel Corp. v. Litton Industries, Inc.*, 488 A.2d 581 (Pa. 1985), where Bethlehem was given an option to buy additional self-unloading ore boats with an escalator clause to be agreed. The judges on the intermediate appellate court and the Supreme Court of Pennsylvania were very divided on the appropriate solution. By a two to two vote, the supreme court upheld the superior court's decision that the deal was too uncertain to enforce. The case involved reliance and, perhaps, bad faith. I cannot see how, as a practical matter, Bethlehem could have established Litton's most favorable escalator clause. Litton had closed its shipyard, and it would not have made economic sense to reopen it absent an incredibly high contract price. See 2 STEWART MACAULAY ET AL., *supra* note 64, at 108-12, for a discussion of the Bethlehem problem.

72. See generally Juliet Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What To Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323.

73. *Id.* at 369 (quoting OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 63 (1985)).

means of filling the incomplete contract Finally, the presence of *sunk costs* and bilateral monopoly will mean that "both buyer and seller are strategically situated to bargain over the disposition of any incremental gain whenever a proposal is made to adopt by the other party."⁷⁴

She and Scott reach very different conclusions. I think she makes a good case for the approach we find in Article 2 of the Code. However, we still have to add to her argument that often the chance that a court might act will have to function very indirectly and imperfectly. There are high cost barriers to litigation, and the parties always will face the risk that the court may get it wrong and fill a gap or impose precontractual liability in a way that pleases neither of them. Again, in some unknown percentage of the cases, this uncertainty may provoke a settlement. Sometimes, the parties will fashion the best solution to the problem they face. Sometimes, the settlement will be only the least bad option open to one or both of them.

Scott and Stephan brush aside remedying losses in reliance on a breached contract, the conventional justification for legal enforcement of promises. They say: "[T]his view misses the main point. If international agreements were not enforceable, State A would not risk its reliance in the first place. . . . The key insight is that enforcement benefits promisors; it enables them to make credible promises to perform."⁷⁵ Perhaps this is more true when nations are involved in international agreements, but at least major private corporations make deals where agreements are not likely to be legally enforceable. There are situations where the parties know that their legal rights are not going to be worth much, but they still make agreements. For example, a *New York Times* article, *The Art of a Russian Deal: Ad-Libbing Contract Law*, discussed transacting in Russia where at that time "[d]eals march on, although the contracts that are bringing new ventures to life might be difficult to enforce."⁷⁶ The author noted: "If both parties to an agreement are benefiting from the deal, presumably they will not break the contract."⁷⁷ In our vocabulary here, this is a statement of the self-enforcing contract. A Skadden, Arps partner commented about deals that break down: "Well, we've made money in the interim, and if the deal stops, O.K. . . . Or, to say it a little differently, we'll dance together until the music stops."⁷⁸ These people are free from contractual

74. *Id.* at 368 (emphasis added).

75. Scott & Stephan, *supra* note 44, at 563.

76. Louis Uchitelle, *The Art of a Russian Deal: Ad-Libbing Contract Law*, N.Y. TIMES, Jan. 17, 1992, at A1.

77. *Id.*

78. *Id.*

liability, but business marches on in the absence of much law. But the lawyers are there, and my colleague Kathryn Hendley tells us that there may be far more contract law in Russia today than we might think.⁷⁹ Moreover, I like protecting some reliance on contracts whether or not the parties thought that their deal was legally enforceable. I think that in all but a few situations, people expect at least a minimum standard of good faith when they are in negotiations. I am persuaded that American contract law often comes close to what Friedrich Kessler and Edith Fine describe as the continental European approach in their article, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract*.⁸⁰

We do have a fair amount of freedom from contract if the parties provide in their contract: "this is not a legally enforceable agreement" ("TINALEA"). Professor Ian Ayres and Gregory Klass⁸¹ suggest at least one situation where such a TINALEA clause should not bar legal liability, and the courts have carved out a few other exceptions.⁸² Ayres and Klass's advocacy of promissory fraud even in the face of such a clause seems persuasive to me. My problem with their position turns on the difficulty of proving what they assume. To turn to one of their examples, how would we know that our defendant obtained an option on property, not with the intention of considering whether to buy it, but only to keep the property from being purchased by one of his or her competitors? I would expect that the charge of promissory fraud to be met with a claim that the defendant wanted to keep all possibilities open.

79. See generally Kathryn Hendley et al., *Law, Relationships and Private Enforcement: Transactional Strategies of Russian Enterprises*, 52 EUR.-ASIA STUD. 627 (2000); Kathryn Hendley et al., *Punitive Damages for Contractual Breaches in Comparative Perspective: The Use of Penalties by Russian Enterprises*, 2001 WIS. L. REV. 639; Kathryn Hendley, *The Role of Law in the Russian Economic Transition: Coping with the Unexpected in Contractual Relations*, 14 WIS. INT'L L.J. 624 (1996).

80. Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

81. Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507.

82. See RESTATEMENT (SECOND) CONTRACTS § 21 cmt. b (1981). The Second Restatement states:

In a written document prepared by one party it may raise a question of misrepresentation or mistake or overreaching; to avoid such questions it may be read against the party who prepared it.

The parties to such an agreement may intend to deny legal effect to their subsequent acts. But where a bargain has been fully or partly performed on one side, a failure to perform on the other side may result in unjust enrichment, and the term may then be unenforceable as a provision for a penalty or forfeiture. . . . In other cases the term may be unenforceable as against public policy because it unreasonably limits recourse to the courts or as unconscionably limiting the remedies for breach of contract.

Id. (citation omitted); see also Wendell H. Holmes, *The Freedom Not to Contract*, 60 TUL. L. REV. 751 (1986).

If circumstances changed so that developing the optioned property made economic sense, he or she would have done so. Even a situation of mixed motives would present problems.

The interesting question is when do people bargaining think about courts and contract law and then decide to write a contract giving each the power to walk away free of any legal obligation? I think that it would be an unusual situation. My guess is that parties think about liability most in contracts to borrow money, but here they are very unlikely to provide that their contract is legally unenforceable. Most creditors are not content to rely on trust and relational sanctions alone. The risk of nonpayment of a debt is all too obvious. Most creditors think about law and work to follow the forms required by law to defend their positions. When the contract is to make something, however, engineers and purchasing agents are impatient with any focus on what will happen if things go wrong.⁸³

Suppose people live in a nation with a functioning legal system with a developed law of contracts. When would parties think of turning off resort to that law without providing a substitute such as arbitration? Sometimes parties will place primary reliance on reputational concerns or norms of fairness and reciprocity, but when would they at the outset of a deal think to reject the last resort of legal enforceability? That is, we have a handshake deal and, what's more, we agree that we will never go to court. Just raising the issue of legal enforceability might raise questions and undercut trust. "Given our trust and relationship, why do you want to get an agreement that we cannot sue? Why are you worried about being sued?" When would such an agreement to stay away from courts be implicit in the deal?

83. Cf. JERRY ADLER, *HIGH RISE: HOW 1,000 MEN AND WOMEN WORKED AROUND THE CLOCK FOR FIVE YEARS AND LOST \$200 MILLION BUILDING A SKYSCRAPER* 206 (1993). Adler illuminated the tension between business and the law in an anecdote:

Bruce considered Ross a tremendously smart man, which was a mixed blessing in a lawyer; the smarter lawyers are, the more sides to a question they see, and the more complicated they want to make everything. Bruce drew a distinction between his world of "business points" and Ross's realm of "legal points." The former had to do with money in the here and now: who spent what, who got how much. The latter had to do largely with the what-ifs, the potential for things to go wrong and the remedies that sanctions that could be applied. It wasn't that Bruce didn't believe that things could go wrong. On the contrary, he knew that thousands of things would go wrong, most of them totally unpredictable, unforeseen and beyond the scope of even the most comprehensive legal draftsmanship. And in that case the solution would be found in the real world and not in the carefully crafted and scrupulously numbered paragraphs of the agreements. Ultimately he would be thrown back on his own resources, to rant and deal as best he could. To spend \$200 an hour pretending otherwise struck him as an expensive form of voodoo.

Id.

For example, the album notes to *Ella Fitzgerald Sings the Duke Ellington Song Book* say: "Ella and [Norman] Granz have become close friends; on the basis of a handshake and no contract, he has been her personal manager for the last couple of years and has gradually steered her into the country's de luxe night clubs"⁸⁴ I cannot imagine that when they shook hands Ella and Norman would even think about the transaction breaking down, and, as a result, they would not spend any time thinking about whether they wanted to have legal rights. Suppose that we could force Ella at the point of the handshake to consider whether she wanted to be able to sue Norman if something bad happened. She might well say that she did not need a contract because she trusted Norman and a contract implied distrust. Often there are ways of achieving the relational bond and getting a document signed too. Norman could say to Ella, "we don't need a contract, but I have these lawyers who stupidly insist on getting a record in the files. Of course, it is just a formality, and I apologize for having to ask you sign here." It would be harder for Ella to do this, unless she could use her lawyer as the evil partner who had to be satisfied.

Again, hypothetically, suppose Norman breached his promises to her.⁸⁵ She then gets a new agent who is a lawyer. Should Ella be able to sue, despite her original intent to rely solely on trust and relational sanctions? Does the law have any role in protecting people who want to deal on the basis of trust and honor when their partner disappoints them? Is putting aside law and things legal just part of the freedom from contract? Could we distinguish a mere breach of a contract term and conduct bad enough to violate fiduciary obligations? My intuition is that relational norms and sanctions do most of the work, most of the time. Sometimes relationships collapse, and then the party disadvantaged might want the protections of a third party. Moreover, just the chance that such a third party might intervene and even that that third party might get it wrong, could affect the behavior of Norman and his employees in speaking for Ella. At least as to violations of fiduciary duties, this would seem to be a good incentive. My intuitions, and we have little more than this even with the psychological studies cited by Scott and Stephan, tell me that the possibility of legal action would have only a slight impact on Norman's sense of obligation to Ella. Any impact might be only the symbolism that the law reflected the cultural norm that an agent should not double-cross an artist. I doubt that the

84. ELLA FITZGERALD, *ELLA FITZGERALD SINGS THE DUKE ELLINGTON SONG BOOK* 19 (Verve 1957, CD reissue 1988).

85. Let me stress that as far as I know, Norman Granz was a loyal fiduciary who helped Ella Fitzgerald's career greatly. Sometimes, perhaps often, trust, friendship, admiration for the other, and reciprocity work very well.

chance that Fitzgerald might be able to sue would undercut Granz strong sense of obligation to her. But, as always, I could be wrong.

III. THE ROLLING CONTRACT: DOES THE CONSUMER GET ROLLED?

In a room full of contracts teachers, you would expect the discussion to move to consumer contracts hidden in fine print, with an arbitration clause attempting to repeal many of the kinds of regulation that business finds in its way.⁸⁶ This Symposium did not disappoint. Judge Frank Easterbrook's opinions in *ProCD, Inc. v. Zeidenberg*⁸⁷ and *Hill v. Gateway 2000, Inc.*⁸⁸ came on stage only to be matched by *Brower v. Gateway 2000, Inc.*,⁸⁹ where a New York court found Gateway's hidden arbitration clause to be unconscionable. To add to the fun, Whitford showed a tape of an interview with Matthew Zeidenberg and his lawyer. Zeidenberg made a cameo appearance at the conference. In his paper in this Symposium, Professor James J. White comments: Matthew "Zeidenberg was surely a naughty fellow who should have had his hands slapped."⁹⁰ At the conference, Zeidenberg

86. See, e.g., Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Roger C. Bern, "Terms Later" Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, Judge Easterbrook Notwithstanding, 12 J.L. & POL'Y 641 (2004); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002). But cf. Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695. In the summer of 2000, Touro Law School offered a symposium with six articles on Judge Easterbrook's opinions in the *ProCD* and *Gateway* cases. 16 TOURO L. REV. (2000). In addition, this issue reprints the messages of twenty-four law professors posted to the American Association of Law Schools Contracts Listserv that criticize, defend, and analyze the *Gateway* case. See *The Gateway Thread*, 16 TOURO L. REV. 1147 (2000). My favorite contribution to the symposium is Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205, 1238 (2000) ("*Gateway* . . . is . . . an invitation to misbehave, whether that misbehavior takes the form of negligence or outright fraud. The notion of reciprocal duty, the glue that holds us all together, is dissolved.").

87. 86 F.3d 1447 (7th Cir. 1996).

88. 105 F.3d 1147 (7th Cir. 1997).

89. 676 N.Y.S.2d 569 (App. Div. 1998).

90. James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 741. The Association of American Law Schools Contracts Newsletter, reporting on the Symposium, said:

The eponymous plaintiff in *ProCD v. Zeidenberg* says that while he was certainly a "free rider" attempting to make money off work done by others, he was not a "crook."

Matthew Zeidenberg, the Ph.D. student whose Internet business plan was derailed by Judge Frank Easterbrook and the Seventh Circuit eight years ago, made the remarks in a testy exchange with James J. White (Michigan) at the *Freedom From Contract* [S]ymposium held February 6-8 at the University of Wisconsin . . .

and White differed sharply. Zeidenberg did not accept White's judgment. Zeidenberg saw himself as the good guy in the drama. To him, ProCD was the villain.

Why do contracts teachers so often get excited about Easterbrook's opinions and the later cases attacking fine print that seek to drag consumers into arbitration? Compared to the body count in Iraq, AIDs, cancer, unemployment, and the loss of jobs overseas, it does not seem that the problem is one of America's major social challenges.⁹¹ Even if a new computer ordered by telephone or online were defective, most computer manufacturers make some effort to fix it or refund a customer's money. Yet, hidden fine-print arbitration certainly gets contracts teachers excited.

Professor Todd Rakoff may have put his finger on my immediate reaction to the *ProCD* and *Gateway* cases.⁹² It hurts to be told that these are contracts. *ProCD* and *Gateway* could have printed these clauses in invisible ink without changing the court's opinion significantly.⁹³ The consumer would not have had much less notice.⁹⁴

White, whose paper referred to Zeidenberg as "naughty boy who ought to have his hand slapped," called him a "crook" during his talk, which prompted Zeidenberg's offended denial.

AALS Contracts Newsletter, Vol. 2, No. 1 Spring 2004.

91. See Douglas G. Baird, *Commercial Norms and the Fine Art of the Small Con*, 98 MICH. L. REV. 2716, 2717 (2000) ("A vision of commercial law that worries excessively about the ability of parties to sneak terms past each other distracts us from the things that matter."); Douglas G. Baird, *Llewellyn's Heirs*, 62 LA. L. REV. 1287 (2002) (arguing that liberal consumer-oriented law professors have a vision of business inconsistent with modern conditions). Indeed, the problem of fine print arbitration clauses may be in the process of "solving itself." The *Wall Street Journal* reports that many firms have been dissatisfied with the costs of arbitration. Instead, some firms have abandoned it and provided in their form contracts with employees, consumers, apartment tenants, and others, that the person accepting the contract of adhesion waives his, her, or its right to a jury. "Companies that believe that juries are biased toward plaintiffs hope this approach will boost their chances of winning in court." WALL ST. J., Aug. 11, 2004, at D1. Of course, this form of waiving the right to a jury trial in a fine-print form contract raises its own legal issues.

92. Todd Rakoff, *Is Freedom from Contract Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 493. In his draft circulated before the conference, Rakoff said that it hurts to be told that these are contracts. One of Ackerman's students called these arrangements "arbitration by ambush." Ackerman, *supra* note 24, at 69.

93. Cf. Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 361 (2002) ("Lawyers writing standard form contracts for clients to use in recording transactions with parties not represented by counsel have a professional duty to restrain their zeal.").

94. Compare Easterbrook's approach in the *ProCD* and *Gateway* cases to Judge Handler's opinion in *Gladden v. Cadillac Motor Car Division*, where that court found "the terms of the remedy limitation, as expressed and presented as part of the express warranty, are so deceptive, confusing, or misleading so as to constitute an inadequate communication to purchasers concerning the meaning of the express warranty." 416 A.2d 394, 400 (N.J. 1980); see also *Specht v. Netscape*

ProCD had translated telephone directories into digital form, and it sold a collection of CD-ROM disks with the results. It charged consumers a lower price than it charged businesses. The U.S. Supreme Court had decided that telephone listings in an ordinary telephone directory could not be copyrighted.⁹⁵ This information was in the public domain.⁹⁶ ProCD tried to create a right to discriminate among its customers as to the rate charged by making contracts with them. However, the CD-ROM disks were sold at stores in a box that attempted to create a contract by fine print. Zeidenberg bought the disks and made the information available over the Internet. Before he acted, he checked with lawyers who specialized in copyright. We could see lurking in the dispute differing views towards creating property rights in computers and software.⁹⁷ Was Zeidenberg stealing ProCD's property? Was ProCD using the alchemy of a pretend contract to claim property in material that was and ought to remain in the public domain?

Communications Corp., 306 F.3d 17, 32 (2d Cir. 2002) (finding that "in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms"). *But cf.* Barnett, *supra* note 86, at 644. Barnett stated:

I am always surprised when lifelong self-professed "realist" critics of what they like to call "formalism" criticize *ProCD* or *Gateway* because they fail to conform to some highly rigid conception of offer and acceptance. Yet, as is widely acknowledged, formal offer and acceptance is only one way of manifesting assent. There is no reason in principle why contracts cannot be formed in stages, provided the circumstances or prior practice makes this clear or adequate notice is provided. This insight is neither revolutionary nor reactionary.

Barnett, *supra* note 86, at 644. The essential part of Barnett's observation is in his proviso. Those who slip terms into the fine print almost never make anything clear or give notice adequate enough to serve the legitimating idea of actual or manifest choice.

95. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363-64 (1991).

96. See, e.g., Brandon L. Grusd, *Contracting Beyond Copyright: ProCD, Inc. v. Zeidenberg*, 10 HARV. J.L. & TECH. 353 (1997).

97. Cf. G. Stephen Taylor & J.P. Shim, *A Comparative Examination of Attitudes Toward Software Piracy Among Business Professors and Executives*, 46 HUM. REL. 419 (1993); see also Alan Cane, *No Free Lunch, No Free Software*, FIN. TIMES, Mar. 31, 2004, at 3 ("[Free software] reflects the anarchic world view of some programmers who believe in free software in the same spirit that 1960s hippies believed in free love. For some, it is an opportunity to show off their programming skills as poets expect little return from publishing their verse."); Patti Waldmeir, *Reality Bytes: Free Software Could Come With a Price*, FIN. TIMES, Mar. 15, 2004, at 7 ("The marriage of free software and big capitalism must be one of the strangest unions of the information age: on . . . one side, an online commune of geeks sharing love and code to create the world's fastest growing computer operating system; on the other, big companies greedy for cheap software."); Richard Waters, *Investors Turn Free Software Into Cash*, FIN. TIMES, Mar. 15, 2004, at 21 ("The open source movement tapped into the powerful sense of communal self-interest and intellectual libertarianism that has long characterized the software industry as well as the strong desire of many programmers to show off their code-writing prowess in public.").

Suppose a consumer bought a Gateway computer, and let us assume that it was completely defective. Easterbrook's opinion would tell the consumer that she or he had made a contract to arbitrate because she or he had opened the box in which computer was shipped and not returned it within thirty days. Somewhere buried in the owner's manual there was a clause to this effect. However, at the time of the *Gateway* case, the clause incorporated by reference the Rule of Conciliation and Arbitration of the International Chamber of Commerce. The consumer could not discover these rules easily, and they were not stated in the owner's manual. Those rules required the consumer to pay a fee of \$4000, and the consumer would get back only \$2000 of that fee if she or he won. Moreover, if the consumer lost, the consumer would be liable for Gateway's lawyer's fees. This was not alternative dispute resolution. This, as a practical matter, was a way of selling new computers "as is" and "with all faults." Of course, Gateway probably made some effort to satisfy customers who received defective computers by replacement or repair. Nonetheless, if its fine print were enforceable, it would not be subject to class actions, and it would not have to defend itself in small claims courts all of the United States. The court in *Brower v. Gateway 2000, Inc.* found this arbitration clause to be unconscionable.⁹⁸

Manufacturers of consumer goods seek to gain a wide freedom from contract by packing inside the box contract clauses that attempt to repeal various laws that business dislike. In *ProCD*, there was a notice that said: "Both the software and the data listings are subject to the terms and conditions of the enclosed license agreement which is part of this product and printed in full on the enclosed envelope. Please read fully the license agreement."⁹⁹ This was printed in six-point type in the middle of a long paragraph on the bottom flap of the software box. In *Gateway*, there isn't even this. You have to discover the arbitration clause by reading the legal stuff buried in the owner's manual. Easterbrook said that in Gateway's ads it offered a limited warranty, the reasonable person would read to see the warranty terms as soon as the person got the box with the computer, and the customer would notice the arbitration clause.¹⁰⁰ Then he could make a choice whether or not to return the computer. I do not think that I am the only one who finds this to be a bad joke.

If you are a contract purist, it is very difficult to offer a convincing argument that these hidden clauses work to create a contract with the

98. 676 N.Y.S.2d at 575.

99. This language appears on the bottom flap of the ProCD box, which contained the CD-ROMs sold to consumers (box on file with author).

100. *Gateway*, 105 F.3d at 1150.

desired effect.¹⁰¹ Whatever your view about the *ProCD* case as a matter of policy, there is also a process issue: we have a lengthy opinion by U.S. District Judge Barbara Crabb that analyzes Wisconsin law on this point in great detail.¹⁰² She is one of the most able judges on the federal bench. Easterbrook never tells us what is wrong with her opinion about Wisconsin law, and his analysis of that law says little more than that Wisconsin has enacted the Code. Then he proceeds with an analysis of that statute in an opinion that White brands as "sloppy."¹⁰³ Whatever you say about the result, he has stepped out of role as a federal judge in a diversity case. But we can put this aside. The activist judges of the Seventh Circuit have struck again.¹⁰⁴

As a matter of policy what should we do? Easterbrook found that Gateway had concluded a contract and the customer was bound to the arbitration clause.¹⁰⁵ Many seem to like Easterbrook's policy argument for treating people as if they had made such a contract. For example, White says that most of us would give up our right to go to court in favor of arbitration in exchange for cheaper computers.¹⁰⁶ He probably is right, assuming that there is at least a minimum level of quality and the manufacturer replaces or repairs defective ones. Computers are cheaper and better than in the past. I could buy a Gateway or a Dell today for anywhere between \$500 and \$1000 that would be a much better machine than the IBM PC that I bought in 1983 for about \$3000.

Professor Clayton Gillette argues that sellers such as Gateway may have reasons to represent the interest of consumers as well or better than

101. See James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693, 1712-13 (2000). But cf. Barnett, *supra* note 86, at 644. In *Defontes v. Dell Computers Corp.*, No. PC 03-2636, 2004 R.I. Super. LEXIS 32, at *17 (Jan. 29, 2004), a Rhode Island court found that Dell's shrink-wrap agreement enclosed in the packaging of the computer was insufficient to provide notice of the arbitration clause, and so it did not become part of the contract. Here, unlike the clause in the *Gateway* case, there was no provision for rejecting the arbitration clause by returning the computer within a stated time. *Id.* at *19-20.

102. *ProCD v. Zeidenberg*, 908 F. Supp. 640 (W.D. Wis. 1996).

103. White, *supra* note 90, at 741. Easterbrook relies primarily on Section 2-204(1) of the Code, which says: "A contract for the sale of goods may be made in any manner sufficient to show agreement" *ProCD*, 86 F.3d at 1452 (internal quotations omitted); see also U.C.C. § 2-204(1) (2003). However, the judge does not follow the definitional cross reference to Section 1-201(b)(3), which says that an "agreement" is "the bargain of the parties in fact" U.C.C. § 1-201(b)(3). Perhaps, some could fashion a reading of "in fact" that covered either *ProCD* or *Gateway*, but I would be hard to persuade that they were doing more than playing games.

104. I acknowledge that I am biased. See Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 764-72.

105. *Gateway*, 105 F.3d at 1050-51.

106. White, *supra* note 90, at 742.

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any other person or agency.¹⁰⁷ I like his argument. Gateway can defeat the expectations of its customers only within limits and only so far. I remind you that American Motors sold almost a half million Renault Alliances and Encores. They got a reputation as having poor transmissions and suspensions and sales stopped cold.¹⁰⁸ The market can work.

Indeed, although they come to much the same result, I like Ian Macneil's approach¹⁰⁹ much better than Easterbrook's. Macneil concedes that these are not real contracts, but he would enforce many of them. He argues that we enter many relationships where we do not know all the terms—marriage, the military, and jobs at university law schools. Our relationship with our computer or software supplier is just one more. There is a consumer function in our kind of society, and the legal system cannot get in its way. Yet, when relational norms and sanctions do not satisfy us, Macneil says that we can consider legal action, always recognizing its costs and potential unanticipated consequences. While many contracts teachers instinctively leap to the side of consumers,¹¹⁰ we must remember that sometimes consumer buyers make unreasonable demands on sellers or find trivial defects as a means of getting out of a deal when they change their mind or find a better deal elsewhere.¹¹¹

107. Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 689. Gillette's argument reminds me of my colleague Neil Komesar's insistence on comparative institutional choices. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994). In his preface, Komesar says: "[t]hrough their skepticism (and even paranoia) about economics, my colleagues and students at the University of Wisconsin Law School have forced me to think hard about economic analysis, how to use it and how to explain it." *Id.* at xi. As one of the resident paranoids, I would be pleased to think that our skepticism had something to do producing with this fine book.

108. See, e.g., Micheline Maynard, *Some Models Just Never Make it Despite Broad Market Testing*, TORONTO STAR, Nov. 5, 1988, at J7; John Terauds, *Depreciation Accelerated After Demise of AMC Renault Alliance*, TORONTO STAR, Sept. 2, 1989, at J6. However, I should report that my late wife's favorite automobile was a 1985 red Renault Alliance convertible that she named "Nancy Drew."

109. Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5 (1984).

110. I plead guilty as charged. See Galanter, *Contract in Court*, *supra* note 3, at 613-16.

111. See Jane Spencer, *The Best Car Deal Around: Never Paying for Repairs*, WALL ST. J., Nov. 12, 2002, at D1 ("The emerging hypochondria is particularly acute among luxury-car drivers, where entitlement and paranoia converge [and] . . . '[s]ome customers need an exorcist, not a technician,' says Mr. Gorogias, the Buick Hyundai dealer."). Long ago, when I was in high school, I had a job as a clerk in a record store. That experience makes me hesitate to romanticize consumers. See also Jochen Wirtz & Doreen Kum, *Consumer Cheating on Service Guarantees*, 32 J. ACAD. MKTG. SCI. 159 (2004).

And are consumers as innocent and unaware as we proconsumer contracts teachers paint them? Do not most people in America know about fine print and roughly what it says? During her comments at this Symposium, Professor Jean Braucher objected to the many references to a speaker's intuition. When in a tight spot, just make up the data; this is, after all, the classic law professor's way. I offer a new form of hard empiricism—cartoons! They tell us at least something of what is in the culture because, to be funny, they have to play with something that most of us recognize.¹¹²

First, several Dilbert cartoons seem written just for contracts teachers. Dilbert and Dogbert, who is drawn as a dog but who plays a human role in the series, are walking together. Dogbert: "I plan to sell an anti-itch lotion that's really just honey." Dogbert continues: "I'll put a tiny disclaimer on the bottle that says, 'Might cause itching.'" Dilbert reacts: "That's not nice." Dogbert responds: "And then I'll sell my customer list to bears."¹¹³

In the next cartoon, Dilbert is talking to Dogbert. Dilbert says: "I didn't read all of the shrink-wrap on my new software until after I opened it." Dilbert continues: "Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion." Dogbert responds: "Call your lawyer." Dilbert: "Too late. He opened software yesterday. Now he's Bill's laundry boy."¹¹⁴

Finally, Dilbert is sitting in front of his computer with a software box in his hands. He reads the following: "Software License: By opening this package, you agree You will not make copies or export to despotic nations. You will submit to strip searches in your home." Dilbert rips open the software box. A person in a white coat stands behind Dilbert and is pulling on a rubber glove. The person says: "Frankly, both of us would have been happier if you had just walked away."¹¹⁵

And I could point to a series of *New Yorker* cartoons, including the one that some see as sexist, involving terms and conditions printed on a

112. I am borrowing this approach from my colleague, Marc Galanter. See his article, *The Face of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998), where he makes the case for "jokology" and offers some fine examples. See also Marc Galanter, *Lawyers in the Laboratory: Or, Can They Run Through Those Little Mazes?* 4 GREEN BAG 2D 251 (2001) [hereinafter Galanter, *Lawyers in the Laboratory*] (analyzing the substitution of lawyers for laboratory rats in a classic joke). "One problem, though, is that no one has been able to extrapolate the test results to human beings." Galanter, *Lawyers in the Laboratory*, *supra*, at 252.

113. Adams, *supra* note 59, Dec. 24, 2002; see also *supra* note 59. Dilbert cartoons are copyrighted by the United Features Syndicate.

114. Adams, *supra* note 59, Jan. 14, 1997.

115. *Id.* June 7, 1997 (emphasis omitted).

woman's panties.¹¹⁶ There is another one from that magazine that shows a form contract that ends "so stop whining, sign or don't sign, but face reality for once in your life, because this is the way the world works, pal."¹¹⁷ Again, these cartoons would not be funny if most of the audience did not recognize the situation. Many Americans, if not most, know that we are surrounded by fine print, and it says whatever happens we lose.¹¹⁸ Without knowing the details, we hope that sellers of consumer products will stand behind them when something goes wrong. Often, if not usually, they do. We know that from time to time (and if we are poor, often) we will have to lump it, blow off steam, and write off the transaction.¹¹⁹

116. The caption: "By breaking the seal on this dress, you accept the terms and conditions printed on my panties." *NEW YORKER*, April 3, 2000, at 50.

117. *NEW YORKER*, Aug. 11, 2003, at 44 (emphasis omitted).

118. See, e.g., Reynolds Holding, *Private Justice: Millions Are Losing Their Legal Rights*, *S.F. CHRON.*, Oct. 7, 2001, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/10/07/MN61162.DTL>; Reynolds Holding, *Private Justice: Can Public Count on Fair Arbitration?*, *S.F. CHRON.*, Oct. 8, 2001, at A15, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/10/08/MN170114.DTL>; Reynolds Holding, *Judges' Action Cast Shadow on Court's Integrity*, *S.F. CHRON.*, Oct. 9, 2001, at A13, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/10/09/MN41366.DTL>; see also Robert S. Greenberger, *As Arbitration Spreads to Consumer Purchases, A Court Battle Loom*, *WALL ST. J.*, Sept. 19, 2000, at A1; Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, *N.Y. TIMES*, Mar. 10, 1997, at A1; Jane Spencer, *Signing Away Your Right To Sue*, *WALL ST. J.*, Oct. 1, 2003, at D1; Andrew Wheat, *Privatizing Justice*, *TEX. OBSERVER*, June 21, 2002, available at <http://www.texasobserver.org/showArticle.asp?ArticleID=807>.

119. In Act 2 of Arthur Miller's *Death of a Salesman*, Willy Loman says that his refrigerator "consumes belts like a goddam maniac. They time those things. They time them so when you finally paid for them they are used up." ARTHUR MILLER, *DEATH OF A SALESMAN* 53 (Penguin Books 1999) (1949). Willy also says: "Once in my life I would like to own something outright before it is broken. I just finished paying for the car and it's on its last leg." *Id.* at 52-53.

Moreover, products such, as computers, are rated by websites,¹²⁰ special magazines,¹²¹ as well as *Consumer Reports*. In March of 2004, that magazine reported "a recent survey of more than 48,000 ConsumerReports.org subscribers found that 2 percent bought PCs that became completely inoperable in the first month; that another 6 percent had serious problems in the first month but the PCs were usable; and that over the past four years, 27 percent of PCs have needed repair."¹²² If the average product offered by Gateway were too bad, people would know. Indeed, Gateway's falling market share may suggest that they do know something about what to expect from this company.¹²³ *Consumer*

120. See, e.g., <http://www.sucks500.com> (allowing consumers to air complaints); see also Nancy A. Feldman, *Gateway to Customer: Want a Refund? Sue Us!* (Apr. 2, 2004), at http://reviews-zdnet.com.com/AnchorDesk/4520-7298_16-5128810.html?tag=adss. There were 156 comments and replies from those who read Feldman's posting. They had headings such as "Another Gateway Horror Story," "This is Why I Do Not Buy Gateway," "Gateway Sold Illusions," and "Is this Surprising Considering Their History?" There were some dissents: "Sometimes the Customer is the Problem," and "Dig Deep Enough, and You Can Find Horror Stories Anywhere, Rabid Conservative." At least those consumers who could find their way to the ZDNet AnchorDesk website had a source for opinions and information. I thank my former student Kenny Hoeschen for the reference to this website. Cf. Roger Bougie, Rik Pieters & Marcel Zeelenberg, *Angry Customers Don't Come Back, They Get Back: The Experience and Behavioral Implications of Anger and Dissatisfaction in Services*, 31 J. ACAD. MKTG. SCI. 377 (2003).

121. See, e.g., Ed Foster, *It's a Sneakwrap World*, INFO WORLD, Oct. 22, 2001, at 68; Anne Kandra, *When Help Is Half a World Away*, PC WORLD, Apr. 2004, at 53, available at <http://www.pcworld.com>; Peter Jasco, *What Price CD-ROM Hardware? Here's What to Watch Out For When You're Buying CD-ROM Hardware*, INFO. TODAY, Sept. 1996, at 26. Jasco wrote:

As reported in the PC World story, the Anniversary PC featured a 6x drive from Wearnes. Gateway advertised it as 'the fastest EIDE CD-ROM anywhere.' In retrospect, the Gateway product marketing manager claimed that 'when we rolled it out, it was one of the only 6x drives.' The PC World journalist—who does not swallow PR-talk hook, line, and sinker—added that 'a faster TEAC drive was available, but Gateway didn't use it.' It's up to whom you believe. But you may wish to consider that, pressure by a CompuServe user group that relentlessly demanded that Gateway resolve its complaints, the company finally decided to replace the Wearnes drive with a true 6x Sanyo drive.

Jasco, *supra*, at 26.

122. *Computers: Desktop vs. Laptop*, CONSUMER REP., March 2004, at 40, 42.

123. See *Gateway Bets on Electronics*, FIN. TIMES, Dec. 2, 2003, at 12 ("Gateway, the PC maker[s] . . . US market share has slipped to 3 percent and it has lost money in 11 of the past 12 quarters."). I am not suggesting, of course, that the original arbitration clause had anything to do with this falling market share. See Jonathan Moules, *Gateway Faces Federal Queries Over Accounts*, FIN. TIMES, May 15, 2003, at 31. As this was being written, Gateway reported higher sales and a lower than expected operating loss. This prompted the value of its stock to increase after the report. Scott Morrison, *Gateway Lifted by Stronger Sales*, FIN. TIMES, June 16, 2004, at 30. Gateway bought eMachines, a low-price computer company, closed its retail stores, and closed its customer sales and support facility in Sioux Falls, South Dakota.

Reports offers a chart that shows that Gateway is second from the bottom in machines needing repairs during the years 1999 to 2003. Almost fifteen percent of its machines needing repairs were inoperable.¹²⁴ Perhaps Gateway could find reasons to object to *Consumer Reports* data, but for now, it is the best we have.

The class action complaint in the Gateway case charged that it failed to provide the service that it advertised, but who is surprised by this?¹²⁵ Do not we know that personal service is the most expensive thing possible? If we want cheap computers, then we get boxes with instructions that most of us do not read. If we order goods from a 1-800 number or online, then we know that we risk more trouble if something is wrong than had we bought goods at a local store. Nonetheless, this is a risk many of us take because of convenience and price. White suggests that if we were asked, most of us would make this trade. "For a nickel or a dime, almost all of us would give up our right to resell software and would agree to arbitrate."¹²⁶ I think that he is probably right. *Consumer Reports* tells us that if we want reliability, support, and performance, we should get an Apple or a Dell. If we want "rock-bottom prices," we should look to Compac or Gateway.¹²⁷ As the carnival barker in a classic film would say, "ya pays your money, and ya takes your chances." Of course, buyers have had unhappy experiences with Dell and Apple too. Some people have friends who

Terril Yue Jones, *Gateway in Deal With Best Buy*, L.A. TIMES, June 12, 2004, at C2. In a filing with the Securities and Exchange Commission, Gateway stated that the company's layoffs of workers and closing of business locations, "combined with high turnover in the management team, have had an impact on employee morale and could have a significant adverse impact on our efforts to retain key employees." Mike Freeman, *Gateway Stock Restrictions Lifting*, SAN DIEGO UNION-TRIB., June 11, 2004, at C3. As a result, the Gateway trademark may be applied to a very different company than the one consumers have come to know from past experience. While it is possible that a company in such trouble might work harder to please its customers, low employee morale at least raises questions about whether Gateway's support and customer services will suffer. These changes in the firm will make it even harder for consumers to gain information about the risks they take buying Gateway products as compared to dealing with its competitors.

124. *Computers: Desktop vs. Laptop*, *supra* note 122, at 42.

125. See Catherine Greenman, *On-Site Service: Lots of Talk to Get Some Action*, N.Y. TIMES, Apr. 12, 2001, at G1. In 1998, the Federal Trade Commission (FTC) charged Gateway with violating provisions of the Magnuson-Moss Warranty Act. Gateway, the FTC charged, failed to make required disclosures about its warranty and deceptively advertised that it would provide onsite warranty service. Gateway paid \$290,000 to settle the case. Of course, a consent agreement "does not constitute admission of a law violation." See Press Release, Federal Trade Commission (Jan. 7, 1999), 1999 WL 5348.

126. White, *supra* note 90, at 742.

127. *Computers: Desktop vs. Laptop*, *supra* note 122, at 43.

can put things right or who can talk knowledgeably with the person on the other end of the help line.¹²⁸

Indeed, we can ask what difference it would have made if ProCD and Gateway had taken heroic measures to communicate to potential customers that only a limited license to use a product was being sold or that disputes would have to go to arbitration. Professor Russell Korobkin points out: "[d]ecision research does provide a basis . . . for predicting that terms found in form contracts frequently will be non-salient to most buyers."¹²⁹ With apologies to Braucher, my intuition is that most consumers would have read past the most clear disclosures possible about these topics without thinking about them.¹³⁰

128. A columnist with the *Financial Times* reported e-mail responses to his report of problems with his new Dell computer.

Many of my new e-mail friends understand that money means leverage. Since computers ignore shareholders at their peril, they recommend making complaints through the investor relations department, not the customer or technical divisions. . . .

Equally, this being America, connections matter . . . I am deeply grateful to several respondents in Texas, who offered to bring my case to Michael Dell's personal attention, claiming to know him, his wife or the lawyer who helped him incorporate in the first place.

Jurek Martin, *Online and On Form*, FIN. TIMES, Feb. 21-22, 2004, at W3.

In a more recent survey of subscribers to ConsumerReports.org, Gateway finished just slightly above Dell on the quality of the technical support offered. Dell did better on solving the consumer's problem, but Gateway topped Dell on the time spent waiting on the phone. However, Dell did much better than Gateway on the repair history of all models of their computers that had been purchased between 1999 and 2003. *Consumer Reports* recommends Apple and Dell for reliability and support. It recommends eMachines, Gateway, and HP for the best value, but it cautions: "reliability for all three brands has been undistinguished." *Computers: New Considerations*, CONSUMER REP., June 2004, at 41, 42-43; see also *Computers: Power Up, Prices Down*, CONSUMER REP., Sept. 2004, at 20, 22 (stating that in comparing the repair history of desktop as compared to laptop computers, Gateway has the worst history among the eight brands of laptops surveyed, but that its tech support was second best for desktops and in third place for laptops). It is obvious that these data were not drawn from a random sample of all of those who bought computers from the various manufacturers during this period. We have no idea to what extent, if at all, the more than 48,000 subscribers to ConsumerReports.org are like all of those purchasers of computers at this time.

129. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1225 (2003).

130. There are also questions about how literate Americans are. One study found that about half of adult Americans "are not proficient enough in English to write a letter about a billing error or to calculate the length of a bus trip from a published schedule" William Celis 3d, *Study Says Half of Adults in U.S. Lack Reading and Math Abilities*, N.Y. TIMES, Sept. 9, 1993, at A1. Another study written for the Education Testing Service of Princeton, N.J., found "[o]nly 35 percent could consistently do such tasks as writing a brief letter to explain a billing error" Cassandra Burrell, *Half of College Graduates Can't Decipher Bus Schedule*, CAP. TIMES, Dec. 10, 1994, at C1. These statistics suggest that efforts at writing clear contract clauses may be futile. Of course, those who buy computers may be more

Yet I return to my argument that our present inconsistent judicial reaction to hidden form contracts such as Gateway's original one may, and I repeat may, be the best that we can hope for as computer prices fall. But I would want to know whether the arbitration and warranty coverage puts in place some incentive for the seller to avoid disputes and handle those that do result in a tolerable fashion. The original Gateway clause was a pure sham. But it was declared unconscionable,¹³¹ and journalists and academics jumped on Gateway.¹³² Gateway then tried to fashion an arbitration clause that looked fair,¹³³ and the one it now uses is fairly close to that used by Dell.¹³⁴ Both use the National Arbitration Forum's ("NAF") procedures¹³⁵ that at least look like dispute resolution rather than evasion.

The NAF makes an elaborate case for its services at its website.¹³⁶ It has posted, among many things, its "Code of Procedure," a "whitepaper" called "Arbitration vs. Lawsuits," a collection of "What the Courts Say About the Forum," and "Arbitration Bill of Rights with Commentary." One NAF marketing document¹³⁷ states:

literate than most, but this is not necessarily so. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002).

131. See *Brower*, 676 N.Y.S.2d at 575.

132. See, e.g., Caroline E. Mayer, *Hidden in Fine Print: "You Can't Sue Us,"* WASH. POST., May 22, 1999, at A1; Meier, *supra* note 118, at A1.

133. Gateway's current terms and conditions appear on its website at <http://www.gateway.com/about/legal/policy.shtml>. The text begins: "You may not . . . report . . . the contents of the Site for public . . . purposes, including the text . . . without Gateway's written permission." *Id.* Construing this as consistent with the copyright laws, I will say only that Gateway offers a limited warranty, but limits this remedy to thirty days. For more detailed information Gateway's "Standard Terms of Sale and Limited Warranty Agreement," see http://www.gateway.com/about/legal/warranties/st_9147.pdf (last visited Aug. 15, 2004). It reserves the option to furnish replacement parts, replace the product, or offer a refund less depreciation. *Id.* The customer may have to take the product to a Gateway service facility. *Id.* Clause eight also provides for arbitration administered by the NAF. *Id.* It is to be held at any reasonable location near the customer's residence. *Id.* The customer can choose to arbitrate by submission of documents, telephone, online or in person. *Id.* The clause states in bold type that in the absence of the clause, the customer would have had the right to go to court. *Id.*

134. Dell's current "U.S. Terms and Conditions of Sale" appear at <http://www1.us.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen~section=012> (last visited Aug. 15, 2004). Clause thirteen calls for binding arbitration to be conducted by the NAF. *Id.*

135. The NAF's "Code of Procedure" appears at <http://www.arbitration-forum.com> (last visited Aug. 15, 2004).

136. *Id.*

137. This document is contained on a CD-ROM that comes with F. PAUL BLAND, JR. ET AL., *CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS* xxiii (3d ed. 2003).

ARBITRATORS FOLLOW THE LAW—Predictable decisions based on legal standards.

AWARDS LIMITED—Awards may not exceed claim for which fee paid.

UNIFORM NATIONAL SYSTEM—Same rules, same procedures—every case, everywhere.

PROFESSIONALS—Decisions are made [by] legal professional, not jurors or volunteers.

COST CONTROL—The cost of arbitration is far lower than any lawsuit.

LIMITED DISCOVERY—Very little, if any, discovery and pre-hearing maneuvering.

PRIVATE—Arbitration proceedings are completely private.

NO SPURIOUS CLAIMS—Arbitration procedures discourage lawsuit extortion.

LOSER PAYS—Prevailing party may be awarded costs.

The forum has a panel of arbitrators who are former judges and lawyers with at least fifteen years' experience. This probably helps when courts are asked to find NAF arbitration unfair. Judges may hesitate to find that former judges and experienced lawyers cannot be fair. The forum will handle class actions if the parties' arbitration contract provides for them.¹³⁸ Courts have found the fees based on the amount of the claim to be reasonable,¹³⁹ and the NAF's Code of Procedure provides that its director can waive fees for indigent parties.¹⁴⁰

138. Both Gateway and Dell bar class actions in their terms and conditions. See *supra* notes 133–34.

139. Justice Ginsburg wrote about the American Arbitration Association's rules. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsburg, J., concurring in part and dissenting in part). She then said: "Other national arbitration organizations have developed similar models for fair cost and fee allocation." *Id.* In a footnote she continued: "They include National Arbitration Forum provisions that limit small-claims consumer costs to between \$49 and \$175" *Id.* at n.2.

140. NAT'L ARB. F., NATIONAL ARBITRATION FORUM CODE OF PROCEDURE § 45A (2003), at <http://www.arb-forum.com/code/070103.pdf>.

NAF arbitration may be enough to provoke a little concern by Gateway and Dell employees about dispute avoidance and quick settlement of complaints. Someone might have to defend what was done before the arbitrator. Many see the lemon laws¹⁴¹ that govern repair of new cars under warranties as the most effective consumer laws going in today's climate. Arbitrating a lemon law with a customer usually means that the customer will not buy another car from the manufacturer.¹⁴² Some states publish annually a lemon law index showing the claims and the results—this is not good publicity.¹⁴³ As a result, the manufacturers press the dealers to fix the cars or call in help. We could hope that the *Brower* case and the others challenging rolling contracts affected the behavior of those that would rely on the arbitration clauses in computer contracts. It is not clear that the manufacturer will win, and there is a risk of bad publicity if another challenge to the process as unconscionable won again.

Perhaps, cases such as *Brower* mean that a few customers get just a little more consideration. It probably would take a spy inside Gateway to find out, but in my optimistic manic phase, I can hope that people inside Gateway want to avoid another *Brower* case.

Yet, we know how this threat of public shaming can wear off as a has to deal with cost cutting when it is in trouble. Of course, in my depressed phase, I could turn to a point made by Professor William

141. See, e.g., WIS. STAT. § 218.0171 (2001–2002). This statute provides that if a new or nearly new vehicle is a "lemon," the manufacturer must replace it free or refund the price. A "lemon" is a car with a serious defect which the manufacturer's dealer cannot fix in four tries or if the defects prevent the owner from using the car for thirty days or more. In addition, a consumer can sue for damages caused by the violation of the section, and a consumer who prevails shall be awarded twice the amount of any pecuniary loss together with reasonable attorney fees. *Id.* § 218.0171(7). "It's one if the most effective—if not *the* most effective—consumer protection statutes we have," says Stephen Meili, director of the Consumer Law Clinic for Public Representation in Madison." Joel Dresang, *Consumer Advocates Applaud Failure to Alter Lemon Law*, MILWAUKEE J. SENTINEL, July 12, 1997, at D1.

All states and the District of Columbia now have lemon laws covering automobiles, and some cover motorcycles. See Rick Popely, *Lawyers Sour on State Lemon Law; Illinois' Protections are Too Weak to Provide Any Benefit*, CHI. TRIB., June 1, 2003, at 1. The Center for Auto Safety rates these laws. See *id.* It found the California law to be the best. *Id.* "New vehicles in California can be classified as lemons in the first 18 months or 18,000 miles, and consumers can sue after two failed attempts at fixing a safety defect." *Id.* The center ranked the Illinois law 49 out of 51. *Id.* Under Illinois law, the dealer gets four chances to fix the car, and there is no exception for safety defects. *Id.*

142. Hans Schattle, *Sourest Among the Sour: Massachusetts Issues its 1989 Automobile Lemon List*, BOSTON GLOBE, July 26, 1990, at 33 ("Thomas J. Pyden, a GM spokesman, was unable to say how much early settlements might cost or save the company. 'What we were finding was winning an arbitration case usually meant losing a customer and that didn't make any sense,' Pyden said.").

143. See *id.*

Woodward. He noted, in commenting on the *Brower* case, Gateway did not settle the case.¹⁴⁴

Rather, it permitted a Federal court to publish its onerous arbitration term and to denominate it as "unconscionable." Either Gateway was poorly advised with respect to the effect of the term on its business or, more likely, it concluded that even a reported judicial decision parsing its form contract would have virtually no impact on its business.¹⁴⁵

Moreover, we can wonder about whether most people would be ready, willing and able to go to NAF arbitration. Lemon laws favor consumers willing to deal with paperwork, "walk into a situation that is totally foreign to them[,] and face a manufacturer's representative who has the advantage of experience."¹⁴⁶ The same would seem to be true of NAF arbitration. Given the amounts involved in most computer transactions, most people would have to represent themselves; it would seldom pay to hire a lawyer. Small claims courts in some places do some hand-holding and help people file complaints. Again, I am speculating, but only one with access to those who have considered taking a computer manufacturer to arbitration could establish whether social distance will bar access to justice.

Another concern was raised about NAF arbitration in *Mercurio v. Superior Court of L.A. County*.¹⁴⁷ The appellate court decided that the arbitration clause in an employee's contract was unenforceable because the employer used threats and cajoling to coerce employees into signing it. The court found the arbitration agreement both procedurally and substantively unconscionable.¹⁴⁸ Only eight NAF arbitrators had offices in the Central District of California. The employee argued that he would be a victim of "the repeat player effect."¹⁴⁹ The employer would arbitrate many cases while the employee would have only one. The employer would gain advantages such as "knowledge of the arbitrators' temperaments, procedural preferences, styles, and the like"¹⁵⁰ Moreover, there might be a tendency for arbitrators to favor the

144. William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 990 n.77.

145. *Id.*; see also William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 WASH. U. L.Q. 243 (1997).

146. Peter Lewis, *Lemon Law Leaves Sour Taste for Owner*, SEATTLE TIMES, Oct. 14, 2002, at B1.

147. 116 Cal. Rptr. 2d 671 (2002).

148. *Id.* at 675-76.

149. *Id.* at 678 (internal quotations omitted).

150. *Id.*

company because of the desire to be selected in future arbitration proceedings. The appellate court said:

We . . . are not prepared to say without more evidence that the 'repeat player effect' is enough to render an arbitration agreement unconscionable. However, given the low threshold of substantive unconscionability in this case we find the lack of mutuality as to arbitrable claims together with the disadvantages to the employee in using NAF as the arbitration provider renders the Countrywide arbitration agreement substantively unconscionable.¹⁵¹

NAF responded with a motion to "depublish" the court's opinion in the case. The Trial Lawyers for Public Justice responded with a lengthy attack on NAF and the repeat player problem: "[t]he significance of these limited NAF arbitration panels is that they permit NAF's administrators to steer important cases to 'reliable' decision makers."¹⁵² It is extremely difficult to do more than speculate about a repeat player effect. Any test of the hypothesis would require access to data about patterns of decisions and the reasons they were made. Yet a big attraction of arbitration is that it remains secret, and so we are unlikely to see such data.

Korobkin adds another concern. He notes:

[I]n finding an arbitration clause in a credit card contract unconscionable because the provision eliminated the possibility of class action suits, one court observed that the problematic provision "serves as a disincentive for [the credit card company] to avoid the type of conduct that might lead to class action litigation in the first place." In other words, the court appeared to suggest that the contractual limitation might create a moral hazard problem on the part of the seller.¹⁵³

Also, we seem inconsistent about whether courts and legal agencies will demand clear disclosure and whether arbitration is an appropriate means of handling consumer and other complaints. I can point out that

151. *Id.* at 679.

152. Letter from F. Paul Bland, Jr., Trial Lawyers for Public Justice, to the Honorable Ronald George, Chief Justice and the Honorable Associate Justices of the California Supreme Court (Apr. 25, 2002). This letter is contained on the CD-ROM that accompanies *BLAND, JR. ET AL.*, *supra* note 137.

153. Korobkin, *supra* note 129, at 1276.

the FTC has regulated the typeface and clarity of auto leasing deals.¹⁵⁴ The *Wall Street Journal* tells us:

[N]early a dozen automotive financing companies are fighting lawsuits from African-Americans who allege that the policies [regarding not disclosing that dealers may mark up finance charges and that the issue is negotiable] harm black car buyers. The lawsuits alleged that dealers tend to "mark up" loans more frequently and aggressively with blacks than with whites.¹⁵⁵

As a result of these suits being filed, several automobile finance companies and the National Association of Automobile Dealers announced that they supported clear disclosure to consumers. Also, Congress recently passed a statute that says auto manufacturers cannot force dealers into arbitration by form provisions in their franchises.¹⁵⁶ Maybe computer consumers are different; or is it that they are not the rich who lease BMWs from wealthy business people who run auto dealerships and are protected?

Bryant Garth points out that ADR such as the CPR Pledge creates a special justice system in which business elites can use arbitrators and mediators "whose background and the selection process insure they would be able to understand and handle large business disputes."¹⁵⁷

154. In a move that authorities hope will push the entire auto industry to clean up its act, five major car makers agreed Thursday to stop hiding costs in ads promoting their car leasing programs. . . . "What you represent to the American consumer should be what they get, and the fine print doesn't get you off the hook," Arizona Atty. Gen. Grant Woods said at a news conference at FTC headquarters in Washington. "If you need a disclaimer and you can't read the disclaimer, then it's not a disclaimer."

John O'Dell, *5 Car Firms' Pacts Will Put Brakes on Hidden Lease Costs*, L.A. TIMES, Nov. 22, 1996, at D1.

155. Lee Hawkins, Jr., *Toyota, Dealers' Trade Group to Back New Loan Disclosures*, WALL ST. J., Feb. 10, 2004, at D3.

156. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2002) (to be codified at 15 U.S.C. § 1226). This statute became law on May 19, 2003. In a letter to members celebrating the passage of this statute, the President of the Wisconsin Automobile & Truck Dealers Association wrote:

Our credibility is at stake. We argued that state law should not be preempted by federal law in this area of contracts. The same should hold true for dealer practices with arbitration clauses in purchase contracts, employment contracts, etc. Stay away from inserting mandatory binding arbitration clauses in any contracts you control. Don't take away from others that which Congress has allowed you to keep. Insurers or lawyers may try advising you differently.

Letter from Gary D. Williams, President, Wis. Automobile & Truck Dealers Ass'n, to WATDA New Vehicle Dealer Members, at 5 (undated) (on file with author).

157. Garth, *supra* note 41, at 949.

However, at the same time, today we have tilted toward a kind of justice that "includes a pecking order that dictates the kinds of cases allowed into the courts."¹⁵⁸ Garth says that we have "created a low-end justice for the rank and file. . . . [We] push ordinary litigants into settlement-oriented ADR processes dominated by quick-and-dirty arbitration and by mediation conducted by private individuals accountable neither through review processes or appeal."¹⁵⁹ Perhaps this is the least bad choice among the options possible in today's economic and political climate. Nonetheless, I am left uneasy. John Gapper, a *Financial Times* columnist, comments: "There are many straightforward and simple ways of offering customers a range of services. Companies that, instead, employ tricky and convoluted methods are storing up trouble for the future."¹⁶⁰ When courts accept these tricky and convoluted methods, they, too, may be storing up trouble for the future.

IV. CONCLUSION

This Symposium dealt with real problems, and my title is overstated. However, we have a wide freedom from contract when we look at the law in action. The number of contracts cases that can get to court is not large, and there is reason to think that that number is decreasing. At least in some instances, contracts disputes are settled in ways other than by attempting to vindicate rights created at the time of negotiation. This, too, is a form of freedom from contract. Sometimes this is a good thing; often it is not. Willard Hurst reports that throughout American history, "we sought to make all secular power responsible to power outside itself, for ends which it alone did not define."¹⁶¹ Evading legal regulation by an arbitration or other provision hidden in a form contract, offends our traditions and may have costs. Finally, we cannot forget that Dilbert is an important social indicator, and even Dilbert has reacted to rolling contracts with frustrated resignation. Let me repeat the way I ended another article to emphasize something I think is important:

If we reduce choice and consent to a magical fiction, this may affect the answers people give to a question of Macneil's: "Do I think conditions will continue to exist whereby each of us will desire to and be able to depend on the other?" Macneil

158. *Id.* at 952.

159. *Id.* at 932.

160. John Gapper, *The Trouble With Presuming Consent*, *FIN. TIMES*, July 6, 2004, at 13.

161. JAMES WILLARD HURST, *THE LAW IN UNITED STATES HISTORY*, 104 *PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY* 518-19 (1960).

warns that "beliefs that one social class 'gets too much,' rapidly convert the psychology of exchange from that of goods to that of harms." It is one thing if some do better than others when they play by the rules of the game. It is something else if those who come out on top do so by tricking others and having their deceptions supported by the legal system. It is easy to overstate the importance of the law of contracts. Relational sanctions and private governments do most of the work of protecting expectations and reliance. Contract law in practice is a flawed product that costs too much in most situations. Nonetheless, law can matter. The chance that a court might upset outrageous behavior by a transactor makes some contribution to the trust necessary to make any economic system work.¹⁶²

162. Stewart Macaulay, *Relational Contract Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 804 (2000) (citation omitted); cf. James W. Fox, Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE WESTERN RESERVE L. REV. 1 (2003); see also Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 BOSTON U.L. REV. 531, 557 (1995). Rose says:

In speaking of balance, I do not mean to suggest that trust in public institutions and trust in private assurances are in some way alternatives. If anything, the opposite is true: Private trustworthiness adds to public trustworthiness, and vice versa. What is most disruptive to an appropriate balance is corruption and weakness in government, where cheaters can use payoffs or intimidation to avoid legal enforcement, where citizens cannot trust the law anyway, and where citizens may come to distrust one another as well, thus losing informal as well as formal grounds for trust.

Rose, *supra*, at 557.