

# Duquesne Law Review

Volume 52, Number 2, Summer 2014

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## Drafting Our Future: Contract Law In 2025

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## The Judicial Vision of Contract: The Constructed Circle of Assent and Unconscionability

*John E. Murray, Jr.\**

A recent article with a similar title<sup>1</sup> focused on one of two radical sections of Article 2 of the Uniform Commercial Code, Section 2-207, popularly but mistakenly identified as the “battle of the forms.”<sup>2</sup> Neither that section nor the other radical UCC departure from classical contract law known as “unconscionability” have been assimilated by courts on the same level as other contracts doctrines. For more than six decades, their use has been attended by conclusory terms parading as analyses on a judicial tapestry of discomfort that is palatable. The despair of Section 2-207 is aptly stated in the classic confession one court: “Section 2-207 is a defendant, lurking demon patiently waiting to condemn its interpreters to the depths of despair.”<sup>3</sup>

The other radical section was first revealed in Section 2-302 of the Code as a modern version of “unconscionability,” the quintessential equitable concept, now to be pursued in some fashion in courts of law. Exactly how that would occur has always been the problem. Notwithstanding the hope that it would become “perhaps the most valuable section of the entire Code,”<sup>4</sup> an early criti-

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1. John E. Murray, Jr., *The Judicial Vision of Contract – The “Constructed Circle of Assent” and Printed Terms* will appear in a forthcoming issue of the *St. Thomas University Law Review* as part of an issue based on papers delivered at the 2014 International Conference of Contract Law.

2. Among many other misconceptions about this section, the popular title may be read to suggest that it is limited to situations involving two forms with “battling” boilerplate terms. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). Such a misconception contradicts the statutory language, precedent and purpose of the statute as it creates unnecessary confusion concerning even the basic chronology of contract making. An oral contract followed by one confirmation with additional terms was not only intended to be covered under Section 2-207; it was the first illustration of its application under a comment to that section. See John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35 (2012) as cited in *Howard v. Feller gas Partners, LP*, 2014 U.S. App. LEXIS 6415 (10th Cir. 2014); *Schnabel v. Trilegiant*, 2012 U.S. App. LEXIS 18875 (2d Cir. 2012).

3. *Reaction Molding Tech. v. Gen. Elec. Co.*, 585 F. Supp. 1097, 1104 (E.D. Pa. 1984).

4. Statement of Karl Llewellyn, 1 STATE OF NEW YORK 1954 LAW REVISION COMMISSION REPORT, Hearings on the Uniform Commercial Code 57.

cism viewed it as “nothing more than an emotionally satisfying incantation, proving it is easy to say nothing with words.”<sup>5</sup> In terms of the development of a cogent analysis, that prophecy has turned out to be largely true. Neither the enacted language of 2-302 nor the unenacted Comment language provides anything resembling a definition of “unconscionability.”<sup>6</sup> Courts are now in general agreement that no “precise” definition of the new “unconscionability” concept is possible.<sup>7</sup>

Sections 2-207 and 2-302 share a common intellectual provenance. They were Karl Llewellyn’s responses to procrustean rules of classical contract law where “technical” analyses produced results that undermined the apparent bargain of reasonable parties unless courts deviated from the rules through the use of “covert tools.”<sup>8</sup> The sections were designed to avoid the necessity to use unreliable covert tools by enabling and empowering courts to create new designs for the agreement process that would more precisely identify the apparent bargain-in-fact of the parties. Since its birth, however, 2-207 became encrusted with new technical obstacles, diametrically opposed to the anti-technical philosophy of

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5. Arthur Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 558-59 (1967).

6. “Different proposals were considered by the Article 2 Drafting Committee during the 1940’s [but] the doctrine of unconscionability was left undefined.” Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment*, 78 ST. JOHN’S L. REV. 663, 698 (2004). The subsequent *Restatement (Second) of Contracts* version in Section 208 (appearing sixteen years later) simply replicates the language of UCC § 2-302.

7. *Lucier v. Williams*, 841 A.2d 907, 911 (N. J. Super. 2004) (“There is no hard and fast definition of unconscionability.”); *Ruppelt v. Laurel Healthcare Providers, LLC*, 293 P.3d 902, 908 (N. M. App. 2012) (“[N]o single, precise definition of substantive unconscionability can be articulated . . . .”); *Original Talk Radio Network v. Alioto*, 2013 U. S. Dist. LEXIS 113788 (D. Ore. 2013) (“Courts in Oregon have recognized that unconscionability defies precise definition.”); *Saenz v. Martinez*, 2008 Tex. App. LEXIS 8297 at \*26 (“Unconscionability has no precise definition because it is a determination to be made in light of the entire atmosphere in which the agreement was made, the alternatives, if any, available to the parties at the time the contract was made, the nonbargaining ability of one party, whether the contract was illegal or against public policy, and whether the contract is oppressive or unreasonable.”); *Commercial Real Estate Inv. v. Comcast of Utah II, Inc.*, 285 P.3d 1193, 1208 n. 9 (Utah 2012) (Lee, J. concurring opinion) (“Common law definitions of unconscionability are . . . so unclear and inconsistent that they provide little, if any, guidance as to what unconscionability really means.”) (quoting Evelyn L. Brown, *The Uncertainty of UCC Section 2-305: Why Unconscionability Has Become a Relic*, 105 COM. L. J. 287, 291 (2000)).

8. The “anti-technical” design of Article 2 of the Code is well documented in the sections themselves. See John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of the Uniform Commercial Code*, 21 WASHBURN L.J. 1 (1981).

Article 2.<sup>9</sup> As to 2-302, lacking a generally accepted definition, the two essential themes running through the Llewellyn version of “unconscionability” were identified in a 1965 case in a jurisdiction that had yet to enact the UCC. Judge Skelly Wright’s opinion described unconscionable contracts or clauses as manifesting the absence of reasonable choice and terms unreasonably favorable to the other party. With or without attribution, Judge Wright’s description reappeared in many subsequent cases.<sup>10</sup> In the somewhat embarrassing position of finding “unconscionable” indefinable, the current fashion inevitably describes unconscionability as “procedural” or “substantive.”<sup>11</sup>

“Procedural” unconscionability is concerned with the circumstances under which the contract was negotiated and formed including the conspicuous or inconspicuous form in which the allegedly unconscionable term is found and, in particular, whether a genuine negotiation occurred, versus a take-it-or-leave-it demand that precluded any choice by the party with inferior bargaining power. Where only one party dictates the terms, the agreement is a “contract of adhesion” which is “procedurally” unconscionable. While genuine negotiation over contract terms could occur between commercial buyers and sellers of relatively equal bargaining power, virtually all consumer contracts are “contracts of adhesion.”<sup>12</sup> “Adhesion” contracts, however, no longer carry the negative implications that were so often discussed a half-century ago as a major component of unconscionability.<sup>13</sup> Currently, it would be more than rare for a court to determine that a contract or provision thereof was unconscionable on the basis of procedural un-

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9. These developments are explored in some detail in the earlier article. *See Judicial Vision, supra* note 1.

10. *See, e.g.,* BGW Assocs., Inc. v. Valley Broad. Co., 532 F.Supp. 1112, 1113-14 (S.D.N.Y. 1981); Davis v. M.L.G. Corp., 712 P.2d 985, 991 (Colo. 1986); Tulowitzki v. Atl. Richfield Co., 396 A.2d 956, 960 (Del. 1978); Reuben H. Donnelley Corp. v. Krasny Supply Co., 592 N.E.2d 8, 11 (Ill. 1991); Pitts v. Watkins, 905 So.2d 553, 557 (Miss. 2005); State of New York v. Gen. Motors Corp., 466 N.Y.S.2d 124, 127 (1983); Witmer v. Exxon Corp., 434 A.2d 1222, 1228 (Pa. 1981).

11. Notwithstanding his disdain for the general concept, Professor Leff suggested this distinction. *See* Leff, *supra* note 5.

12. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011), the Court was unimpressed by the analysis of the California Supreme Court in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), that arbitration agreements waiving class actions were unconscionable in consumer contracts of adhesion since “the time in which consumer contracts were anything other than adhesive are long past.”

13. In the landmark case of *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86-87 (N.J. 1960), the court provides a classic exposition of the “adhesion” concept.

conscionability alone.<sup>14</sup> Indeed, the current vogue suggests that there is nothing “wrong” where a contract is properly characterized as procedurally unconscionable.<sup>15</sup>

Substantive unconscionability is concerned with whether a contract, or a term of a contract, is overly harsh, one-sided, or manifests an outrageous degree of unfairness.<sup>16</sup> Unlike procedural unconscionability, a court may deem a contract or a term of a contract unconscionable on the basis of substantive unconscionability alone.<sup>17</sup> While the “procedural” versus “substantive” distinction appears in virtually any significant discussion of unconscionability, its analytical strength is greatly exaggerated. Unique insight is not required to demonstrate that procedural unconscionability deals with Skelly Wright’s first element, the absence of reasonable choice, while substantive unconscionability manifests his second element, unreasonably favorable terms.<sup>18</sup> Thus, the “procedural” and “substantive” descriptions are subject to the same criticism that Professor Leff provided for the original language of unconscionability in Section 2-302. They are nothing more than additional “emotionally satisfying incantations proving that it is easier to say nothing with words.”<sup>19</sup>

While the two radical UCC sections are not expressly limited to standardized (boilerplate) terms, the disputes giving rise to their application typically involve such repeatedly used printed terms. Thus, the two sections are embedded in the perennial problem of determining the enforceability of printed terms where no satisfactory analysis has been developed, though the problem has been visible for well over a century. The affinity between the two sections is easily apparent in the archetypical situation of a printed clause containing the inevitable terms favorable to a party, drafted to the edge of the possible by a lawyer who is doing her best to anticipate the last scintilla of potential loss to her client. The essential question for a court in such cases is no different from the

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14. See JOHN E. MURRAY, JR., MURRAY ON CONTRACTS, § 97[c] (2011).

15. In *United States v. Hare*, 269 F.3d 859, 862 (7th Cir. 2001), Judge Frank Easterbrook’s opinion for the court states, “But what’s wrong with a contract of adhesion anyway?”

16. See, e.g., *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1139 (11th Cir. 2010); *Garrett v. Janiewski*, 480 So.2d 1324, 1326 (Fla. Dist. Ct. App. 1985).

17. See, e.g., *Maxwell v. Fidelity Fin. Servs.*, 907 P.2d 51, 69 (Ariz. 1995); *Gillman v. Chase Manhattan Bank, N. A.*, 534 N.E.2d 824, 829 (N.Y. 1988); *Adler v. Fred Lind Manor*, 103 P.3d 773, 783 (Wash. 2004).

18. See *In re House*, 2008 Bankr. LEXIS 1521 (S.D. Ohio 2008) at \*11.

19. Statement of Karl Llewellyn, *supra* note 4.

essential question that courts routinely face in contracts litigation generally, i.e., determining which terms will qualify as “operative,” thereby entering the judicially constructed circle of assent.

It has long been an open secret that the insistence of courts that they are simply discovering the intention of the parties in ascertaining the terms of a contract is not true and never was true. While there is universal agreement concerning the application of the objective test, very little attention is paid to the fact that an officially recognized “contract” is necessarily a judicial construct.

The process begins with evidence of an alleged agreement that will be subjected to numerous judicial sieves to determine which manifestations of assent the court deems ‘operative.’ If a ‘contract’ is discovered, it is a construct, a judicially conceived circle of assent, displaying what the court deems to be an objectively reasonable agreement between objectively reasonable parties colored by policy dimensions that reflect judicial favors and frowns. The distilled construct is the only agreement enforceable at law, regardless of the intention of the parties since the intention of the parties will remain unknowable.<sup>20</sup>

Courts are asked to consider whatever objective manifestations are available to determine what terms they deem appropriate for inclusion in the constructed circle of assent they create, regardless of the actual intention of the parties. Courts have engaged in this process from time immemorial, long before there was any mention of a new doctrine of unconscionability or the possibility of finding a contract where the printed form of a party contained terms different from or additional to the terms in the other party’s printed form.

Any manifestation of agreement is subject to interpretation and it will be interpreted according to a normative standard of reasonableness and good faith, though the actual parties may not have met either of those standards. The standards will be applied by judges with different experiential and linguistic backgrounds. Some judges may recognize the limitations of such backgrounds and admit evidence of reasonable, alternative meanings of words or conduct, while other judges may reject such proffers on the foot-

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20. *Judicial Vision*, *supra* note 1.

ing that the manifestations are unambiguous.<sup>21</sup> Even the initial determination of whether a contract has been formed will depend upon whether a reasonable party would have understood a communication as an offer or whether the other party should have understood words or conduct as manifesting an acceptance of the offer. Whether the issue is formation or interpretation of a contract, the issue is always what a “reasonable party” would have understood as the judge places himself in the position of that reasonable party. The “reasonable” criteria that pervades interpretation contains the biting innuendo that “reasonable” is in the eye of the beholder.

Evidence of an agreement made prior to a writing may not be admitted if the judge determines that reasonable parties would have or “would certainly” have included such an agreement in the kind of writing that the parties finally executed.<sup>22</sup> Strong evidence of an agreement will not prove a contract exists if it fails to meet the requirement of a writing under a statute that began in 1677 but remains part of contemporary contract law. Yet, some courts will be willing to discover a satisfaction of the statute of frauds through detrimental reliance on the oral contract. Such judicial activism is reminiscent of a “covert tool.”

There are many other covert tools that Karl Llewellyn did not address. Language of condition—sometimes even including the use of the term “condition”—will be denied conditional effect because of the classic policy that the law abhors forfeitures. Breaching a contract by assigning a contract right in the teeth of language precluding assignments of such rights will be creatively construed to distinguish a duty not to assign from the surrender of the power to assign, thereby validating the assignment. Such an analysis reflects the favorable policy of freedom to assign contract rights.

Whether a breach of contract is important enough to discharge the duty of the aggrieved party will depend upon its “materiality.” Again, the court will determine whether the breach is “material”

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21. The notion that words have a “plain meaning” and interpretation is permitted only if a court decides that the language is ambiguous on its face continues, notwithstanding compelling arguments to the contrary. This illustration and others that follow are more fully developed in the earlier article, *Judicial Vision*, *supra* note 1.

22. The “would certainly” test is the UCC § 2-202 modification of the original common law test which would admit more evidence since, to preclude evidence of a prior agreement, the court would have to determine that reasonable parties “would certainly” have included it in the writing before the court.

based essentially on whether the aggrieved party has or will receive the substantial performance that he expected to receive when the contract was formed.<sup>23</sup>

The materiality standard is expressed in Section 2-207. The essential concern is the determination of the operative terms of a contract where a response to an offer contains “additional” terms.<sup>24</sup> Additional terms contained in a boilerplate section of a response to an offer that otherwise appears to be a definite expression of acceptance is treated as an acceptance forming a contract rather than a common law counter offer. The application of the classic counter offer rule allowed for a substantively unfair “last shot principle” that the statute sought to eliminate. Section 2-207 empowers a court to interpret and construe a response to an offer as it would be understood by a reasonable party in the position of the offeror rather than its technical meaning that would require it to be characterized as a counter offer simply because it contained a boilerplate term that was not in the offer. The underlying assumption is that such a boilerplate term is ignored by reasonable parties. Section 2-207, therefore, was designed to allow courts to construct a more substantively fair circle of assent.

Similarly, Section 2-302 is designed to allow courts to achieve a higher quality of substantive fairness. Courts were aware of this challenge. As suggested by a particularly insightful opinion:

Unconscionability is not defined in Section 2-302 of the Uniform Commercial Code . . . . It is an amorphous concept obviously designed to establish a broad business ethic. The framers of the Code naturally expected the courts to interpret it liberally so as to effectuate the public purpose and to pour content into it on a case-by-case basis. In that way, a substantial measure of predictability will be achieved . . . .<sup>25</sup>

The challenge of “pouring content” into the “amorphous concept” over the four decades since that opinion has proven to be formidable. No bright line test has appeared because, as Llewellyn himself discovered, there was no possibility of such a test. There was, however, no question that he expected courts to do the “pouring” in the mode of common law development, which he appreciated so

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23. RESTATEMENT (SECOND) OF CONTRACTS, § 241 (1981).

24. The “different” versus “additional” terminology in § 2-207(1) and (2), as well as other pathologies of the 2-207 case law, is addressed in *Judicial Vision*, *supra* note 1.

25. *Kugler v. Romain*, 279 A.2d 640, 651-52 (N.J. 1971).

much while recognizing that an approach by statute was dubious and awkward at best. The only way to achieve the purpose of this iconoclastic section that imported the underlying concept of equity into the law was to enable courts to achieve substantive fairness openly. His expectations for this splendid development began with his belief that courts would be eager to exert this power in appropriate cases. He believed that, “[w]hen it gets too stiff to make sense, the court may knock it over.” The unconscionability section would provide an official imprimatur to allow courts to “knock it over” without stealth. The challenge was considerable. How does a court explain its use of such an amorphous concept?

Traditional doctrines of contract law, with which courts have become reasonably comfortable on a regular basis, were often viewed as amorphous or mysterious. The “mystery” of the parol evidence rule was often viewed as familiar to many but fathomed by few.<sup>26</sup> The symmetry between the doctrines of material breach and substantial performance were revealed to many for the first time in the *Restatement (Second) of Contracts*.<sup>27</sup> The history of doctrines such as anticipatory repudiation, third party beneficiaries and many others, reveal the necessity for exactly the kind of common law development of an unconscionability doctrine that Llewellyn expected. Indeed, among the current “doctrines” of contract law, which one has remained unchanged by courts since its inception?

What may be the greatest obstacle to this development is the sacred rubric of contract law that one is bound by the terms to which he apparently agreed, regardless of whether he read or understood such terms. The “duty to read” doctrine is quintessential to any system of contract law to emasculate the absurd defense that one is not bound because he failed to read the document he understood as the contract document. If there is a record on paper or perceivable on a screen that a party should have understood as constituting the terms of her contract, she must be bound by the contents of that record, absent fraud, misrepresentation, mistake, or unconscionability. The whole notion of courts “policing” contracts for egregiously unfair (though not fraudulent or mistaken) terms was difficult to assimilate in light of the fundamental duty

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26. In his *Preliminary Treatise on Evidence at the Common Law*, 390 (1898), James Bradley Thayer began his discussion of the parol evidence rule as follows: “Few things are darker than this, or fuller of subtler difficulties.”

27. RESTATEMENT (SECOND) OF CONTRACTS, § 237, cmt. d.



to read rubric. That duty is so embedded that an unconscionability defense for a merchant is virtually impossible. This is so, notwithstanding the fact that, in a clash of forms between multinational corporations, the standard terms of the corporation with superior bargaining power will become the terms of the contract just as the standard terms of a large seller will be the “my way or the highway” form binding a consumer.

Unconscionability, therefore, was relegated essentially to consumer transactions. The successful use of the unconscionability defense was dangerously low until it was resuscitated to defending against boilerplate arbitration contracts of adhesion, which began appearing pervasively in myriad transactions, strongly supported by interpretations of the Federal Arbitration Act.<sup>28</sup> Courts were required to address arbitration agreements containing cost-splitting provisions, limitations on time to assert claims, “loser pays” the cost of arbitration clauses, the waiver of rights under various statutes, and preclusion of class representative actions.<sup>29</sup> Notwithstanding the absence of a generally accepted unconscionability analysis, the arbitration/unconscionability cases augur the capacity of courts to deal effectively with claims of substantive unfairness.

There is no question that parties, particularly consumers, do not read the boilerplate that invariably attaches to standardized transactions.<sup>30</sup> Statutes requiring conspicuous print and other disclosure encouragements to make terms more accessible have not induced their reading and assimilation. Karl Llewellyn found the “true answer” to the problem was to “delegate to courts the tasks of assessing as a substantive matter whether particular terms are unreasonable or indecent.”<sup>31</sup> While several other “an-

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28. 9 U.S.C. §§ 1–14 (2012). See MURRAY ON CONTRACTS, § 97.

29. *Id.*

30. The evidence is compelling that on-line transactions manifest the same clear deficiency. A recent article reports a series of empirical studies by Florencia Marotta-Wurgler noting the minuscule proportion of retail shoppers (one or two per thousand) who chose access to license agreements and, of those who did access the terms, they typically spent too little time to read anything more than a small portion of the text. Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 547–48 (2014).

31. *Id.* at 556, quoting Llewellyn’s famous “blanket assent” statement from his book, *The Common Law Tradition: Deciding Appeals*, 370 (1960):

Instead of thinking about ‘assent’ to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do

swers” have been suggested, only one appears realistic at the moment.

The *Restatement (Second) of Contracts* bravely entered the murky waters of standardized agreements in Section 211. The section begins with a restatement of the “duty to read” rule: “[w]here a party . . . signs or otherwise manifests assent to a writing and has reason to believe” he is signing a contract, and he is bound by the terms of the writing, including boilerplate clauses.<sup>32</sup> The rule, however, is subject to an “exception” in Section 211(3):

Where the other party has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

The language is curious and somewhat controversial by focusing on the “belief” of the party who will not be adversely affected by the clause—the drafter of the standardized record.<sup>33</sup> If the drafter “had reason to believe” that the other party would not have agreed had he known of the clause, it would not enter the constructed circle of assent. A comment suggests that evidence of “reason to believe” may be inferred from a particularly “bizarre” or “oppressive” term, or because the term eviscerates non-standard terms explicitly agreed to or otherwise eliminates the dominant purpose of the transaction.<sup>34</sup> The same comment, however, suggests a focus on the understanding of the adversely affected party:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, *they are not bound by unknown terms which are beyond the range of reasonable expectation.*<sup>35</sup>

This is a general statement of the “reasonable expectation” concept created by Professor (later Judge) Keeton who found it par-

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not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.”

32. RESTATEMENT (SECOND) OF CONTRACTS, § 211(1).

33. See John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982); MURRAY ON CONTRACTS, § 98.

34. RESTATEMENT (SECOND) OF CONTRACTS, § 211, cmt f.

35. *Id.* (emphasis added).

ticularly applicable to insurance cases.<sup>36</sup> If applied to contracts generally, it has an iconoclastic appearance. Literal reading and application of boilerplate provisions would no longer obtain. Rather, a court would be challenged to determine which of the boilerplate terms a reasonable party would have reasonably expected. Only terms which a reasonable party, regardless of background, experience or education,<sup>37</sup> would reasonably expect to find in the boilerplate, would be granted entry into the constructed circle of assent as operative contract terms. Nothing could be more fundamental in contract doctrine than commanding courts to discover the reasonable expectations of the parties with respect to contract language that is generally ignored. The great mistake of the past was to recognize that such boilerplate language is ignored by reasonable parties, while insisting that it have the same significance as negotiated term language—all in obeisance to the “duty to read” rule. In certain situations, courts have rejected the notion that boilerplate terms must have equal status. Both printed time-is-of-the-essence clauses and printed merger clauses have not always been credited with the same effects as negotiated clauses of the same type.

The solution to the printed clause dilemma that would encompass most of the unconscionability cases is a general recognition of the reasonable expectations concept.<sup>38</sup> Objections would include the necessity of courts determining reasonable expectations. The notion that courts should not pursue questions of substantive fairness contradicts our entire legal history. Courts pursue the parties’ reasonable expectations in virtually every contract case they decide. There is no empirical foundation on which to base a notion that courts are incapable of pursuing parties’ reasonable expectations because the record of their contract includes boilerplate terms that reasonable parties ignore. The duty-to-read rubric should be modified to state the exception that the rule does not apply with respect to boilerplate terms that reasonable parties ignore.

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36. See P. Keeton, *Insurance Law Right at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

37. Section 211(2) clearly states that all parties are to be treated equally in their determination of “reason to believe” or “reasonable expectations.”

38. A suggestion of reasonable expectations for consumer contracts as an addition to § 2-302 of the UCC was greeted with alarm. James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 326-27 (1997).

The final development would be the adoption of a concept currently found in Article 2.1.20 of the International Institute for the Unification of Private Law ("UNIDROIT") Principles, which are designed to supplement the article of the United Nations Convention on Contracts for the International Sale of Goods: "No term contained in standard terms which is of such a character that the other party could not reasonably have expected it is effective unless it has been expressly accepted by the other party."

The time has come to eliminate the chaos of contract law with respect to printed terms and the unconscionability issues that attend such clauses. Karl Llewellyn believed that only courts were capable of providing the solution. He was right.

# The Future of Fault in Contract Law

Robert A. Hillman\*

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Currently, courts, Restatement drafters, and analysts debate the role, if any, that fault plays in contract law.<sup>1</sup> According to many judicial opinions, the *Restatement (Second) of Contracts*, and various analysts, the reasons for failing to perform a contract, whether willful, negligent, or unavoidable, have little or no bearing in determining contract liability.<sup>2</sup> These authorities claim that contract liability is “strict,” meaning that the reasons for non-performance are irrelevant in determining the injured party’s rights.<sup>3</sup> But other sources believe that the reasons for failing to perform, which focus on whether non-performance is the promisor’s fault, are crucially important in the resolution of many, perhaps most, disputes under contract law.<sup>4</sup> The topic of this symposium is

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\* Edwin H. Woodruff Professor of Law, Cornell Law School. For extensive discussion of fault in contract law, see Symposium, *Fault in American Contract Law*, 107 MICH. L. REV. 1341 (2009).

1. See, e.g., Symposium, *Fault in American Contract Law*, 107 MICH. L. REV. 1341 (2009).

2. See George M. Cohen, *The Fault That Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1446 (2009) [hereinafter Cohen, *Fault Within Contract Law*] (“The myth that contract law is a system of strict liability stubbornly persists.”).

3. E. ALLAN FARNSWORTH, *CONTRACTS* 737, 761 (4th ed. 2004); Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1341 (2009); (“The basic rule of liability in contract law is no fault.”); Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract*, 107 MICH. L. REV. 1381 (2009) (case law reflects the lack of relevance of fault); Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1351, 1361-62 (2009) (explaining that contract liability is strict in that “the victim of the breach need not prove fault by the contract breaker” and that moving to a fault analysis would “change the law”).

4. For additional commentary consistent with this point, see Cohen, *Fault Within Contract Law*, *supra* note 2, at 1455 (“Contract doctrine contains numerous direct expres-

“Contract Law in 2025.” So the question I address here is: what will become of the dispute about fault in contract law in the next twelve or so years? In Part I of this essay, I summarize the argument that fault does not matter. In Part II, I argue that fault plays an important role in contract law today. In Part III, I make the prediction that by 2025 the controversy likely will disappear.

Before proceeding, it is important to define two terms used throughout this article. First, what do I mean when I say that the promisor was at fault?<sup>5</sup> There are many reasons for failing to perform a contract. A party may want to take advantage of better opportunities elsewhere with the belief that the gain from breaching will exceed contract damages liability. Or a party may have entered into a losing contract and refuse to perform for that reason. Or a party may decline to perform unless the other party, who has relied on the contract, agrees to provide additional compensation to the promisor. Each of these failures to perform constitutes a breach and is willful in the sense that the promisor deliberately decides not to perform.<sup>6</sup> A party may also fail to take appropriate action to ensure performance and become unable to perform. Such conduct constitutes negligent or reckless behavior and is a breach.<sup>7</sup> However, if a promisor has done all that is reasonably possible to avoid breach, but changed circumstances make performance impossible or impracticable, the promisor has neither willfully nor negligently breached. The same conclusion applies to a party who fails to perform because the contract terms are unenforceable on grounds such as unconscionability, duress, or the like.

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sions of fault. The Restatement and UCC include the following terms, all of which naturally invite a fault inquiry: best efforts, diligence, fault, fraudulent, good (and bad) faith, injustice (and justice and unjust), justified, know and reason to know, mitigate, negligent, precaution, reasonable, unconscionable, and willful.”); Melvin A. Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1414 (2009) (“[I]t should not be surprising that fault is a pervasive element in contract law. Some areas of contract law, such as unconscionability, are almost entirely fault based. Other areas, including interpretation, include sectors that are fault based in significant part. Still other areas, such as liability for nonperformance, might superficially appear to be based on strict liability, but can best be understood as resting in significant part on fault.”) (emphasis added). See generally Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505 (2002).

5. For a discussion of the fogginess of willful breach, see Richard Craswell, *When Is a Willful Breach “Willful”? The Link Between Definitions and Damages*, 107 MICH. L. REV. 1501, 1502-04 (2009).

6. Craswell sees an ambiguity in the concept of willfulness based on the failure to determine “which event in the sequence leading up to the breach should be assessed for deliberateness or intentionality.” *Id.* at 1515.

7. See Eric A. Posner, *Fault in Contract Law*, 107 MICH. L. REV. 1431, 1438 (2009) (a breacher is at fault when the breacher fails to take reasonable precautions).

As used here, “fault” encompasses willful, reckless, and negligent breaches.<sup>8</sup> It does not include failures to perform if the party has taken adequate precautions but simply cannot perform because of changed circumstances or if the terms are unconscionable or the like. In fact, in the latter situation, we shall see that the promisee is the one at fault.<sup>9</sup>

This leads to the second definitional issue. “Contract liability” encompasses two separate issues.<sup>10</sup> “Contract liability” may refer to whether a promisor who has failed to perform has breached the contract. Despite my observation above that not all failures to perform are breaches and that a promisor who fails to perform may have a valid defense, some authorities insist that the reasons for failing to perform have little or no place in the analysis of whether a party has breached a contract.<sup>11</sup> “Contract liability” also may refer to the measure of money damages or other relief. Some legal scholars who maintain that contract liability is strict focus on remedies.<sup>12</sup> They argue that the reasons for breach have no effect on contract remedies.<sup>13</sup> Some analysts also stake out a normative position that courts should *not* consider fault in determining breach or remedies (although theorists are not always clear on whether they are describing the current state of contract law or explaining what it should be).<sup>14</sup> I argue in Part II that both the breach and remedy visions of strict liability are incorrect in that in many, if not most, contracts cases, fault figures in both the determination of breach and the measurement of damages or other relief.

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8. Judge Richard Posner argues that courts should treat only negligent breaches as fault-based. See Posner, *supra* note 3, at 1353-54. According to Posner, negligent breaches diminish society’s resources, but deliberate breaches are efficient. *Id.*

9. See *infra* notes 73-76 and accompanying text.

10. Cohen, *Fault Within Contract Law*, *supra* note 2, at 1446.

11. See, e.g., Ben-Shahar & Porat, *supra* note 3, at 1344 (“The primary ambition of this Symposium . . . is to inquire into the reasons why fault plays no more than a limited role.”); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 32 (1985) (“Even though the fundamental rule governing breach of contract is a strict liability rule, ancillary contract rules based upon fault do exist.”); Posner, *supra* note 3, at 1351 (“The option theory of contract . . . implies that liability for the breach of a contract is strict.”); Scott, *supra* note 3, at 1382 (“The core of contract law as applied in the courts is a no-fault regime.”).

12. See, e.g., Cohen, *Fault Within Contract Law*, *supra* note 2, at 1446 (discussing and refuting the “strict liability paradigm”); see also Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else.”).

13. See *infra* Part I.

14. Judge Posner, for one, appears to advocate on efficiency grounds that liability *should be* strict, regardless of the actual judicial approach. Posner, *supra* note 3, at 1351.

As we shall see, several reasons underlie contract law's heavy use of fault concepts in assessing failure to perform and appropriate remedies. For example, a court may view as immoral and worthy of condemnation a promisor who willfully or negligently breaks a promise and import those perceptions into legal decisions and rules.<sup>15</sup> Or a court may measure the reasonableness of a party's conduct with the goal of administering a fair and equitable system of exchange.<sup>16</sup> Or a court may focus on creating incentives to facilitate efficient outcomes, a strategy that necessarily encompasses the reasons for breach and the assessment of remedies.<sup>17</sup> Of course, such reasons are not mutually exclusive, although analysts who recognize fault's role in contract law sometimes dispute whether moral reasons or incentives predominate.<sup>18</sup> In light of undisputable evidence of, and strong reasons for, assessing fault in contract law, the mystery is why the no-fault perception persists.

In Part III of this essay, I predict that this perception cannot last. Part of the reason should be obvious already after reading this introduction. If I am right that fault already plays a huge role in contract law, perceptions to the contrary should wither away (although they have lasted for a long time). And we will see that sources already are wavering.<sup>19</sup> In addition, I show why technological advances that have changed the manner in which many contracting parties do business and that have increased the opportunities for advantage-taking and information gathering suggest an even larger role in the future for fault in contract law.

#### I. THE PERCEPTION THAT THE REASONS FOR FAILING TO PERFORM DO NOT MATTER

Much judicial language and the *Restatement (Second) of Contracts* lend support to the idea that fault is irrelevant in assessing

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15. Eisenberg, *supra* note 4, at 1414; *see also* Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551 (2009) (a promise is a moral commitment to perform).

16. For example, a court may assess fault in determining which party should bear the risk of a misunderstanding concerning the meaning of their agreement or whether a breaching party is likely to cure a default.

17. For example, if a party cannot perform because of an unanticipated catastrophic event through no fault of her own, holding the party to performance will not create incentives for greater care.

18. *See, e.g.*, Ben-Shahar & Porat, *supra* note 3, at 1344 ("Damage booster[s] . . . have nothing to do with the mens rea of the promisor, the volition of his act, or its morality . . . . Instead, the willful-breach cases have to do with incentives.").

19. *See infra* note 28 and accompanying text.



contract breach and remedies. Some courts posit that the reasons for breach do not matter because a contract obligation is nothing more than an option to perform or pay damages. Judge Richard Posner is a champion of this position both in his judicial opinions and in his influential writings on contract law. For example, Judge Posner reasons:

What is true and worth noting is that the civil law—the law of Continental Europe, as distinct from Anglo-American law—of contracts places an emphasis on fault that is not found in the common law. As Holmes remarked, the common law conceives of contracts as options—when you sign a contract in which you promise a specified performance you buy an option to either perform as promised or pay damages, unless damages are not an adequate remedy in the particular case. Whether you were at fault in deciding not to perform—you could have done so but preferred to pay damages because someone offered you a higher price for the goods that you'd promised to the other party—is therefore irrelevant.<sup>20</sup>

A related claim focuses on the goal of contract remedies, which is to award damages sufficient to compensate the injured party for the loss of the expected performance.<sup>21</sup> Assuming full compensation (itself a dubious proposition in light of compensation hurdles such as foreseeability, certainty, and attorney's fees rules), this approach demonstrates that courts ignore fault issues in assigning remedies.<sup>22</sup> By awarding only expectancy damages and denying punitive damages and specific performance, courts refrain from punishing the breacher or compelling performance. By granting expectancy damages and nothing less, courts refrain from penalizing the injured party. As such, fault plays no role in assessing damages. The *Restatement (Second) of Contracts* reinforces this perspective:

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20. *Bodum USA, Inc., v. La Cafetiere, Inc.*, 621 F.3d 624, 634 (7th Cir. 2010) (citation omitted). Many courts follow this reasoning. *See, e.g.*, *Kase v. Salomon Smith Barney, Inc.*, 218 F.R.D. 149, 156 n.9 (S.D. Tex. 2003) (“Because [plaintiff’s] only remaining cause of action is for breach of contract, not fraud or negligence, issues such as intent and lack of accident or mistake are irrelevant to this lawsuit.”).

21. ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 163-88 (3d ed. 2014) [hereinafter HILLMAN, *PRINCIPLES*].

22. *See, e.g.*, FARNSWORTH, *supra* note 3, at 761 (noting that “contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.”).

The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. “Willful” breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party.<sup>23</sup>

Many courts appear to follow the Restatement position. The following language is typical:

The law does not condone breach of contract, but it does not consider it tortious or wrongful. If a party desires to breach a contract, he may do so purposely as long as he is willing to put the other party in the position he would have been had the contract been fully performed . . . . Fault is irrelevant to breach of contract.<sup>24</sup>

Similarly, another court has stated that “a promisor’s motive for breaching his contract is generally regarded as irrelevant because the promisee will be compensated for all damages proximately resulting from the promisor’s breach.”<sup>25</sup> Some courts are not even tested by the degree of nastiness of the breach: “motive, regardless of how malevolent, remains irrelevant to a breach of contract claim and does not convert a contract action into a tort claim exposing the breaching party to liability for punitive damages.”<sup>26</sup>

Prominent legal scholars (including Judge Posner in his scholarly writings) also maintain that fault is either irrelevant to issues

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23. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (1981). The law and economics movement likely influenced the *Restatement (Second)* position. For example, Allan Farnsworth, the reporter of the *Restatement (Second)*, wrote a description in his treatise of the legal-economists’ position that parrots the *Restatement (Second)*: “Willful’ breaches should not be distinguished from other breaches.” FARNSWORTH, *supra* note 3, at 737; *see also* Patricia H. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733, 736 (1982).

24. *Eichmann v. Nat’l Hosp. and Health Care Servs., Inc.*, 719 N.E.2d 1141, 1145 (Ill. App. Ct. 1999) (quoting *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1050 (Ill. App. Ct. 1980)).

25. *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60, 68 (Ind. Ct. App. 2009) (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173, 180 (Ind. 1976)); *see also* *Koufakis v. Carvel*, 425 F.2d 892, 906 (2d Cir. 1970) (“A breach is a breach; it is of marginal relevance what motivations led to it.”).

26. *JRS Prod., Inc. v. Matsushita Elec. Corp. of Am.*, 8 Cal. Rptr. 3d 840, 852 (Cal. Ct. App. 2004).

of both breach and remedies<sup>27</sup> or that fault plays a limited role.<sup>28</sup> Some of these writers follow the courts that adopt a narrow view of the nature of a contract promise.<sup>29</sup> These scholars often rely on Holmes's adage that a contract means no more than a promise to perform or to pay damages. They argue that a promisor who fails to perform but who fully compensates the promisee for her loss has not broken a promise, and therefore is not at fault.<sup>30</sup> In fact, we will see that the logical conclusion from this observation, adherents believe, is that contract law should and does encourage breach if the promisor is better off by breaching after compensating the promisee with expectancy damages.<sup>31</sup>

Beyond conceptualizing the content of a contract promise as narrow, some analysts argue that strict liability is good policy, sometimes intimating that the enumerated policy is so persuasive that contract law must be following it. For example, Judge Posner claims that no-fault "minimize[s] the expense and uncertainty of litigation" because it requires only a "comparison . . . of the language of the contract with the fact of nonperformance."<sup>32</sup> He argues that fault, on the other hand, is an unruly concept that increases the cost of dispute resolution or litigation.<sup>33</sup> Contract law opts for strict liability, as the argument goes, to minimize such costs.

Judge Posner also asserts that strict liability "reduces transaction costs by optimizing risk bearing."<sup>34</sup> By this he apparently

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27. See Posner, *supra* note 3, at 1350 (discussing Holmes) ("[W]hen you sign a contract in which you promise a specified performance . . . you buy an option to perform or pay damages.").

28. See, e.g., E. Posner, *supra* note 7, at 1431 ("[A]lthough Anglo-American contract law is usually called a strict-liability system, it does contain pockets of fault."); Saul Levmore, *Stipulated Damages, Super-Strict Liability, and Mitigation in Contract Law*, 107 MICH. L. REV. 1365, 1366 (2009) ("Contract law has been understood as deploying strict liability, but it is strict only to a point—because once the 'duty to mitigate' is at issue, fault comes into play as courts consider the reasonableness of the post- and even the prebreach mitigation efforts."); Richard Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 164, 168 (1983) ("A must make and break a promise, but B is not required to prove that the breach was negligent or intentional or otherwise 'wrongful.'").

29. Cohen, *Fault Within Contract Law*, *supra* note 2, at 1447 (describing the position).

30. Posner, *supra* note 3, at 1350; Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1569 (2009).

31. See *infra* notes 112-119 and accompanying text.

32. Posner, *supra* note 3, at 1353; see also Scott, *supra* note 3, at 1392.

33. See Posner, *supra* note 3, at 1353, 1359; see also Craswell, *supra* note 5, at 1502 (indeterminacy of the term "willful"); E. Posner, *supra* note 7, at 1431 ("[T]he disadvantage of [a fault-based system] is that courts would need to make difficult inquiries and could make more errors.").

34. Posner, *supra* note 3, at 1351.

means that the promisor is generally the superior risk bearer—the party best able to prevent the risk or insure against it<sup>35</sup>—and strict liability creates incentives for the promisor to take the most efficient level of precautions against those risks.<sup>36</sup> Precautions “range from quality control to backup supplies to purchasing insurance to not promising in the first place.”<sup>37</sup>

Some analysts who describe contract law as largely strict attempt to explain away doctrines that seemingly focus on fault, arguing that economic explanations that do not entail fault are clearer and more persuasive.<sup>38</sup> Others more boldly assert that case law does not bear out the claim that courts generally rely on fault concepts.<sup>39</sup> Further, they claim that commercially sophisticated business parties generally prefer strict liability.<sup>40</sup> I respond to Part I’s descriptive and normative arguments supporting strict liability in the next section.

## II. THE REASONS FOR FAILING TO PERFORM CURRENTLY PLAY AN IMPORTANT ROLE

The following discussion sets forth a selection of the leading contract principles and doctrines of today in which fault plays a role. The discussion also evaluates, where relevant, the leading alternative claims of strict liability adherents set forth above. Subsection A discusses contract law’s use of fault in assessing whether a party has broken the contract. Subsection B analyzes fault in the context of determining remedies.

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35. See Posner and Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89-91 (1977); see also Cohen, *Fault Within Contract Law*, *supra* note 2, at 1457.

36. Cohen, *Fault Within Contract Law*, *supra* note 2, at 1448 (explaining the approach); see also Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 MICH. L. REV. 1479, 1480 (2009) (“[I]n general the expectation remedy is sufficient to provide optimal deterrence.”). But Scott points out that strict liability may fail to deter promisor inefficiencies such as failing to take precautions to ensure performance and promisee inefficiencies such as failing to mitigate before the promisor’s repudiation. Scott, *supra* note 3, at 1393-94.

37. Cohen, *Fault Within Contract Law*, *supra* note 2, at 1453.

38. See, e.g., Posner, *supra* note 3, at 1357 (“[T]he fact that the law uses moral language doesn’t mean that legal duties are moral duties.”).

39. See, e.g., Scott, *supra* note 3, at 1382 (“The core of contract law as applied in the courts is a no-fault regime.”).

40. See, e.g., *id.* at 1383 (“[B]oth autonomy and efficiency values support the claim that commercial parties will prefer strict liability rules to fault-based rules for assessing performance and the response to nonperformance.”).

*A. Contract Breach*

*The nature of a promise.* We saw that some advocates of strict liability rely on Holmes's pronouncement that a contract is a promise to perform or to compensate the promisee for non-performance.<sup>41</sup> A promisor who chooses the latter therefore cannot be at fault. But this is a very narrow view of the nature of a contract promise. At minimum, this view ignores the many contracts that explicitly or implicitly import standards of care, such as best efforts, due care, and good faith (I address the latter shortly).<sup>42</sup> Even in the absence of a judicial invocation of such standards, Holmes's view ignores the reasonable expectations of most commercial parties who understand that the costs of contract breakdown, whether in the form of settlement negotiations, dispute resolution, or lawsuits, are generally a poor substitute for performance and the creation of a good working relationship.<sup>43</sup> In fact, non-legal "business cultures" govern the day-to-day relations of many parties who believe that they should honor agreements and avoid "legalese."<sup>44</sup> These parties reasonably believe that a contract promise is to perform the contract.<sup>45</sup>

A contract promise requires performance for moral reasons as well.<sup>46</sup> As a general matter, morality requires people to look out for the personal and property interests of others.<sup>47</sup> In particular,

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41. See *supra* notes 27-31 and accompanying text; see also Posner, *supra* note 3, at 1350; Shavell, *supra* note 30, at 1569.

42. See Cohen, *Fault Within Contract Law*, *supra* note 2, at 1450-51. Cohen also points out that "parties often draft terms designed to discourage certain conduct" such as "satisfaction clauses[.]" *Id.* at 1451.

43. See, e.g., IAN MACNEIL, *THE NEW SOCIAL CONTRACT* 66-67 (1980); Cohen, *Fault within Contract Law*, *supra* note 2, at 1450 ("[W]e should be wary of theoretical justifications for strict liability that depend on overly confident assertions of mutual intent."); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467 (1985); see also *Demasse v. ITT Corp.*, 984 P.2d 1138, 1148 (Ariz. 1999) ("[T]he contract rule is and has always been that one should keep one's promises.").

44. See Macaulay, *supra* note 43, at 467; Stewart Macaulay, *The Reliance Interest and World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247, 260 (1991).

45. *Id.*, see also BARRY NICHOLAS, *FAULT AND BREACH OF CONTRACT*, IN *GOOD FAITH AND FAULT IN CONTRACT LAW* 337, 345 (Jack Beatson & Daniel Friedmann eds., 1995), quoted in Eisenberg, *supra* note 4, at 1429 ("Fault is . . . absent from the conventional common law conception of liability for breach of contract only because it is in substance incorporated in the meaning of 'contract.'"); Shiffrin, *supra* note 15, at 1564-66.

46. Eisenberg, *supra* note 4, at 1428.

47. ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 12-13 (1997) (describing CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981)); see also Shiffrin, *supra* note 15, at 1568 n.2 ("By morality, I mean those nonlegal, objectively grounded normative principles that regulate our motives, reasons, and conduct . . .").

contract promisors have a “moral obligation to honor [their] promises” in order to avoid harming the interests of their promisees.<sup>48</sup> According to Charles Fried, the author of the most comprehensive moral theory of contract law:

[A] promise creates a moral obligation because the promisor purposefully invokes the “convention of promising.” A convention is a “system of rules” governing the making of commitments that others can “count on.” In fact the very purpose of the convention of promising is to confer on the promisee “moral grounds . . . to expect the promised performance.”<sup>49</sup>

Professor Mel Eisenberg observes that “[i]n the area of nonperformance, law and morality, although not identical, tend to converge rather than diverge.”<sup>50</sup> This is not surprising. The goal of contract law may not be to enforce moral norms directly, but it also does not want to promote immoral behavior.<sup>51</sup> This is not the place, nor is it necessary, to delve deeply into the complex relationship of law and morality, however. Suffice it to say that if contracting parties reasonably expect performance, and if promisors have a moral obligation to look out for the interests of their promisees, countenancing breach through a narrow view of legal promising may undermine society’s faith in the contract institution, which obviously would have significant instrumental implications.<sup>52</sup> As Lon Fuller commented, the “regime of exchange would lose its anchorage and no one would occupy a sufficiently stable position to know what he had to offer or what he could count on receiving from another.”<sup>53</sup> Under such conditions, people may choose not to contract even if it would benefit both of them.<sup>54</sup> Or they may look to non-legal mechanisms for enforcement of their arrangements, such as requiring security deposits or premature

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48. FARNSWORTH, *supra* note 3, at 737 (citing FRIED, *supra* note 47, at 17).

49. HILLMAN, *supra* note 47, at 12-13 (quoting and describing FRIED, *supra* note 47, at 12-13; 16); *see also* Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. 1, 1 (2007).

50. Eisenberg, *supra* note 4, at 1428.

51. Shiffrin, *supra* note 15, at 1552. As early as 1825, courts in the U.S. worried about this issue in contracts cases. *See, e.g.*, *Mills v. Wyman*, 20 Mass. 207, 210 (“[T]here are great interests of society which justify withholding the coercive arm of the law from” moral duties.).

52. *Cf.* Bar-Gill & Ben-Shahar, *supra* note 36, at 1484 (“The sanctity of contract is infringed not by the willful breach per se, but by the propensity to disregard the full scope of the contractual obligation and to chisel away at it.”).

53. LON L. FULLER, *THE MORALITY OF LAW* 28 (rev. ed. 1969).

54. Marschall, *supra* note 23, at 734, 740.

performance that may be costly and inefficient.<sup>55</sup> Through the development of a doctrine in which fault plays an important role, contract law has absorbed these important instrumental reasons for rejecting contract damages as an alternative to performance.

It should not be surprising, therefore, that courts look askance at purposeful, reckless, and negligent breaches. The rest of this subsection enumerates numerous instances in which courts do so.

*The objective test of contract formation and interpretation.* Despite judicial language requiring a “meeting of the minds” for contract formation and for ascertaining the “intent of the parties” in contract interpretation,<sup>56</sup> contract law actually asks whether a reasonable person would believe the parties made a contract and decides the meaning of contract terms objectively as well. Judge Learned Hand’s famous dictum in *Hotchkiss v. National City Bank of New York* makes this point:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties . . . . If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.<sup>57</sup>

Under this objective test of contract formation and interpretation, a promisor is liable for misleading use of language, whether purposeful, reckless, or careless.

There are countless examples of the use of the objective standard to police purposeful, reckless, and negligent use of language. One example suffices here. Under the misunderstanding doctrine, if a material term in a contract is objectively ambiguous and the parties are thinking of different meanings of the term, the con-

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55. *Contract in General*, 7 INT’L ENCY. OF COMP. L. 20 (Arthur T. Von Mehren ed., 1982) (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.1, at 67 (1977)).

56. *See, e.g.*, *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 702 (2d Cir. 1998) (“[I]t is the intent of the parties which controls the interpretation of contracts.”); *Octagon Gas Sys., Inc. v. Rimmer*, 995 F.2d 948, 953 (10th Cir. 1993) (“In construing the meaning of a written contract, the intent of the parties controls.”); *Holbrook v. United States*, 194 F. Supp. 252, 255 (D. Or. 1961) (“[T]he intention of the parties . . . controls the contract’s interpretation and when that is ascertained, it is conclusive.”).

57. *Hotchkiss v. Nat’l City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff’d*, 201 F. 664 (2d Cir. 1912), *aff’d*, 231 U.S. 50 (1913).

tract is unenforceable.<sup>58</sup> However, courts enforce one party's understanding of the meaning of a term if that party did not know or have reason to know the meaning attached by the other party and the other party knew or had reason to know the meaning attached by the first party.<sup>59</sup> In other words, courts determine the meaning of language and the enforcement of terms in misunderstanding situations by evaluating whether a party is at fault for purposefully, recklessly, or negligently failing to clarify that party's view of the meaning of terms.<sup>60</sup>

The objective approach to contract formation and interpretation strikes at the heart of the no-fault claim. Contract law channels behavior toward making enforceable agreements, but it also governs how to avoid them. Under the objective approach, careless, reckless, or purposefully misleading language can bind a promisor notwithstanding the promisor's actual intentions, thereby "punishing" the promisor for her fault-based conduct.

*Material breach.* A promisor materially breaches if the promisee fails to receive substantially what the promisee bargained for. A finding of material breach means that the promisee can suspend performance and ultimately cancel the contract.<sup>61</sup> Factors for determining material breach include those focusing on the reasonable expectations of the promisee, but other factors also encompass the promisor's actions, including the promisor's fault. For example, section 275 of the *Restatement (First) of Contracts* states that "the wilful, negligent or innocent behavior of the party failing to perform" is influential in determining the materiality of a breach.<sup>62</sup> The second *Restatement* substitutes a test of the promisor's "good faith and fair dealing" in determining the materiality of a breach, but the result is essentially the same.<sup>63</sup> Another factor for determining materiality in the *Restatement (Second)* is the likelihood that the breacher will cure its failure, thereby measur-

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58. *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. Ch. 1864); RESTATEMENT (SECOND) OF CONTRACTS § 20(1) (1981).

59. RESTATEMENT (SECOND) OF CONTRACTS § 20(2) (1981).

60. See Cohen, *Fault Within Contract Law*, *supra* note 2, at 1455-56; Eisenberg, *supra* note 4, at 1423-24.

61. RESTATEMENT (SECOND) OF CONTRACTS §§ 241, 242 (1981).

62. RESTATEMENT OF THE LAW OF CONTRACTS § 275(e) (1932).

63. RESTATEMENT (SECOND) OF CONTRACTS d. § 241 cmt. f (1981) ("The extent to which the behavior of the party failing to perform . . . comports with standards of good faith and fair dealing is . . . a significant circumstance in determining whether the failure is material . . . . In giving weight to this factor courts have often used such less precise terms as "wilful.").



ing at least in part the reliability and sincerity of that party.<sup>64</sup> In addition, according to the second *Restatement*, upon a finding of material breach, the promisor's good faith and fair dealing are also factors for determining if a promisee may cease her own performance.<sup>65</sup>

As with the objective approach to formation and interpretation, the material breach doctrine goes a long way toward proving the importance of fault in contract law. If fault plays a role in determining the rights of the injured party to cease performance and cancel the contract, there may be few litigated cases of breach that do not involve an investigation of fault.

*Good faith and unconscionability.* Not only is good faith a factor for determining the materiality of a breach, it also constitutes an implied term filling out the performance obligations of a promisor.<sup>66</sup> As a general matter, courts find bad faith if the promisor's performance belies the promisee's reasonable expectations. Contract language cannot always capture many of the intricacies of the parties' understandings. In addition, contract drafters rarely allocate the risk of all of the contingencies because of their limited imagination, experience, and time. In such situations, the source of reasonable expectations is the term society would deem fair and reasonable: "Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable."<sup>67</sup> Good faith performance therefore rules out conduct that "violate[s] community standards of decency, fairness, or reasonableness."<sup>68</sup>

Writer-advocates of strict liability prefer an economic explanation for the good-faith duty. Judge Posner argues that fault principles obfuscate issues and introduce litigation costs. He therefore maintains that good faith is an unnecessary diversion.<sup>69</sup> For ex-

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64. *Id.* § 241(d); see also Bar-Gill & Ben-Shahar, *supra* note 36 (breacher more likely to breach again and to be dishonest).

65. RESTATEMENT (SECOND) OF CONTRACTS § 241(e) (1981).

66. See generally HILLMAN, PRINCIPLES, *supra* note 21, at 297-303.

67. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921).

68. RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a (1981); see Robert A. Hillman, "Instinct with an Obligation" and the "Normative Ambiguity of Rhetorical Power", 56 Ohio St. L.J. 775, 792 (1995) (citing *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984)) ("[r]easonable parties . . . intend to incorporate the meaning of terms society would find fair and just."); see also *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (holding that an at-will employment contract contained an implied covenant of good faith and fair dealing and that a bad-faith termination constituted a breach of contract).

69. See Posner, *supra* note 3, at 1358 ("There is a legally enforceable contract duty of 'good faith,' but it is just a duty to avoid exploiting the temporary monopoly position that a contracting party will sometimes obtain during the course of performance.").

ample, where a buyer has no choice but to accede to the seller's demand for a price increase, Posner comments:

Courts might describe the seller's conduct . . . as coercive, extortionate, or in bad faith, but all they would mean by these highly charged words . . . would be that an implicit term of every contract (unless disclaimed) is that neither party shall take advantage of a temporary monopoly, conferred by the contract . . . . One can if one wants denounce the temporary monopolist's conduct as wrongful, but the adjective adds nothing to the analysis.<sup>70</sup>

I have commented elsewhere on Judge Posner's position:<sup>71</sup>

Of course, the phrase "tak[ing] advantage" in Posner's definition is also "highly charged" and requires an investigation of the fault-based motives of the seller and the circumstances of the buyer. For example, a seller who believes that changed circumstances entitle the seller to more consideration would not necessarily be "taking advantage" of a promisee who has no market alternatives. And a buyer with ample substitute opportunities would not be the victim of advantage-taking even if the seller's motive was to extract extra-contractual gains. "Temporary monopoly" is also a technical term meaning roughly that the buyer has no reasonable alternatives. Determining what constitutes reasonable alternatives in various contexts will also tax the courts. Posner simply may want to substitute one set of abstract concepts for another, which may not clarify issues or reduce litigation costs at all.<sup>72</sup>

The same kinds of considerations that inform the doctrine of good faith apply to contract law's unconscionability doctrine, although the two principles differ in that good faith deals with implied terms and unconscionability with express ones.<sup>73</sup> Unconscionability applies the "moral standards that are rooted in aspirations for the community"<sup>74</sup> to police the manner in which con-

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70. *Id.* at 1358-59.

71. HILLMAN, PRINCIPLES, *supra* note 21, at 302.

72. For the traditional view, see Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 852 n.14 (1979).

73. See Eisenberg, *supra* note 4, at 1415-18.

74. *Id.* at 1418.

tracts are formed and the fairness of the resulting terms.<sup>75</sup> The history and modern-day applications of the doctrine are well rehearsed.<sup>76</sup> Here, I only want to make the rather obvious point that unconscionability and related doctrines such as fraud and duress play an important role in introducing fault into contract law. When these principles apply, contract law focuses on the overreaching of the promisee and excuses the promisor.

*Torts arising in the contract setting.* Some analysts have found it a mystery why tort law is fault-centered and, in their view, contract law is not.<sup>77</sup> Of course, this article argues that the dichotomy is not very compelling. But one likely reason for any divergence is that courts show little hesitancy in finding a tort in contract settings.<sup>78</sup> For example, courts have recognized an “independent tort” in the contract context including where a party misrepresents facts during negotiations or recklessly performs a contract.<sup>79</sup> This may relieve the pressure to inject fault into contract law itself.<sup>80</sup> But, of course, tort and contract are themselves artificial legal categories and the significance of the role of fault, whether called a component of tort or contract, shows the importance of fault in exchange transactions.<sup>81</sup>

*Impracticability and related excuse doctrines.* Contract doctrines such as impracticability, impossibility, and frustration of purpose excuse a promisor from performance if unanticipated circumstances make performance extremely costly, and the promisor did not assume the risk of the circumstances. Under impracticability, for example, courts excuse a promisor “if performance as agreed has been made impracticable by the occurrence of a contin-

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75. U.C.C. § 2-302 (2002).

76. See U.C.C. Art. 5 (2002); see also Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981).

77. See, e.g., Ben-Shahar & Porat, *supra* note 3, at 1341.

78. See, e.g., W. PROSSER & W. KEETON ON TORTS 660-61 (William L. Prosser et al. eds., 5th ed. 1984) (“[T]he American courts have extended the tort liability for misfeasance to virtually every type of contract where defective performance may injure the promisee.”).

79. See *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1326, 1328-33 (S.D. Fla. 1999); John A. Seibert, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1600-03 (1986).

80. See HILLMAN, PRINCIPLES, *supra* note 21, at 205-07.

81. See, e.g., *Mauldin v. Sheffer*, 150 S.E.2d 150 (Ga. Ct. App. 1966) (holding engineer liable for punitive damages for using plans for one construction project on another unrelated project); see also *Romero v. Mervyn's*, 784 P.2d 992, 998 (N.M. 1989) (awarding punitive damages under a contract theory for “malicious, fraudulent, oppressive, or . . . reckless[]” behavior).

gency the non-occurrence of which was a basic assumption on which the contract was made . . . .”<sup>82</sup> Performance is “impracticable” if it would result in a severe loss to the promisor.<sup>83</sup> The “non-occurrence of a contingency . . . was a basic assumption” language means that the parties made their agreement on the assumption that the disrupting event would not occur.<sup>84</sup> The *Mishara* court nicely summarized the doctrine: “It is implicit . . . that certain risks are so unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties.”<sup>85</sup>

On the other hand, courts will not excuse performance if the promisor should reasonably have foreseen the risk and, through its own neglect, failed to contract around the risk or to take reasonable precautions against it.<sup>86</sup> In this way, fault enters the equation in excuse cases.<sup>87</sup> Focusing on court dicta such as in *Mishara*, however, some analysts insist that successful excuse cases are no exception to strict liability because the promisor did not promise to perform under the circumstances.<sup>88</sup> This ignores the reality that in most excuse cases, the allocation of risk of the supervening disruption (whether the promisor promised to perform under the circumstances) is uncertain and involves analyzing the circumstances to determine what the parties probably intended or would have intended had they bargained over the matter. The often fogginess of this investigation invites courts to consider matters such as the fault of the promisor. In many impracticabil-

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82. U.C.C. § 2-615(a) (2007); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

83. *See, e.g.*, *Lawrance v. Elmore Bean Warehouse, Inc.*, 702 P.2d 930, 933 (Idaho Ct. App. 1985).

84. HILLMAN, *PRINCIPLES*, *supra* note 21, at 361-62.

85. *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 310 N.E.2d 363, 367 (Mass. 1974).

86. *See, e.g.*, *Roy v. Stephen Pontiac-Cadillac, Inc.*, 543 A.2d 775, 778 (Conn. App. Ct. 1988); *see also* Eisenberg, *supra* note 3, at 1419-22.

87. *See, e.g.*, FARNSWORTH, *supra* note 3, at 630 (“The third requirement for excuse is that the impracticability must have resulted without the fault of the party seeking to be excused.”).

88. *See* Cohen, *Fault Within Contract Law*, *supra* note 2, at 1457; Posner, *supra* note 3, 1351 (“The promise is to perform or pay damages, and so if you choose not to perform—even if you are prevented from performing by circumstances beyond your control—you *must* pay damages.”).

ity cases, in fact, fault and the degree of harm caused by performance are probably the most influential factors.<sup>89</sup>

Writers also defend strict liability in excuse cases as good policy on efficiency grounds. For example, Judge Posner asserts that courts fill risk-allocation gaps based not on whether the promisor was at fault in failing to perform or other factors, but on what “the parties could be expected to have done had they negotiated over the issue.”<sup>90</sup> Further, Posner maintains that parties would have allocated the risk to the promisor, who is the “cheaper insurer against the risk of nonperformance.”<sup>91</sup> According to Judge Posner, the promisor must be the cheapest insurer because otherwise the promisor would not have made the promise.<sup>92</sup> Strict liability thereby “reduces transaction costs by optimizing risk bearing.”<sup>93</sup> By definition in impracticability cases, however, the promisor cannot calculate the cost of the disabling risk at the time she makes the promise because the risk is unforeseeable or at least unforeseen. So it is difficult to see how the decision to make the promise depends on whether the promisor is the cheapest insurer. And as Professor Porat points out, in many instances the promisee may be the superior risk-bearer, such as where a promisor’s performance depends on the cooperation of the promisee or where the promisor relies on information about the prospect of performance by the promisee.<sup>94</sup>

Strict-liability theorists add that strict liability is good policy because it diminishes the cost of litigation by replacing fuzzy fault principles with the claimed relative certainty of economic analysis.<sup>95</sup> But despite these claims that fault issues are costly and uncertain,<sup>96</sup> willfulness or negligence is often indisputable in the context of excuse doctrines. For example, courts do not excuse a sell-

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89. See, e.g., FARNSWORTH, *supra* note 3, at 630 (citing cases); Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 652 (1983) (“A helpful generalization in predicting a court’s finding on the parties’ risk allocation or in predicting how a court will allocate the risk in gap situations is that when losses to the promisor would be moderate courts will not excuse performance, but when losses would be extreme and the promisor has acted reasonably courts will excuse performance.”) (citing cases and authorities).

90. See, e.g., Posner, *supra* note 3, at 1353.

91. *Id.* at 1351.

92. *Id.* (a promisor will make a promise to perform or pay damages if the promisor is “the cheaper insurer against the risk of nonperformance”).

93. *Id.*

94. Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397, 1398-1403 (2009).

95. Posner, *supra* note 3, at 1353, 1359.

96. See *id.*; see also Craswell, *supra* note 5.

er who sells goods to a third party that were earmarked for the buyer based on an inability to perform. And a supplier that is contractually obligated to supply molasses from “the usual run from the National Sugar Refinery” who fails contractually to assure a sufficient supply from the refinery cannot claim reasonable care.<sup>97</sup> In fact, as a general matter, sorting out which party is the superior risk-bearer in any given case may be more costly, time consuming, and indeterminate than filling gaps based on the promisor’s fault and the severity of the unanticipated event.<sup>98</sup>

### B. *Contract Remedies*

I now revisit and evaluate the observation of some writers that contract law’s principal remedy, expectancy damages, reveals that contract liability is strict. The goal of contract damages, the argument goes, is compensation, not compulsion, and courts do not distinguish breaches in assessing damages. Nor do they grant punitive damages or, ordinarily, specific performance. The following discussion, however, illustrates the many applications of fault in contract remedial law and sets forth alternative explanations for the dearth of specific performance and punitive damages cases.<sup>99</sup>

*Measurement of expectancy damages.* The issue of fault often arises when courts determine how to measure expectancy damages. For example, often courts must decide whether to measure these damages based on the cost of completing work promised by the breaching party or based on the projected increase in the value of the promisee’s property if the breacher had performed. All other things being equal, courts are likely to choose the higher measure if a promisor’s breach was willful because courts disapprove of

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97. *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 179 N.E. 383, 384 (N.Y. 1932) (“The defendant does not even show that it tried to get a contract from the refinery . . . . It has wholly failed to relieve itself of the imputation of contributory fault.”).

98. Cohen, *Fault Within Contract Law*, *supra* note 2, at 1452-53; *see, e.g.*, *Transatlantic Fin. Corp. v. U.S.*, 363 F.2d 313 (D.C. Cir. 1966) (concluding that ship owner could insure against risk of deviation, but U.S. government charterer could assess the probability of closing of Suez Canal); *see also* John Eloffson, *The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests*, 30 COLUM. J.L. & SOC. PROBS. 1 (1996).

99. *See* George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994) (analyzing different measures of damages depending in part on fault); Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517, 1518 (2009) (“[I]n reality, courts frequently award promisees more than their expectation when they find that a breach is willful, and thus act to deprive willful breachers of any gains from breach.”).

this behavior and want to encourage promisors to perform their contracts.<sup>100</sup>

Another example of fault's influence on expectancy damages is the certainty hurdle of consequential damages. Injured promisees must prove such damages with sufficient certainty so that courts have ample guidance on the promisee's actual loss.<sup>101</sup> However, comment a to *Restatement (Second)* section 352, as well as case law, reveal that courts relax the degree of certainty required for the promisee to recover if the breach is willful.<sup>102</sup>

Finally, it is now well accepted that the strength of the theory for enforcing a contract may directly affect the measure of damages. For example, in doctor-patient relations, some courts have enforced contract claims against doctors for failed operations. However, such courts may be reluctant to grant full expectancy damages if the doctor has not been negligent: "Where . . . in a number of the reported cases, the doctor has been absolved of negligence by the trier, an expectancy measure may be thought harsh."<sup>103</sup> On the other hand, if the botched operation is the doctor's fault, one would expect the court to be much less merciful.

*Mitigation of Damages.* The focus of mitigation is on the conduct of the injured promisee.<sup>104</sup> An injured promisee must act reasonably after breach to minimize the loss.<sup>105</sup> Accordingly, the promisee must take affirmative steps, such as agreeing to reasonable substitute opportunities that diminish the loss from breach,

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100. See, e.g., *Groves v. John Wunder Co.*, 286 N.W. 235, 236 (Minn. 1939) (majority willing to award much larger cost of restoration damages because "[d]efendant's breach of contract was willful. There was nothing of good faith about it. Hence, that the decision below handsomely rewards bad faith and deliberate breach of contract is obvious. That is not allowable."); see also *Kangas v. Trust*, 441 N.E.2d 1271, 1276-77 (Ill. App. Ct. 1982) ("[T]he willful violation of the contract by a builder is a factor which may be considered by the trier of fact in determining whether the breach requires application of cost of repair of diminution in value as the measure of damages."). Other factors, of course, play a role in these and similar cases.

101. See, e.g., *Kinesoft Dev. Corp. v. Softbank Holdings, Inc.*, 139 F. Supp. 2d 869 (N.D. Ill. 2001).

102. See, e.g., *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 643 (8th Cir. 1975) ("The wrongdoer should bear the risk of uncertainty that his own conduct has created.") (citing *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 565 (2d Cir. 1970)); 5 CORBIN ON CONTRACTS 1022 (1964) ("[D]oubts will generally be resolved in favor of the party who has certainly been injured and against the party committing the breach.").

103. *Sullivan v. O'Connor*, 296 N.E.2d 183, 187-88 (Mass. 1973).

104. But not always. Levmore suggests that the mitigation inquiry is one of "comparative fault." Levmore, *supra* note 28, at 1370. Scott points out that the mitigation principle applies to both parties, but it is limited by the rule that allows the promisee to await the time for performance before mitigating. Scott, *supra* note 3, at 1388-89.

105. If the promisee fails to act reasonably to mitigate, the court will require her to absorb her own avoidable loss.

and must refrain from conduct that increases damages.<sup>106</sup> Courts may even require an injured promisee to deal further with the breacher in order to minimize damages, depending in part on the breacher's motive for the breach.<sup>107</sup> For example, if a contract party breaches deliberately and thereby exhibits its unreliability, a court will not require the promisee to accept a new offer from the breacher.<sup>108</sup> On the other hand, courts also consider the breaching promisor's conduct in mitigation cases if it is the "superior mitigator," such as when the breacher can reasonably cure its default.<sup>109</sup>

Judge Posner explains the mitigation principle's purpose as preventing a party "from exploiting his temporary, contract-conferred monopoly in order to obtain a more generous settlement of his claim of breach of contract."<sup>110</sup> Applying economic analysis to the mitigation question in this way, Posner argues, leads to greater clarity.<sup>111</sup> But I wonder whether employing language such as "exploiting" and "contract-conferred monopoly" produces greater clarity than language that declares that the injured promisee cannot recover for conduct that would unnecessarily increase the damages liability of the breaching promisor, such as declining to avail herself of advantageous market substitutes.

*The efficient breach fallacy.* Strict-liability analysts not only assert that expectancy damages are based on strict liability, they also argue that the policy of granting expectancy damages *promotes* breach under certain circumstances. I have described the "efficient breach" theory elsewhere:

According to the "theory of efficient breach," expectancy damages correctly *encourage* a party to breach when the breach is *efficient*, in that the breach makes some parties better off without making anyone worse off. On the other hand, expect-

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106. See, e.g., *Schiavi Mobile Homes, Inc. v. Girona*, 463 A.2d 722, (Me. 1983) (dealer failed to mitigate damages by not accepting a substitute offer for mobile home); *Clark v. Marsiglia*, 1 Denio 317, 318 (N.Y. Sup. Ct. 1845) ("[T]he plaintiff [has] no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.").

107. See Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 598 (1976) (observing that courts often consider whether a breach was willful or unavoidable in determining if the avoidable consequences rule requires an injured party to accept a new offer from the breaching party).

108. See *id.* at 560.

109. See Cohen, *Fault Within Contract Law*, *supra* note 2, at 1453.

110. See Posner, *supra* note 3, at 1359.

111. *Id.* ("One can if one wants denounce the temporary monopolist's conduct as wrongful, but the adjective adds nothing to the analysis.").



tancy damages dissuade a party from breaching when a breach would cause more losses than gains. Suppose, for example, you agree to sell your piano to [your neighbor] Alice for \$1200 . . . . [T]he piano is worth \$1400 . . . . Another neighbor, Bob, offers to buy the piano from you for \$1800. According to the lawyer-economists, expectancy damages allow, even encourage, you to break your contract with Alice, to pay her \$200 (her expectancy damages measured by the market price-contract differential), and to deliver the piano to Bob, who outbid Alice for the piano. You gain enough from selling to Bob instead of Alice (\$600) so that you can pay Alice her expectancy damages and still come out \$400 ahead. Bob, who bid the highest for the piano is also better off because he valued the piano more than the \$1800 he paid (otherwise he would not have made the deal). Alice is no worse off because she recovers her \$200 expectancy . . . .

Lawyer-economists point out that awarding damages greater than an injured party's lost expectancy would be undesirable because it would discourage breach when breach would be efficient. Suppose, for example, that Alice could recover \$200 lost expectancy damages and \$600 punitive damages. You would not breach because it would not be profitable for you, even though we have just demonstrated that, without the punitive damages liability, breaching would make you and Bob better off and no one worse off (hence a breach would be efficient). Awarding damages any lower than expectancy also would be undesirable because you would have the incentive to breach even when your gain from doing so would be less than Alice's real loss.<sup>112</sup>

As noted in the excerpt above, analysts look to the absence of punitive damages as evidence of contract remedies' efficient-breach, strict liability approach.<sup>113</sup> The key to the measurement of damages, they believe, is, therefore, efficiency, not fault. There is little reason to condemn a contract breaker who is trying to "increase

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112. HILLMAN, PRINCIPLES, *supra* note 21, at 157; *see also* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 664 (1999) ("If the breaching party is not responsible for the non-breaching party's full losses, then there is an incentive to breach even when the breach would not be efficient.")

113. *See* Posner, *supra* note 3, at 1354.

the overall contractual pie” by finding a better opportunity and making the promisee whole.<sup>114</sup>

The efficient breach hypothesis is interesting and fun to discuss, but it has little basis in reality. For one thing, its basic premise, that expectancy damages make the injured party whole, is not accurate. Consider the various limitations on expectancy awards, including the requirements that damages must be foreseeable, certain, and caused by the breach; the limitations on prejudgment interest; and the lack of compensation for most attorneys’ fees. Add the additional expenses and time commitment of possible negotiation and litigation, and it will be rare indeed for contract law to fully compensate a promisee by awarding expectancy damages. And the prospect for injured parties of incurring these uncompensated damages and expenses means that breaching parties have leverage to extract favorable settlements below their expectancy liability. If injured parties are not fully compensated, of course, the foundation of the efficient breach theory collapses.

The efficient breach strategy is also beset with problems for the promisor, who must predict the promisee’s damages if the promisor breaches, including difficult-to-forecast consequential damages that must be foreseeable, certain, and unavoidable. Accurate prediction would require access to the promisee’s business records and a determination of how these hurdles would play out if the case went to trial. Further, the promisor must account for the potential damage to its reputation and good will. These, too, will often be incalculable, which itself may be sufficient to deter a breach.<sup>115</sup>

Furthermore, a rule that encourages breach may ultimately be inefficient for a host of reasons. For example, encouraging the promisor to breach may lead to costly negotiations or litigation over how much the promisor must pay the promisee to purchase the right to breach. Ian Macneil pointed out that the efficient breach theory has:

[B]ias . . . in favor of individual, uncooperative behavior as opposed to behavior requiring the cooperation of the parties. The whole thrust . . . is breach first, talk afterwards . . . . [However,] “talking after a breach” may be one of the more expensive forms of conversation to be found, involving, as it so

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114. Bar-Gill & Ben-Shahar, *supra* note 36, at 1482.

115. HILLMAN, *PRINCIPLES*, *supra* note 21, at 200.

often does, engaging high-priced lawyers, and gambits like starting litigation, engaging in discovery, and even trying and appealing cases.<sup>116</sup>

Finally, and perhaps most important, countenancing or even favoring efficient breach may undermine society's faith in the contract institution.<sup>117</sup> It is worth reemphasizing Lon Fuller's point that the "regime of exchange would lose its anchorage and no one would occupy a sufficiently stable position to know what he had to offer or what he could count on receiving from another."<sup>118</sup> A policy of encouraging or even condoning efficient breach might discourage contract making in situations where an exchange would benefit both parties. Contracting parties understand that circumstances may change, so they seek transactional security. Without this security, it would make little sense to contract in the first place.<sup>119</sup>

In sum, if efficient breach is a fallacy and contract law does not encourage breach in some circumstances through expectancy damages awards, strict liability advocates have to look elsewhere for support.

### III. THE ROLE OF FAULT IN 2025

Were it not for the prevalence of today's perception that contract liability is and should be strict, nothing I have said so far would be very surprising or controversial. Party conduct influences court decisions concerning whether a failure to perform constitutes a breach and concerning the appropriate remedy. Perhaps the most obvious reason for the prevalence of fault is that judges and juries are human beings who cannot help but be influenced by the degree of nastiness and inconsiderateness of a breach.<sup>120</sup> Decisions

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116. Ian Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 968 (1982). In addition, although contracts principles such as expectancy damages, the lack of specific performance, and punitive damages seem consistent with efficient breach, these rules are better explained on other grounds. See ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* 402 (6th ed. 2011).

117. HILLMAN, *PRINCIPLES*, *supra* note 21, at 200-01; *but see* Bar-Gill & Ben-Shahar, *supra* note 36, at 1482-83.

118. LON L. FULLER, *THE MORALITY OF LAW* 28 (rev. ed. 1969).

119. Marschall, *supra* note 23, at 734, 740. The new *Restatement (Third) of Restitution* repudiates the theory of efficient breach. See RESTATEMENT (THIRD) OF RESTITUTION § 39 and cmt. h (2010) ("The rationale of the disgorgement liability in restitution, in a contractual context or any other, is inherently at odds with the idea of efficient breach . . .").

120. See Eisenberg, *supra* note 4, at 1414 ("As a normative matter, fault *should* be a building block of contract law. One part of the human condition is that we hold many mor-

are full of language and inferences that people should keep their promises and that unintentional breaches deserve less approbation than intentional ones.<sup>121</sup> Although many have noted that legal rules and moral norms are distinct,<sup>122</sup> the latter inevitably influence the law. This is not to say that courts are uninterested in instrumental reasons for contract rules, but these necessarily encompass fault principles too. For example, in order to encourage contract making and the movement of resources to their highest valued uses, courts must deter “opportunistic breaches.”<sup>123</sup> In order to avoid the costs of repeated breakdowns in performance, courts must consider the reliability of the breacher.<sup>124</sup> So it should be no mystery why courts account for fault in contract law. Of course, none of these deeply embedded norms and principles is going to change or disappear in the near or, for that matter, distant future.

For now, a series of incorrect assumptions fuels the no-fault perspective. We have seen that the no-fault model incorrectly assumes a world of economically rational actors in which injured parties are content with nonperformance and compensation if the promisor does not perform. In this context, punishing contract breakers produces no benefit, but might deter them from making economically rational decisions. Further, advocates of no-fault

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al values concerning right and wrong. Contract law cannot escape this condition.”) (emphasis added); Cohen, *Fault Within Contract Law*, *supra* note 2, at 1459 (“Judges are not automatons; they exercise judgment, which includes making normative assessments like fault.”); S. P. Dunham & Co. v. Kudra, 131 A.2d 306, 312 (N. J. Super. Ct. App. Div. 1957) (referencing trial court’s statement that defendant’s conduct “is one of the things I prefer not to . . . have to live with in the community. I couldn’t justify it.”) (alteration in original).

121. See, e.g., North Star Alaska Housing Corp. v. United States, 76 Fed. Cl. 158, 189-90 (2007) (“The dispositive issue here then is whether defendant’s representatives acted, with animus, in a fashion calculated to hinder plaintiff’s performance. If they did, this would be the type of opportunistic behavior in an ongoing contractual relationship that would violate the duty of good faith performance.”); Jacob & Youngs, Inc., v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (“The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.”); Roudis v. Hubbard, 574 N.Y.S.2d 95, 96 (N.Y. App. Div. 1991) (“[W]hen an unintentional deviation from a nonessential contract requirement is made, the measure of damages is the value of the house with and without the specified material or contract deviation.”); see also Shiffrin, *supra* note 15, at 1566-77 (2009).

122. See, e.g., Mills v. Wyman, 20 Mass. 207 (1825); see also *supra* notes 46-55 and accompanying text.

123. Opportunism occurs when a promisor “wants the benefit of the bargain without bearing the agreed-upon cost, and exploits the inadequacies of purely compensatory remedies . . . .” Patton v. Mid-Continent Sys. Inc., 841 F.2d 742, 751 (7th Cir. 1988). “By definition, opportunistic behavior does not create wealth but simply redistributes wealth from one party to another.” Dodge, *supra* note 112, at 654.

124. See, e.g., Bar-Gill & Ben-Shahar, *supra* note 36.

erroneously believe that strict liability systematically creates appropriate incentives for promisors to take the optimal level of precautions to avoid breach. Proponents of strict liability also yearn for clarity in contract law and believe that a fault-free model contributes to that clarity, even though a no-fault regime raises many issues of its own. In sum, today's advocates of strict liability give too little weight to the counter-principles and policies that undermine their perception.

In the future, therefore, no-fault adherents may simply lay down their arms. Evidence of this trend already exists: many of today's theorists, if pressed, likely understand and would admit that the true "rule" is that the parties' conduct is important in assessing contract performance and the remedies available for breach. In fact, some of the strongest advocates of strict liability already hedge a bit themselves.<sup>125</sup> I predict that in the future, more contracts scholars will bring themselves to repudiate the lore that the reasons for breach do not matter.

Furthermore, technological advances that have changed the manner in which many contracting parties do business only portend a greater role for fault in the future. For example, vendors increasingly do business with consumers and small businesses over the Internet using electronic standard forms. Jeff Rachlinski and I have already written about the use of such standard forms in the "electronic age."<sup>126</sup> We identified various forms of opportunism occasioned by this new form of doing business. For example, we wrote that "e-businesses probably have more avenues for tinkering with the presentation format of their electronic boilerplate."<sup>127</sup> Some nefarious vendors may use this strategy to confuse readers and diminish their comprehension of the rights they forfeit.<sup>128</sup> In addition, these vendors can collect data on the kinds of presentations that lead potential customers to link to the terms and conditions in order to deter customers from doing so.<sup>129</sup> At a minimum, vendors who include nasty terms can count on the impatience of their customers, who likely will not read the boiler-

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125. See *supra* note 28 and accompanying text.

126. Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

127. *Id.* at 479.

128. *Id.*

129. *Id.*

plate at all.<sup>130</sup> Notwithstanding these new strategies by vendors, traditional fault-based concepts such as unconscionability and good faith are suited for, and will likely play a greater role in, policing against these various new forms of opportunism.

Technological advances such as smartphones may also lead to a greater focus on what constitutes appropriate consumer shopping behavior.<sup>131</sup> Professor Peppet, for example, points out that smartphones “saturate our daily experiences with previously unavailable information.”<sup>132</sup> Consumers can readily access information such as the reputation of firms, the quality of goods, and the nature of standard forms even while shopping in brick-and-mortar stores, and Peppet asks whether contract law should consider what he calls this “augmented reality” of readily accessible information in assessing the enforceability of standard form contracts. For example, Peppet wonders whether the application of doctrines such as unconscionability might be “less and less justified” in the new “augmented reality.”<sup>133</sup> Failure to research and read, leading to the enforcement of a marginal contract or term, may be the consumer’s own fault.

Rachlinski and I have responded to Peppet’s thoughtful piece:

We are nervous about [Peppet’s conclusions], although [he] deserves lots of credit for raising the issues and for anticipating our concerns. Perhaps most important, everyone knows that consumers do not read their standard forms. There are a host of reasons for this in both the paper and digital worlds, including impatience and information overload. Similarly, we doubt that consumers will pause very long to use their smartphones to gather information, especially about the quality of the offered standard form. In addition, to the extent that consumers use their smartphones while shopping, they may not know how to access some of the pertinent information that may be available. Consumers also may have good reason to distrust some of the information they do ac-

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130. Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY” 283 (Jane K. Winn ed., 2006). Examples of unfair terms surfacing in e-standard forms due in part to the lack of reading include automatic renewal and modification without notice clauses.

131. Scott Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676 (2012).

132. *Id.* at 679.

133. *Id.* at 715.

cess, such as reports by consumers on product reliability and ratings of products or terms that are often very unreliable. If anything, smartphones are likely to further reduce consumers' perusal of their standard forms (not to mention cause eyestrain trying to read them). In such an environment, an argument can be made that judicial policing of standard terms should increase, not decrease.

Furthermore, as Professor Peppet observes, smartphones are becoming ubiquitous among the well-to-do and educated segments of our population, but not among the poor and uneducated. Although contract law delves into the background of its actors in many respects, we wonder if it is advisable here. At minimum, deciding enforcement on the basis of smartphone ownership raises lots of additional questions. For example, would ownership of a smartphone be sufficient to heighten the duty of consumers to gather information or should the duty arise only if the consumer brings the device with her at the time of contracting? If consumers with smartphones are to be held to a higher standard, would such a rule deter people from purchasing such a device or, if the narrower rule applies, deter them from bringing the device with them during shopping? Should people be penalized for failing to bring them? As a general matter, should wealth which inevitably increases access to information, heighten the duty to investigate through digital information?

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[D]o smartphones change the people who use them? Smartphones facilitate access to information about quality of products, vendors, and even contract terms. Smartphones do not, however, alter the cognitive factors that lead consumers to avoid scrutinizing the boilerplate. If consumers are uninformed because information is costly and difficult to obtain, then Professor Peppet's observations help put courts on the right path. But if consumers decline to read or investigate because they believe that doing so is of little use to them, then it is hard to see how smartphones can make much difference.<sup>134</sup>

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134. Robert A. Hillman & Jeffrey J. Rachlinski, *Contract Law in the Age of Smartphones: Do Smartphones Make for Smarter Consumers?*, J.L. & PUB. POL'Y BLOG

I do not rule out the possibility that some changes brought about by new technology will diminish the need for fault-based concepts in contract law. For example, improvements in methods for predicting acts of nature may narrow the circumstances for applying excuses such as impossibility and impracticability. In addition, new technology allows for the rapid dissemination of bad publicity that may rein in opportunism. For example, watchdog groups on the Internet can search for and discover unfair terms in vendors' standard forms and rapidly publicize these terms.<sup>135</sup> The outcry when Facebook attempted to change their terms in order to appropriate its members' information evidences this phenomenon.<sup>136</sup> Thinking imaginatively, perhaps new methods of determining expectancy damages that utilize future computer programs may narrow the discretion of courts to employ fault in assessing damages. Notwithstanding these ideas, this symposium asks about contract law in 2025. I don't believe any of these ideas, or others that diminish the need for fault in contract law, will have made their mark by then.

#### IV. CONCLUSION

The conclusion can be very brief: fault is an important concept in today's contract law and will continue to be so, maybe even more so, in 2025.

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(Oct. 4, 2011), <http://www.jlpp.org/2011/10/04/contract-law-in-the-age-of-smartphones-do-smartphones-make-for-smarter-consumers/> (footnotes omitted).

135. Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 106-107 (2011). The ALI's *Principles of the Law of Software Contracts* facilitates the discovery of unfair terms by watchdog groups by creating incentives for the disclosure of terms prior to any particular transaction. See ALI, PRINCIPLES OF THE LAW: SOFTWARE CONTRACTS § 2.02 (2010).

136. Hillman & O'Rourke, *supra* note 135, at 107.



## Two Alternate Visions of Contract Law in 2025

*Nancy S. Kim*\*

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### INTRODUCTION

The topic of this symposium issue addresses the state of contract law in the year 2025, but it raises the question: What does it mean to enter into a contract *today*? Contract law presumes a certain paradigmatic scenario where two equally sophisticated parties negotiate terms to achieve a mutually beneficial bargain. This paradigmatic scenario has given way to contracts in a variety of forms, presented in different ways, and serving various functions. They can be paper or digital; they can be negotiated or adhesive. Contracts occupy different roles in a transaction, the marketplace, and society. They can be used to plan complex transactions between multinational corporations, but they can also be used to establish codes of conduct on a social networking site. Does contract law adequately respond to the needs of today's society? If not, how can it be expected to meet the needs of society in 2025?

Contract law's past portends its future. Technology has provided the impetus for many of the changes to contracts and contract law. Technological innovation has created new legal issues regarding business practices. Businesses have attempted to address these issues and reduce uncertainty and risk through private ordering. Technology has also enabled new forms of contracting and made it easier to engage in transactions and commercial relationships across great distances and time zones. Formerly the prov-

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ince of large corporations, today even sole proprietors may engage in international business transactions thanks to the Internet and other advancements.

Part I of this essay examines how businesses have shaped the evolution of contract's form from the past to the present and explains how courts have responded by reshaping contract law.<sup>1</sup> Part II of this essay anticipates changes in the business landscape and explains how these changes might create new challenges for contract law. Part III predicts two alternative visions for contract law in 2025. The first is as a diminished body of law, made nearly irrelevant by other laws and preempted by private rules administered by non-judicial entities. The second vision is that of a robust contract law administered by courts that understand the diversity of marketplace needs, acknowledge contracting realities, and consider the context of transactions in applying doctrinal rules. This essay concludes that the strength of contract law lies in its flexibility, but its relevance depends upon how courts use that flexibility to guide its development.

## I. CONTRACTS AND MARKETPLACE CHANGES

Contracts play an important role in a market economy. They differ from other promises because they are legally enforceable, and thus more reliable. Not surprisingly, the development of modern contracts took place alongside the growing sophistication of a market economy. As markets grew and became more competitive, due in large part to the increased sophistication of machinery, marketplace needs required the ability to engage in future planning.<sup>2</sup> Parties required assurance of future performances. Companies needed to project costs and predict sales in order to estimate their future use of materials. Businesses needed credit to purchase raw materials and equipment. Contracts encouraged trust, which was essential to credit-based transactions. By providing needed assurance, contracts facilitated planning for future events rather than limiting the parties to what they could present-

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1. This section references and incorporates my prior work discussing contract's evolution in light of societal and marketplace changes. See NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (2013); Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327 (2011).

2. See E. ALLAN FARNSWORTH, *CONTRACTS* § 1.3, at 8 (4th ed. 2004) ("Producers . . . saw the need to plan for the future in order to compete with other producers. An exchange of promises looking to a future exchange of performances would give a producer the basis for predictable calculation . . .").

ly purchase or trade. The security provided by contracts also emboldened parties to enter into transactions with strangers.<sup>3</sup> A larger pool of trading partners provides more opportunities for exchange and more possibilities for gain.<sup>4</sup> In the absence of contract, markets would have remained small and local. Contracts permitted a shift from a primitive, barter economy to a more sophisticated, credit-based one.

In the transition from a barter economy to one based on credit, a particular model of a contract emerged and flourished. Friedrich Kessler depicts this model as one where “free bargaining” parties are “brought together by the play of the market” and “meet each other on a footing of social and approximate economic equality.”<sup>5</sup> Contract law developed in response to this model of a contract as a private affair between two equals, and reflected free market principles such as autonomous decision-making and freedom from judicial intervention.<sup>6</sup>

Industrialization enabled the mass production of goods, which eventually created a change in contract’s form and contracting method. Companies increased the efficiency of standard transactions by standardizing terms in form contracts.<sup>7</sup> Form contracts also facilitated consumer credit, encouraging innovation and economic growth. Goods, such as sewing machines and automobiles, were too expensive for most consumers to purchase outright so companies instituted installment payment plans.<sup>8</sup> Without credit—and standard form contracts—the growth of new industries would have stalled. Socially useful but costly products might have failed as few consumers could afford to pay the total price at the time of purchase.

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3. Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883, 1899 (2005) (“By expanding the possible trading partners for each person, contract law makes us all wealthier because it provides greater possible gains from exchange.”).

4. *Id.*

5. Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

6. *Id.* (stating that contracts as “the language of the cases tells us” are a “private affair” and, therefore, the judicial system “provides only for their interpretation, but the courts cannot make contracts for the parties.”).

7. *Id.* at 631 (noting that large scale enterprise and mass production and distribution made a “new type of contract inevitable—the standardized mass contract.”).

8. LENDOL G. CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* 162 (1999) (explaining how costly consumer goods led to the creation of installment plans which in turn fueled the growth of industries producing these goods).

Mass consumer form contracts were generally contracts of adhesion, meaning that their terms were non-negotiable and the consumer was made to agree to them on a “take it or leave it” basis. Businesses used form contracts with other businesses as well as consumers, but they did not use them in the same way. Form contracts between two businesses generally were not adhesive, although they were often unread.

Lawmakers and courts recognized that standard form contracts differed from negotiated ones, and that the role of standard form contracts in mass consumer transactions differed from their role in business-to-business transactions. State legislatures enacted special laws to regulate insurance and credit card contracts. They also adopted versions of the Uniform Commercial Code (UCC), which treats merchants differently from consumers. For example, section 2-209 states that “no oral modification” clauses in contracts are enforceable provided that, if the contract is between a merchant and a non-merchant, the non-merchant needs to separately initial that provision.<sup>9</sup> Section 2-207 of the UCC states that additional terms in a form acceptance should be construed as “proposals for addition”<sup>10</sup> and if the transaction is between a merchant and a non-merchant, these additional terms are not part of the contract.<sup>11</sup> Courts recognized that consumers often had no bargaining power and that form contracts were easy to ignore and difficult to understand.<sup>12</sup> They shaped contract law to take these

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9. U.C.C. § 2-209 (2012).

10. U.C.C. § 2-207(2) (2012).

11. *Id.* Section 2-207 (2012) states:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract.

Between merchants, such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

See also JOSEPH M. PERRILLO, CALAMARI AND PERRILLO ON CONTRACTS, § 2.21, at 88-89 (6th ed. 2009)(stating that if the records form a contract, the additional or different terms are treated as offers to modify the terms of the contract and “(i)f either party is a non-merchant, the terms of the offer constitute the contract without modification. The one exception is if the offeror expressly assents to the additional or different terms. The offeror’s silence will not normally be considered assent to the additional or different terms.”).

12. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (striking down warranty disclaimer). In discussing *Henningsen v. Bloomfield*, Jay Feinman and Caitlin Edwards write that “while not abandoning ‘freedom of contract,’ the court recognized the ubiquity of ‘the

contracting realities into account, developing the doctrine of unconscionability,<sup>13</sup> and rules governing interpretation and construction, such as the rule of *contra proferentem*,<sup>14</sup> the reasonable communicativeness test,<sup>15</sup> and the doctrine of reasonable expectations.<sup>16</sup>

At the end of the last century, another major shift in the business landscape created other changes in contracting form. The advent of personal computers, digital information, and the Inter-

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standardized mass contract' presented to consumers on a take-it-or-leave-it basis. Other courts had increasingly scrutinized the reasonableness of warranty disclaimers on claim checks, parking lot leases, contracts between banks and their customers and flight insurance policies." Jay M. Feinman & Caitlin Edwards, *Henningsen v. Bloomfield Motors, Inc. (1960): Promoting Product Safety by Protecting Consumers of Defective Goods*, in *COURTING JUSTICE: 10 NEW JERSEY CASES THAT SHOOK THE NATION* 35, 45 (Paul L. Tractenberg ed., Nov. 5, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2364772](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364772). Feinman and Edwards write that, as a result of *Henningsen*:

[The] vision of contract law changed . . . . The traditional approach to contracts envisioned two independent individuals bargaining on an equal footing about contract terms that would be to their individual advantage. In holding Chrysler's warranty disclaimer ineffective, the court recognized that that conception no longer fit an economy of mass distribution . . . . The traditional model of bargaining no longer applied, so rather than simply enforcing a contract, the court had to 'protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer.'

*Id.* at 53.

13. See *Williams*, 350 F.2d at 448-49 ("In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel . . . . [W]e hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced."); U.C.C. § 2-302(1) (2012) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.").

14. *Contra proferentem* means "against the offeror" and the technique, applied where contract language is reasonably susceptible to two interpretations, adopts the meaning less favorable in its legal effect to the party who chose the words. Margaret N. Kniffen, *CORBON CONTRACTS*, Vol. 5, § 24.25 (1998). See also, e.g., *Florence Nightingale Nursing Serv. v. Blue Cross/Blue Shield*, 41 F.3d 1476, 1481 (11th Cir. 1995) (stating that the application of *contra proferentem* requires "ambiguities to be construed against the drafter of a document").

15. See, e.g., *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835-36 (9th Cir. 2002) (noting that under the reasonable communicativeness test, a disincentive to study the provisions of a cruise ticket is an extrinsic factor impeding the passenger's ability to become "meaningfully informed."); see also Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 *RUTGERS L. REV.* 1307, 1309 (2005) (stating that "courts recognized the traditional cautionary function served by the signed paper contract and fashioned new rules to account for the different signals sent to offerees by novel methods of contracting.").

16. *RESTATEMENT (SECOND) OF CONTRACTS*, § 211(3) (1981) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

net dramatically changed the marketplace. Technological advances brought with them unanswered questions about the viability of business models and the risks associated with offering certain goods and services.<sup>17</sup> Software and digital information providers were concerned that their products could be easily duplicated or unfairly exploited. The development of software was costly, but the end product could be easily copied and distributed. It was unclear whether software was protected by copyright. Furthermore, software could be unpredictable and often contained "bugs" or problems that impeded perfect operation. Content on one website could be scraped and reposted on another website, frustrating the original website's attempts to attract viewers and monetize information. In addition, users might post unlawful information, subjecting the website to copyright infringement or other liability.

Where the law was uncertain, companies tried to protect their products and limit their liability by using contracts. The digital era ushered in novel contracting forms such as the shrinkwrap, the clickwrap, and the browsewrap, which companies presented to consumers in ways intended to minimize transactional impediments.<sup>18</sup> Courts generally upheld these wrap contracts<sup>19</sup> provided that the contracts gave consumers notice and an opportunity to reject terms.<sup>20</sup> This meant that consumers would be deemed to have consented to an agreement by clicking "accept" on an icon or a "Terms of Use" hyperlink, even if the action was automatic and they did not realize the legal effect of what they were doing.

The low cost and ease with which digital contracts can be duplicated, and the proliferation of digital devices, have made contracts ubiquitous in today's society. Contracts govern nearly all online activity. They also regulate offline activity between businesses

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17. For a more detailed discussion, see KIM, WRAP CONTRACTS, *supra* note 1, at 17-30.

18. Shrinkwraps are agreements encased in plastic wrap that typically accompany software compact discs. Because they are contained within the product packaging, the consumer does not have an opportunity to review terms prior to purchase. Clickwraps and browsewraps are digital agreements. A clickwrap requires clicking agreement in some manner, such as on an "accept" box. A browsewrap is a hyperlink that is designated as an agreement by the words "Terms of Use" or similar language. *Id.* at 3.

19. I use the term "wrap contracts" to refer to a unilaterally imposed set of terms which the drafter purports to be legally binding and which the recipient does not sign with a pen to acknowledge assent. KIM, WRAP CONTRACTS, *supra* note 1, at 2.

20. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (upholding the terms of browsewrap); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (recognizing a contract that was received after sale was completed); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999) (upholding a forum selection clause in an agreement contained in a scroll box that required a click).

and consumers. They often contain surprising and unfair terms. With print adhesive contracts, companies routinely impose mandatory arbitration, limitations of liability, and disclaimers of warranty. Wrap contracts include these and even more oppressive terms, such as the extraction of rights to user created content and to user personal information, unilateral modification clauses,<sup>21</sup> and even the curtailment of free speech rights.<sup>22</sup>

The pervasiveness of contracts and the resultant consumer habituation to them means that consumers fail to read or even notice them. Consumers object to being hijacked by contracts that are dense and impenetrable. Academics raise concerns about the deletion of important rights by form contract<sup>23</sup> and the inability of consumers to accurately assess information necessary to proper decision making.<sup>24</sup> Legislators have responded to some of these problems by implementing laws that address contractual abuses, such as the Credit CARD Act,<sup>25</sup> which includes disclosure requirements designed to counter the obscure terms in lengthy credit card agreements. The American Law Institute, too, has responded by undertaking a new project, Restatement of the Law Third, Consumer Contracts, which focuses on consumer contracts

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21. For a discussion of oppressive terms commonly contained in digital contracts, see KIM, WRAP CONTRACTS, *supra* note 1, at 44-69; Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Wrapping Traders to the Law of the Horse*, 26 *BYU J. PUB. L.* 1 (2011).

22. For example, one website states:

You agree to file or initiate any complaint, chargeback, dispute, public comment, forum post, website post, social media post, or any claim related to any transaction with our website and/or company. By using our website, making any purchase, or conducting any transaction with us, you agree to all terms and conditions stated herein.... You agree that any breach of this agreement shall also constitute liability in the amount of \$200 plus any related costs directly or indirectly relating from any such breach.

*Terms and Conditions*, ACCESSORY TOWN, <http://acctown.com/pages/terms> (last visited March 24, 2014). Another company allegedly claimed that its customer had violated a non-disparagement clause in its terms of service assessed a \$3500 fine for violation of its terms of service, and reported non-payment of the fine to credit reporting agencies. See Susannah Kim, *Utah Couple Fined \$3,500 by Online Merchant KlearGear Retains Lawyer, Turns Tables*, ABC NEWS (Nov. 26, 2013), <http://abcnews.go.com/Business/couple-fined-3500-writing-negative-review/story?id=21018224>.

23. See MARGARET JANE RADIN, *BOILERPLATE* (2012); see also Zev J. Eigen, *The Devil is in the Details: The Interrelationship Among Citizenship, Rule of Law and Form Adhesive Contracts*, 41 *CONN. L. REV.* 381, 387 (2008) (arguing that the frequency of contracting may result in society's collective notion of contract being "watered-down").

24. See OREN BAR-GILL, *SEDUCTION BY CONTRACT* (2012).

25. Credit Card Accountability Responsibility and Disclosure Act of 2009, 15 U.S.C. §§ 1601-1667f (2014).

and consumer protection law.<sup>26</sup> Courts, by contrast, have been less responsive to consumers' claims of abuse by contracts than they have been in the past.<sup>27</sup> Most courts adhere to a mechanistic application of post-*ProCD* precedent,<sup>28</sup> where a click constitutes a manifestation of assent and the barrage of multi-page contracts has no bearing on a consumer's so-called "duty to read."

If history is any indication, the judiciary's failure to remedy contractual abuse may spur action in different quarters. Regulators such as the Federal Trade Commission (FTC) tend to step up their enforcement efforts when courts enforce contracts that permit what policy discourages.<sup>29</sup> For example, judicial enforcement of pre-dispute arbitration clauses in form contracts has raised concern among legislators, consumer advocates, and regulators. Accordingly, the Consumer Financial Protection Bureau (CFPB) has

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26. See *Current Projects, Restatement Third, The Law of Consumer Contracts*, A.L.I., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=25](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=25) (last visited Mar. 14, 2014).

27. I provide an extensive critique of recent court cases enforcing wrap contracts against consumers in a book. KIM, WRAP CONTRACTS, *supra* note 1. Cases include *Briceño v. Sprint Spectrum, L.P.*, 911 So.2d 176 (Fla. Dist. Ct. App. 2005) (upholding arbitration clause in updated terms of use); *A.V. v. iParadigms, LLC.*, 544 F.Supp. 2d 473 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom A.V. ex. rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (enforcing terms of use against minors); *Scherillo v. Dun & Bradstreet, Inc.*, 684 F.Supp. 2d 313 (E.D.N.Y. 2010) (upholding online agreement against plaintiff who did not remember reading terms). There have been a few heartening exceptions to this trend. See *Clark v. Renaissance West, LLC*, 307 P.3d 77 (Ariz. Ct. App. 2013) (finding an arbitration agreement unconscionable); *In re Google Inc. Gmail Litigation*, No. 13–MD–02430–LHK, 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013) (interpreting Google's online agreement to limit its ability to access user emails).

28. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the Seventh Circuit ruled that a finding of assent did not require that the consumer have the opportunity to review terms prior to purchase but merely have an opportunity to return the purchased item after having an opportunity to review the shrinkwrap license *after* purchase. *ProCD*, 86 F.3d at 1452–53. Most courts have adopted the reasoning in *ProCD*. See *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003); *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638–39 (8th Cir. 2005). There have, however, been some notable exceptions. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000); *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747 (Kan. 2006).

29. Furthermore, the existence of regulatory agencies themselves attests to another possible consequence, which is the creation of additional agencies to deal with specific problems caused by the failure of contract law—and the judiciary—to address abuses. The Federal Trade Commission resulted from the Federal Trade Commission Act, 15 U.S.C. §§ 41–58, which was a legislative response, in part, to contracts restraining trade and competition. See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L. J. 1 (2003). The Consumer Financial Protection Board was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, in response to banking practices, typically implemented through contracts.



begun study of the use of these clauses in connection with consumer financial products or services.<sup>30</sup>

There is a synergy of sorts that plays out between and among the judiciary, the legislature, and regulatory bodies. Judicial inaction or complicity in the face of contractual abuse encourages action by regulators and legislators, which eventually diminishes the purview of contract law. Consequently, the future of contracts and contract law will, to a large extent, depend upon the interplay of marketplace changes and the judicial response to those changes. The next section explains how this might look in 2025.

## II. THE MARKETPLACE IN 2025 AND THE ROLE OF CONTRACTS

In this section, I will offer my predictions for what marketplace changes to expect in 2025. These predictions do not require a crystal ball as they merely extrapolate from existing trends. The first is that software or digital technology will become incorporated into more consumer goods and to a greater extent as society continues moving toward a norm of pervasive or ubiquitous computing and augmented reality. The “Internet of Things” refers to the concept where everyday products are seamlessly integrated with networked devices embedded with microprocessors. In the future, many more “things” will use electronic technology and will use it more extensively. While many cars currently have global positioning systems (GPS) and sensors to alert drivers to obstacles, future cars will use technology to gather and employ data based upon usage and to handle some or all of the driving. Consumers will monitor and control their homes from another country as easily as they now switch channels using a remote from their living room couch. A “smart” house today can turn on the lights and turn up the heat minutes before you get home, and track water and energy usage to help you conserve energy and save money. In the near future, however, houses may be able to capture much more data, some of it more personal than the amount of energy consumed. This information might include the number of people who enter your home, the duration of your shower, how often you

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30. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) mandates that the CFPB conduct the study and gives it the power to issue regulations on the use of arbitration clauses if doing so is in the public interest and for the protection of consumers. *CFPB Finds Few Consumers File Arbitration Cases*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/> (last visited Mar. 14, 2014).

brush your teeth, how frequently you look in a mirror, and how much time you spend in your bed (and with whom).

The information gathered by our networked everyday items might be combined with information gleaned from other sources. At the time of the writing of this essay, Google recently announced its \$3.2 billion acquisition of Nest, a company that makes stylish thermostats and smoke and carbon monoxide detectors which use sensors and algorithms to track and influence user behavior.<sup>31</sup> Google could obtain a clearer, more intimate picture of its users by combining information obtained from online Google sources (Google Plus, Gmail, and Google Search) with data obtained from Nest thermostats and smoke detectors. Furthermore, by combining that information with data collected from its driverless cars and wearable computing devices, it could obtain an alarmingly comprehensive picture of your daily activities as well as the activities of those who live, work, and socialize with you. Companies like Google can use that information to make inferences about their customers—such as their religious beliefs, sexual orientation, and political affiliation—and try to influence their behavior. Some companies currently do just that. Pandora, Netflix, and Amazon, for example, all have developed algorithms based upon customers' preferences, profiles or past usage that enable these companies to recommend tailored products and services.<sup>32</sup> The difference will be that in the future the extent and type of information will mean that their inferences may be more accurate, more revealing, and their ability to manipulate consumer behavior more successful.

In the near future, we, too, will be altered and enhanced versions of our present selves. The term "augmented reality" generally refers to enhancing human senses with computer generated technology and making real world experiences digitally manipulable. In this brave new world, people will not carry their devices, they will *be* their devices. Even now, embedded chips can restore

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31. Claire Cain Miller, *For Google, a Toehold Into Goods for a Home*, N.Y. TIMES (Jan. 14, 2014), <http://www.nytimes.com/2014/01/14/technology/google-to-buy-nest-labs-for-3-2-billion.html>.

32. See, e.g., Natasha Singer, *Listen to Pandora, and It Listens Back*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/technology/pandora-mines-users-data-to-better-target-ads.html> ("People's music, movie or book choices may reveal much more than commercial likes and dislikes. Certain product or cultural preferences can give glimpses into consumers' political beliefs, religious faith, sexual orientation or other intimate issues. That means many organizations now are not merely collecting details about where we go and what we buy, but are also making inferences about who we are.").

hearing, track the location of lost pets and regulate the beating of the human heart. The Internet of Things will include networking the thing called the human body. Google has already garnered much attention for Google Glass, a wearable computer device that looks like glasses.<sup>33</sup> It also recently announced that it is working to develop contact lenses that, with a wireless chip and sensors, will measure glucose levels.<sup>34</sup> While technology may result in better health care, what happens to the data collected from those microchips embedded in your body? Who will control what you see and how you see it? Who owns the data gathered from our future cyborg selves? Who can use it? And who is responsible when the system breaks down—the user, the manufacturer of the product, or the various third parties that install, integrate, implement or upgrade portions of the system? What happens if the network is hacked<sup>35</sup> and all the faucets in your home are remotely turned on, flooding the interior?

While technology holds great promise for enhancing daily life and advancing society and the economy, it also poses great challenges and raises unanswered questions. Can marketers use information obtained through these smart devices (that you take long showers, use scented creams, or cheat on your spouse) to sell you things? The technology to collect this information will be available before legislation exists to govern its use. What about the information collected about third parties who have had their picture taken, their movements monitored, and their preferences recorded simply by being around you and your networked things? In this legal “no man’s land,” businesses (and their lawyers) must confront the many unanswered questions raised by new technologies. Without established laws, precedent or norms to govern behavior, businesses will turn to private ordering to set their own rules. The boundaries of the law are blurred when it comes to new technologies but contracting makes them clearer—and gives companies an advantage when it comes to putting down stakes regarding the acceptability of certain practices.

As they have in the past, businesses will use contracts to legitimize dubious new business practices, which may, over time, be

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33. *What it Does – Google Glass*, GOOGLE, <http://www.google.com/glass/start/what-it-does> (last visited Mar. 14, 2014).

34. *Introducing our smart contact lens project*, GOOGLE BLOG (Jan. 16, 2014), <http://googleblog.blogspot.com/2014/01/introducing-our-smart-contact-lens.html>.

35. “Hack” is defined as “to gain access to a computer illegally.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 520 (10th ed. 2001).

come accepted norms. Software companies, for example, use contracts to limit their liability for failures so that even though Microsoft is a multi-billion dollar company, it is not liable when a system crash causes a company to lose business or a consumer to lose important files. They also use contracts to legitimize privacy-invasive tracking practices. Most of the existing laws, and those currently being proposed, allow companies to obtain consumers' consent in order to establish authorization to otherwise illegal monitoring or use of information.<sup>36</sup> By shaping contract doctrine in a way that makes consent easy to establish, courts defeat the protections expected of this legislation. A recent Government Accountability Office (GAO)<sup>37</sup> Report on consumer privacy states that "consumers often were not aware of, and had not always consented to, personal information being repurposed for marketing and other uses."<sup>38</sup>

Given recent history in the area of online privacy and data collection, and absent any regulation, businesses will likely continue to collect and use this information before consumers are even aware of it. Companies, finding it undesirable to discard potentially valuable data, will likely include limitations of liability and waiver clauses in their contracts, which effectively insulate them from responsibility for their products and services. They may also include provisions that expressly permit repurposing of data, require consumers to warrant the data collected and require consumers to indemnify companies against third party-claims of misappropriation or misuse. Businesses will use contracts to set the boundaries of acceptable business practices regarding information use, ownership and liability by having the consumer "consent" to these oppressive terms in an unobtrusive contract when the consumer signs up for the networked home service or purchases a "smart" house.

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36. Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1563 (2006) (noting that consent is a defense to federal laws governing privacy).

37. The GAO is an "independent, nonpartisan agency that works for Congress" whose mission is "to 'help improve the performance and ensure the accountability of the federal government for the benefit of the American people . . . with timely information that is objective, fact-based, non-partisan, nonideological, fair, and balanced.'" See *About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Mar. 14, 2014).

38. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-663, INFORMATION RESELLERS: CONSUMER PRIVACY FRAMEWORK NEEDS TO REFLECT CHANGES IN TECHNOLOGY AND THE MARKETPLACE 35 (Sept. 2013), available at <http://www.gao.gov/assets/660/658151.pdf>.

Consumer habituation to ubiquitous contracts, the overwhelming volume of terms, and cognitive limitations mean that consumers will be even less likely to read contracts and identify troublesome terms. Present-bias,<sup>39</sup> optimism bias,<sup>40</sup> and other heuristic biases will continue to exist in 2025. Exacerbating the natural tendency of human beings to avoid reading fine print, terms are frequently updated to reflect constantly changing business practices which increases both the burden on consumers of reading terms and the likelihood that businesses will continuously modify terms in their favor. For example, Nest's current terms of use restricts how the company uses information obtained through its products. But the company reserves the right to modify its terms of service:

Nest reserves the right to make changes to these Terms. You should ensure that you have read and agree with our most recent terms of service when you use the Services. Continued use of the Services following notice of such changes shall indicate your acknowledgment of such changes and agreement to be bound by the terms and conditions of such change.<sup>41</sup>

As Nest matures as a company, it is highly likely that it will modify its terms of use to allow greater exploitation of data collected<sup>42</sup> just as other companies have done, most notably Facebook and Google.<sup>43</sup>

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39. "Present-bias" refers to a focus on the short term rather than the future or long-term. See Ted O'Donoghue & Matthew Rabin, *Doing it Now or Later*, 89 AM. ECON. REV. 103 (Mar. 1999); see also BAR-GILL, SEDUCTION BY CONTRACT, *supra* note 24, at 22 (noting that myopia is common in consumers who prefer "immediate benefits even at the expense of future costs.").

40. "Optimism bias" refers to an overestimation of the potential benefits and an underestimation of the risks of an activity. See Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in CHOICE, VALUES AND FRAMES 86 (Daniel Kahneman & Amos Tversky, eds., Cambridge University Press, 2000) (noting a "common tendency of people to overestimate their ability to predict and control future outcomes."). *Id.* at 476.

41. *Terms of Service*, NEST, <https://nest.com/legal/terms/> (last visited Mar. 14, 2014).

42. See also Miller, *supra* note 31 (quoting analyst Danny Sullivan as saying that "Google likes to know everything they can about us, so I suppose devices that are monitoring what's going on in our homes is another excellent way for them to gather that information . . . . The more they're tied into our everyday life, the more they feel they can deliver products we'll like and ads.").

43. See Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELEC. FRONTIER FOUND. (Apr. 28, 2010), <https://www.eff.org/deeplinks/2010/04/facebook-timeline> (showing how Facebook's privacy policies have eroded user's control over their information over time). Google recently announced updated Terms of Service that would permit it to use information about users in paid advertisements. See *Google Terms of Service*, GOOGLE POLICIES & PRINCIPLES (Nov. 11,

Companies' attempts to fill the legal gap created by technological innovations go beyond privacy into areas such as employment and criminal law. What happens when your networked "smart" car, which monitors how quickly you are driving, whether you braked, and whether you were listening to music, eating or glance in your rearview mirror, collides with another?<sup>44</sup> It is currently unclear who can access the data contained in your car's black box. But if your insurance company inserts a clause in your insurance policy which gives it the right to access the data, your "consent" legitimizes its access and settles the matter—at least until one of two things happens: a court refuses to enforce the contract, or a law is passed prohibiting the practice.

The trend of current cases indicates that the former is unlikely to happen anytime soon. On the contrary, the attenuated notion of consent in wrap contract cases requires only "constructive notice" and a subsequent failure to reject or immediately terminate the transaction. This leads to some predictable behavior by opportunistic contract drafters. Some employers have recently started to remotely delete *all* information on departing employees' personal devices which are networked to the company's system, including non-company related, personal information such as family photos, music and email programs.<sup>45</sup> Some of these companies engage in "phone wiping" even when the phone belongs to the employee and was purchased with the employee's money. This practice falls into the gap created when technology surpasses the law. Not surprisingly, companies have resorted to contracts to fill the gap, using wrap contracts to get employees to click "agree" to phone wiping practices.<sup>46</sup> The act of clicking constitutes a mani-

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2013). <http://www.google.com/intl/en/policies/terms/update/>; *Summary of Changes, GOOGLE POLICIES & PRINCIPLES* (Nov. 11, 2013) <http://www.google.com/intl/en/policies/terms/changes/>; see also Claire Cain Miller & Vinu Goel, *Google to Sell Users' Endorsements*, N.Y. TIMES (Oct. 11, 2013), <http://www.nytimes.com/2013/10/12/technology/google-sets-plan-to-sell-users-endorsements.html>.

44. See Jaclyn Trop, *The Next Data Privacy Battle May Be Waged Inside Your Car*, N.Y. TIMES (Jan. 11, 2014), <http://www.nytimes.com/2014/01/11/business/the-next-privacy-battle-may-be-waged-inside-your-car.html> (reporting that a device commonly called a "black box" collects information like direction, speed and seat belt use and is in nearly every car today and may soon be mandatory).

45. Lauren Weber, *Leaving a Job? Better Watch Your Cellphone*, WALL ST. J., Jan. 22, 2014, at B7.

46. *Id.* ("Many employers have a pro forma user agreement that pops up when employees connect to an email or network server via a persona device . . . but even if these documents explicitly state that the company may perform remote wipes, workers often don't take the time to read it before clicking the 'I agree' button").

festation of assent, even though the employee is not actually aware of the practice.<sup>47</sup>

As they have in the past, businesses will present consumers with new contractual forms and courts will ponder new questions regarding consent. Courts play an important role in the development of business practices. Rather than watering down the standard of notice and consent required for contract formation, judges could apply a standard that reflects contracting realities from the consumer's standpoint. They could require that businesses do more to make these new business practices salient through heightened notice or specific assent requirements. Consumers' subsequent actions would more closely reflect their acceptance or rejection of these new practices. Rather than becoming normalized through inattention or lack of awareness, the growth or obsolescence of these practices would reflect consumer desires and enhance market efficiency.

Courts can also shape the development of business practices through the use of policing doctrines such as unconscionability and duress.<sup>48</sup> They can strike down certain practices and force companies to modify them (or motivate legislators to expressly permit them). Courts can also do the converse. They can define assent in a way that fails to reflect norms of reasonable human behavior. They can promote business interests in the name of efficiency and ignore the relationship between efficiency and informed decision-making. They can refuse to acknowledge market failures and disregard doctrinal defenses like unconscionability and duress. They can ignore contractual abuse and pretend that when they do so, they are merely being impartial and respecting "freedom to contract."<sup>49</sup>

My focus so far has been on the legal disruption created by new technologies and the effect on consumers and consumer contracts, but new technologies have also changed the way companies interact and contract with each other. Ronald Gilson, Charles Sabel,

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47. *Id.* One former employee stated that after he was terminated, the phone he purchased went blank and that "[h]e has no memory of signing a release or user agreement, though he concedes that a dialogue box may have appeared when he first connected to [the company's] server 'and like everyone else, I was like, 'OK, check.'"

48. See Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI. KENT L. REV. 265 (2014) (proposing that a doctrine of "situational duress" apply in certain electronic contracting situations).

49. As the court in the landmark case of *Henningsen* noted, "freedom of contract is not such an immutable doctrine as to admit of no qualification in the area of which we are concerned." *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960).

and Robert Scott report that companies are moving away from “vertical integration,” where one company owns its suppliers.<sup>50</sup> By controlling its supply chain, the company is able to avoid the “hold-up” game where one of its suppliers engages in opportunistic behavior. By contrast, they observe “vertical disintegration” in a number of industries where firms engage in “a process of iterative collaboration and co-design of both the interface and the components it joins.”<sup>51</sup> Rather than one firm controlling all aspects of its supply chain, it engages with other firms that specialize in a particular aspect of production. Yet, the rapid pace of innovation means that any firm along the chain may alter or reconfigure what it produces. Because the firms in the chain depend upon each other to maintain compatibility of products and retain market relevance, each must engage cooperatively in the event of chain disruptions. Gilson, Sabel, and Scott argue that “the vertical disintegration of the supply chain observed in many industries is mediated neither by fully specified explicit contracts . . . nor by entirely implicit relational contracts supported only by norms of reciprocity and the expectation of future dealings.”<sup>52</sup> Rather, they have identified a new form of contracting which they refer to as “contracting for innovation” which “supports iterative collaboration between firms by interweaving explicit and implicit terms that respond to the uncertainty inherent in the innovation process.”<sup>53</sup>

Many United States firms have overseas suppliers. Apple, for example, has at least two hundred suppliers, most of whom are based outside of the United States.<sup>54</sup> As more United States firms engage overseas companies to handle various stages of production, the potential for changes from original plans—and the corresponding need for flexibility—increases. Political upheavals, factory accidents, new laws and regulations and even cultural misunderstandings may cause delays or require changes in production or distribution. While some parties may engage in opportunistic behavior without stringent contract terms to keep them in check,

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50. Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 434 (2009) (“Despite conventional industrial organization theory, however, contemporary practice is moving away from vertical integration.”).

51. *Id.* at 434.

52. *Id.* at 435.

53. *Id.*

54. *Supplier Responsibility*, APPLE, <http://www.apple.com/supplierresponsibility/our-suppliers.html> (last visited Mar. 14, 2014).



interdependency and reputational concerns will likely regulate and control bad faith behavior. A contract is a weak mechanism for controlling behavior where the likelihood of enforcement is low. Companies may find contracts useful for outlining shared goals and expectations but other, extralegal mechanisms—such as trade organizations or pressure from other businesses—may be more effective at reigning in uncooperative actors. Business lawyers, anticipating the need for flexibility, will create contracts that enable companies to maneuver and accommodate innovation while still providing a modicum of assurance and a means by which to rein in opportunistic behavior.

### III. TWO ALTERNATE VISIONS OF CONTRACT LAW

The overarching purpose of contract law is not to improve the efficiency of transactions or redistribute wealth—it is to enforce the intent of the parties and protect their reasonable expectations. Other considerations—efficiency, fairness, and redistribution—pertain to the reasonableness inquiry. Contract law fails when it disregards parties' intent and their reasonable expectations. When contract law fails, other law must fill the gap.

Contract law is failing in the area of consumer contracts, leaving this area ripe for regulatory and legislative action. Consumers are being held to contracts to which they did not intend to agree. This is especially true with wrap contracts, which are both ubiquitous and unobtrusive, and therefore, often ignored. Consumers do not reasonably expect to be bound by contracts they did not actually *see* much less read. Not surprisingly, we are already seeing sector specific regulations of consumer contracts in certain areas, most notably banking but also increasingly, privacy. If courts fail to adopt a more equitable approach to consumer contracts—one that reflects reality—then other regulation will certainly follow. The role of the courts and contract law will shrink accordingly and consumer contracts as a category will grow increasingly more segmented and subject to different legal rules and regulatory regimes.

By contrast, the behaviors and needs of parties in sophisticated commercial transactions differ from those of parties in mass consumer transactions. Contracts between two sophisticated commercial entities typically do reflect their intentions and courts should defer to the contract and to the extralegal channels ap-

proved by the parties.<sup>55</sup> Even in business-to-business transactions, contracts play different roles. Contracts may be more aspirational than regulatory in some business relationships but not others. They may be viewed as works-in-progress in some transactions but not others. They may be customized and heavily negotiated or they may be standardized and unread. Contract law in 2025 should recognize the different roles contracts play depending upon the nature of the transaction or relationship.

A judiciary that applies rules without context ignores the intent of the parties—and so loses sight of contract law’s purpose. Commercial actors may seek alternative forms of dispute resolution, essentially “opting-out” of contract law. Meanwhile, legislators and regulators may seek to right contractual wrongs ignored by the judiciary. Consumer protection laws will step in where courts fear to tread. As in the past, contract law’s domain may then be carved into subspecialties, such as employment or insurance law,<sup>56</sup> or overrun by other areas of the law such as property, privacy, or tort.<sup>57</sup> Under this vision, contract law in 2025 is diminished and meager, muscled out in the consumer arena by other laws and shunned in the business-to-business environment by commercial entities mistrustful of what courts may do.

But there is a more promising, alternate vision of contract law. Under this vision, contract law responds to the needs of contracting parties in a flexible manner that recognizes marketplace needs and realities. The judges who administer the law realize that a mass consumer contract is not the same as a negotiated commercial agreement. They understand that a contract has different functions in different transactions and that a contract’s role, and the application of doctrinal standards, may shift depending upon the type of transaction and the parties involved. Under this vi-

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55. As Gilson, Sabel and Scott write: “[C]ourts must follow the instructions of the contracting parties as to how their contract is to be adapted to its particular context . . . in responding to contract innovation driven by changes in the contracting parties’ business environment, courts must practice the passive virtues: The parties, not the courts, drive innovation.” Robert J. Gilson, Charles F. Sabel, & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 174 (2013).

56. Lawrence Friedman first made this observation when he noted that “[t]he most dramatic changes touching the significance of contract law in modern life also came about, not through internal developments in contract law, but through developments in public policy which systematically robbed contracts of its subject-matter.” LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 24 (1965).

57. Grant Gilmore famously pronounced that contract law was “dead” and its rules reabsorbed into tort. GRANT GILMORE, *THE DEATH OF CONTRACT* 95 (1974).

sion, the judiciary takes advantage of the adaptability of contract law to fulfill its promise—to promote the intent of the parties and protect their reasonable expectations.

#### CONCLUSION

While society's definition of a contract—as a legally enforceable promise—may not have changed much, the delivery mechanisms, the methods of contracting, the role of the contract, and the application of the doctrine itself have changed. Contracts—and contract law—will continue to evolve as drafting parties invent new ways to meet the needs of a changing marketplace. Courts will evaluate new contracting forms, assess their enforceability, and establish their limits. In doing so, courts should be guided by the function of the contract and the context of the transaction. The strength of contract law lies in its dynamism and adaptability. The development of the law is not predetermined or inevitable; judges shape its direction and guide its path. The future of contract law then—its relevance and its vitality—depends upon the wisdom of the courts.

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## The Future of Many Contracts

Victor P. Goldberg\*

Forty years ago, my former colleague, the late Ian Macneil, published an article entitled *The Many Futures of Contracts*.<sup>1</sup> When I was asked to contribute to this symposium on what contract law might look like in 2025, the play on words was too good to resist. Professor Macneil developed the notion of “relational contracts,” emphasizing the limits of classical contract law in dealing with long-term contractual relations. His work had a strong influence on scholarship, including my work. The notion that many contractual relationships are long-lived and require some form of adaptation as circumstances change and new information becomes available is a powerful one, one that was not well appreciated in classical contract law.

Law evolves slowly and doctrine has not changed much since Macneil wrote. And, I suspect, contract law a decade from now will not look very different from today. So, rather than predict, I will discuss some concerns I have with the doctrine as it stands today with the hope of nudging the law in a different direction.

Contract law is facilitative. As a first principle, parties should be free to define their obligations. For sophisticated parties it means that their words should be taken seriously. My first concern is with doctrines that tend to undermine the written document, for example, the watering down of the parol evidence and plain meaning rules. Other problematic doctrines include the expansive use of custom, usage, and course of performance as manifested in decisions like *Columbia Nitrogen*<sup>2</sup> and *Nanakuli*,<sup>3</sup> and the liberal application of the implied covenant of good faith and fair dealing to trump the contract language. I am not insisting on an absolutist position, but I do believe that the spirit of the Uniform Commercial Code (“UCC”) and the tone of the *Restatement (Second) of Contracts* go too far in their willingness to go beyond

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1. Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

2. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971). For a critical analysis of the case, see VICTOR GOLDBERG, *FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE* ch. 7 (2006).

3. *Nanakuli Paving and Rock Co. v. Shell Oil Co., Inc.*, 664 F.2d 772 (9th Cir. 1982).

the written document. They put more faith in the role of judges and juries *ex post* than in transactional lawyers *ex ante*.

Contract performance takes place over time, and a significant question is how the obligations should be adapted as circumstances change and new information becomes available. I want to consider the implications of these realities for two doctrinal problems: remedies and quantity flexibility. It is instructive to think of these problems as exercises in contract design. Doctrine is, or should be, only about default rules, and the manner in which parties design their relationships should provide insights into how those default rules should be structured. The starting point should be recognition of the tradeoff between the parties' desire for the flexibility to adapt as new information becomes available and their desire to rely upon the continuation of the relationship. If the contract grants one party the flexibility to adapt, the counterparty might want to confront it with a price that would reflect the costs the counterparty would incur by granting that discretion.

One possible response to changed circumstances is to terminate the agreement. When designing their relationship, the parties might include an option to terminate for one or both parties. The option might be unconditional, or it might be exercisable only in certain circumstances. The counterparty might want to impose a hurdle to protect its reliance upon the continuation of their arrangement. The more it would be hurt by termination, the greater the price the counterparty would put on the option to abandon. Termination would not be a breach of the agreement; it would be an agreed-upon term.

If we treat breach as the exercise of an option to terminate, then we can view the remedy for breach as the price of that option. How should that option be priced? Framing the question in this manner has implications for how we should approach the issue of contract remedies. Farnsworth states the traditional view: "The basic principle for the measurement of those damages is that of compensation based on the injured party's expectation. One is entitled to recover an amount that will put one in as good a position as one would have been in had the contract been performed."<sup>4</sup> But why? Would parties typically choose to price the termination

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4. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8,188-89 (2d ed., vol. 3 1990).

option that way?<sup>5</sup> The answer is probably “yes,” if it only meant compensating the non-terminating party with the contract-market differential. But the “make-them-whole” remedy often goes well beyond the price differential, and in those situations, parties often opt for something other than the promisee’s expectations. The exercise price for the option to terminate need not have any relationship to the legal remedies of the UCC or Restatement. To shed light on this, consider how parties explicitly price the termination option in different contexts.

Consider two classes of agreements in which the price of the option to abandon is essentially zero, despite the fact that the counterparty places considerable reliance on the continuation of the relationship. First, a venture capitalist (“VC”) provides funds to an entrepreneur for a project that typically has a high risk of failure and a long period before it would yield positive profits. Typically, the contract gives the VC an option to abandon and a right of first refusal. The option to abandon is valuable to the VC, but it is costly for the entrepreneur since the VC could always use the option to rewrite the deal opportunistically in a way more favorable to it. Moreover, the first refusal right limits the entrepreneur’s access to alternative funding sources. An outsider must realize that the original VC’s failure to exercise the first refusal right would mean that it has overbid; therefore, the outsider would probably choose to forgo the opportunity. The entrepreneur is thus vulnerable to the possible opportunistic threat of termination. What protection does the entrepreneur include in the contract? Typically, none. The option price is zero; the entrepreneur’s protection would be non-contractual, primarily the reputation concern of the VC.

Second, the automobile franchise relationship, before it was enshrouded in legislative protections for franchisees, gave the manufacturers a cancellation option at a nominal price, or, in some instances, at a zero price. The Ford franchise contract pre-1940 was legally unenforceable, which, in effect, meant that either party could walk away costlessly. In *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*,<sup>6</sup> the Court of Appeals for the Second Circuit found the franchise agreement to be illusory, despite the claimed reli-

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5. Scott and Triantis have written an important paper arguing against the compensation principle as the appropriate remedy for breach of contract. See Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428 (2004).

6. 116 F.2d 675 (2d. Cir. 1940).

ance of the dealer on alleged oral statements by Ford representatives:

[D]efendant's settled policy was 'Once a Ford dealer, always a Ford dealer'; that by the dealership contract 'the plaintiff had become a member of the great Ford family; that the plaintiff would remain a Ford dealer as long as it wanted to'; that the Ford policy, settled for many years, 'was a guarantee of this; and that the plaintiff need have no hesitation whatever in investing all available funds in the promotion of the sale and servicing of Ford products as such investments would be perfectly safe.' . . . [P]laintiff was encouraged to enlarge its facilities, increase its sales force and expand its business, in reliance on the assurances given by the defendant that plaintiff was 'in' as a Ford dealer as long as it wanted and should have no concern over the wisdom of making long term commitments and long term plans.<sup>7</sup>

Ford wanted its dealers to make investments in reliance on continuation of the relationship, and, by and large, dealers did so. The dealers could not rely on the contract language since it was unenforceable; they relied instead on the expectation that their satisfactory performance would assure the renewal of their franchise. Dealers wanted more, but, absent legislative intervention, they could not get the producers to give explicit protection to their reliance.<sup>8</sup>

In other contexts, the option price can be substantial. The contract between the movie studio and the actor, for example, includes a "pay-or-play" clause.<sup>9</sup> If it were to receive new information between the time the contract is signed and the time the movie is completed, the studio could terminate. In effect, the pay-or-play clause fixes a price for this termination option. For major talent, it would be the so-called "fixed fee," which might be in the \$20 million range. For lesser talent, the fee would be smaller, and the right to compensation might not be triggered until the occurrence of some subsequent event, perhaps the receipt of a bona fide outside offer. The option price would reflect the fact that the actor

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7. *Id.* at 678.

8. Since passage of the Dealers Day in Court Act of 1956, automobile franchise agreements that were not enforceable or were terminable on short notice have been prohibited; see STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS, 61-71 (1966).

9. See GOLDBERG, *supra* note 2, at ch. 15.



has set aside a particular time period in which it can no longer accept alternative projects. The more attractive these alternatives, the greater the option price.

In corporate acquisitions the agreements often include options to walk away, sometimes with the option price being made explicit. Sellers of public corporations typically have the right to reject the deal by paying a breakup fee, usually around 3% of the deal price.<sup>10</sup> Buyers will usually have a right to walk away from the deal if there is a material breach of the seller's representations and warranties or if there is a material adverse change ("MAC"). Some agreements also allow the buyer to terminate by paying a breakup fee. The fee could be made contingent upon specific facts. For example, in one recently litigated case, the contract allowed the buyer to pay a breakup fee of \$325 million if the deal could not close despite the buyer's best efforts.<sup>11</sup> If, however, the deal failed to close because of a "knowing and intentional breach of any covenant," the damages would be uncapped.<sup>12</sup> The vice chancellor found that the buyer and its lawyers had committed a number of bad acts and that the breach of the covenant was intentional.<sup>13</sup> The buyer settled for \$1 billion, roughly three times the breakup fee.<sup>14</sup>

The option perspective on breach of contract was set out over a century ago by Oliver Wendell Holmes: the "duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."<sup>15</sup> If the contract were silent on what should happen if one party were to terminate, the option price would be set by the default remedy. This characterization is sometimes referred to as "efficient breach," terminology that I find to be unfortunate. The more general statement is "efficient adaptation to changed conditions," with one subset of adaptations being termination. The notion that a party has an option to perform or terminate does not sit well with many commentators who regard breach as immoral. Daniel Friedmann has been a particularly vocal proponent of this position.<sup>16</sup> There is

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10. See David Fox, *Breakup Fees –Picking Your Number*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Sept. 11, 2012, 9:03 AM), <https://blogs.law.harvard.edu/corpgov/2012/09/11/breakup-fees-picking-your-number/>.

11. *Hexion Specialty Chem., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008).

12. *Id.* at 724.

13. *Id.*

14. *Id.* at 746.

15. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

16. Daniel Friedmann, *The Efficient Breach Fallacy*, 16 J. LEGAL STUD. 1 (1989).

nothing immoral, however, about a voluntary agreement that would allow one party to terminate, perhaps for a price, if certain circumstances arose. Indeed, even Professor Friedmann would be comfortable with parties contracting over a termination remedy; his moral indignation only goes as far as the default rule.<sup>17</sup>

The fundamental point is that the default contract law remedy is, in effect, the implied termination clause, and it should be viewed as just another contract term from which parties are free to vary. The remedy default rule, however, is stickier than others. The stickiness of the expectation damage remedy has great rhetorical power. If a breacher is perceived as having wronged the promisee, then corrective justice would seem to require that, like a tort victim, the promisee should be made whole. “The fundamental principle that the law’s goal on breach of contract is not to deter breach by compelling the promisor to perform, but rather to redress breach by compensating the promisee.”<sup>18</sup> That provides an anchor for doctrinal argument and friction for moving away from the default remedies. I am suggesting that it is time to lift that anchor.

Reframing the problem as a matter of transaction design and recognizing the reliance-flexibility tradeoff shows why the benefit of the bargain remedy is too simplistic. Holmes’s framing as the promisor having a choice between performing or paying damages was, in large part, a response to the notion that default rules should be derived from ethical norms rather than commercial needs. Reviving Holmes’s aphorism would at least nudge the rhetoric in a more useful direction. The evidence from the design decisions of contracting parties indicates that the price of termination often bears no resemblance to the redress remedy. Decoupling the pricing of the termination option from the question of compensation can lead to a more nuanced approach to contract remedies.

I will give one illustration of a remedy doctrine that makes no economic sense and which could plausibly disappear within the next decade: the lost volume seller remedy embodied in UCC § 2-708(2). The problem in the retailing context is a simple one. A customer orders a consumer durable, such as a car. Before delivery, the customer cancels the order (a breach). The retailer sells the same car to another customer at the same price. The retailer

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17. *Id.* at 23.

18. FARNSWORTH, *supra* note 4, at §12.18.

then sues the customer for breach. The customer argues that since the contract price and cover price were the same, the retailer's damages were zero. The retailer responds by claiming that it would have sold the second car anyway, so it would have made the profit on each of the cars. The profit would be the difference between the contract price and the but-for cost, which, in the retail context, is the difference between the retail and wholesale price—the gross margin.

That is the solution embodied in UCC § 2-708(2). The resolution gets more complicated as various difficulties are considered. Would the second buyer have bought only *this* car? Would the retailer be able to sell additional cars at the same cost? All of these complications are irrelevant if the problem is reframed in terms of the option price. This remedy in effect sets the customer's option price at the gross margin—roughly 12-15% of the retail price. That is, the customer agrees to pay \$3,000 for the option to pay an additional \$17,000 to buy a car with a retail price of \$20,000. Even assuming customers are aware of this, is there any reason to believe that they would agree to such a bargain? The possibility that a customer might order a car and then change her mind is a cost of doing business for the retailer. Moreover, the retailer can influence the likelihood of a cancellation. In particular, it could set an explicit option price in the form of a non-refundable deposit. The higher the deposit, the less likely the cancellation. Under what conditions would a consumer agree to a substantial deposit? If, for example, the car model is a hot seller, manufacturers might have to allocate the cars amongst their dealers; even if a dealer had potential buyers for more than, say, twenty cars a month, it could not sell to all of them. The option price as reckoned by the lost volume formula would be zero—the dealer could not have sold another car. That, however, is precisely the situation in which the customer might rationally choose to pay a substantial option price. Conversely, if demand were slack, the formula would result in an option price equal to the gross margin, whereas the contract would likely set an option price at, or near, zero. UCC § 2-708(2) gets it backward.

Termination is an extreme form of adaptation to change. Less extreme would be variation of quantity. That raises a second set of concerns about doctrine. UCC § 2-306(1) purports to deal with the problem by using “good faith” to define obligations. This, I would suggest, is a big mistake. It again reflects the Code drafters' failure to understand basic economics and their lack of faith in

transactional lawyers. The basic problem, simply put, is that in a long-term contractual relationship, supply and demand conditions are likely to change and the parties will want to adapt as new information becomes available. In some instances, the adaptation mechanism would entail an elaborate governance system. In others, it would entail giving one party control. As with the analysis of termination, the parties' discretion need not be unbounded. The party with discretion can be confronted with a price reflecting the counterparty's reliance.

UCC § 2-306(1) explicitly addresses "full output" and "requirements" contracts. In the former, the quantity decision is at the discretion of the seller. The buyer agrees to take whatever the seller chooses to produce. In the latter, the quantity decision is at the discretion of the buyer. The seller agrees to provide whatever the buyer chooses to order. If the discretion were completely unbounded, such an agreement could be disastrous. If the market price rose even one cent above the contract price, the buyer could claim requirements thousands of times its normal needs. Fear of this possibility led the drafters of the Code to cap the discretion by imposing a good faith limitation. The poster-child case for extreme quantity variation is *Oscar Schlegel Manufacturing Co. v. Peter Cooper's Glue Factory*.<sup>19</sup> When the market price more than doubled the contract price, the buyer increased its purchases more than tenfold.<sup>20</sup> The parties might be quite eager to constrain such opportunistic behavior.

Unfortunately, the UCC throws out the baby with the bathwater. It purports to operationalize the good faith standard without regard to why parties might want to allocate quantity discretion to one of them. The Official Comments provide some indication of what is meant by good faith: the amount demanded in a requirements contract cannot be disproportionate to estimates.<sup>21</sup> There is some dispute as to whether the disproportion rule applies only to increased demands or whether it is symmetrical. The asymmetry of the rule in some jurisdictions is justified by the simple arithmetic fact that the downward discretion is bounded by zero.<sup>22</sup> The second aspect of good faith memorialized in the Offi-

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19. 132 N.E. 148 (N.Y. 1921).

20. As I have shown elsewhere, the contract did actually put limits on the buyer's discretion, but the seller failed to invoke the limits. See GOLDBERG, *supra* note 2, at ch. 3.

21. U.C.C. § 2-306 cmt. 3 (1972).

22. See *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1343 (7th Cir. 1988). The court found that the buyer's cutting its requirements to zero could be in good faith, but

cial Comments is the notion that a buyer cannot reduce or eliminate its requirements merely because it would otherwise lose money.<sup>23</sup>

Parties do not, however, get unbounded discretion. The requirements are normally tied to a particular purpose. For example, a buyer might take all the coal necessary to run a particular power plant. Or a buyer might limit its requirements to a particular purpose. The limits could be made tighter by incorporating a maximum and/or a minimum. Those limits could be further defined over various time periods. The buyer might agree, for example, to take a maximum of 400 tons per week and a minimum of 25,000 tons over three years.<sup>24</sup> Within those constraints, discretion can be further limited so that the counterparty's reliance can be accounted for. The contract allocates flexibility to the party that values it most. If the value of that flexibility exceeds the counterparty's cost of providing it, there is room for a deal. The counterparty bears the cost of providing that flexibility, and the contract can convey that information to the seller by, in effect, imposing a price. The price need not be explicit.

There are many ways to price flexibility. There are, for example, a number of variations on a "take-or-pay" contract. The party with discretion might have to pay a stand-by fee, or it might promise to pay for a minimum quantity—either 100% of the contract price or some fraction thereof. In a take-or-pay contract, the buyer agrees to pay for a certain percentage of the specified quantity,

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that the burden of proving that its decision was in good faith was on the defendant and that it had failed to do so. *Id.*

23. Comment 2 reads:

Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section.

U.C.C. § 2-306 cmt. 2 (1972).

24. Those limitations were included in Lake River's contract with Carborundum. See *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985); see also Victor P. Goldberg, *Cleaning Up Lake River*, 3 VA. L. & BUS. REV., 427-45 (2008).

regardless of whether or not the buyer actually takes it. The price for the first, say, 20% of the product in any given month is, in effect, zero. If the value of the seller's plant is contingent on the continued purchases by the buyer, the guaranteed "take" is one way to protect the seller's reliance. The greater the reliance, other things equal, the higher the guaranteed payment will be. The seller's reliance need not, in general, be fully protected—that is, the parties can share the risk of a bad outcome by setting the sum of the guaranteed payments below the seller's costs if the buyer were to order less than the minimum. Parties could include liquidated damages if the buyer were to fail to take a minimum amount; there would be, of course, the risk that a court would find that the liquidated damages were a penalty and would refuse to enforce the clause (that is another doctrine that has outlasted its sell-by date).

To illustrate the confusion caused by UCC § 2-306(1), consider the leading case in New York, *Feld v. Henry S. Levy & Sons, Inc.*<sup>25</sup> Levy baked and sold rye bread.<sup>26</sup> Inevitably, there would be some waste product—imperfect loaves and unsold bread—which Levy had to dispose of. The bakery decided to install an oven to convert these into breadcrumbs, which had some commercial value.<sup>27</sup> To ensure prompt removal, it entered into a one-year, full-output contract with Feld, a seller of breadcrumbs.<sup>28</sup> To protect its reliance interest, Levy required that Feld obtain a "faithful performance" bond.<sup>29</sup> Because Feld had other sources of breadcrumbs, the contract put no constraints on Levy's discretion. Levy was concerned with producing bread and, not surprisingly, did not want the tail of its waste product determining how much it should produce. That is, if Levy decided to produce no breadcrumbs, nothing in the written agreement prevented it from doing so. Levy was disappointed with the results and, after failing to renegotiate the contract price, dismantled the oven and ceased producing breadcrumbs.<sup>30</sup> Dismantling the oven did not amount to termination of the agreement since Levy was required to give six months notice; had it reinstalled the oven, it would still have been obliged to de-

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25. 335 N.E.2d 320 (N.Y. 1975).

26. *Id.* at 321.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

liver the crumbs to Feld. Feld sued for breach, arguing that Levy could not in good faith reduce its output to zero.<sup>31</sup>

The Court of Appeals held that, despite the contract language, the seller was not free to decide whether it should produce any breadcrumbs at all.<sup>32</sup> The implied duty of good faith required that it continue to produce breadcrumbs “even if there be no profit. In circumstances such as these and without more, defendant would be justified, in good faith, in ceasing production of the single item prior to cancellation only if its losses from continuance would be more than trivial, which, overall, is a question of fact.”<sup>33</sup> The court gave no indication as to how a jury could determine that fact. More significantly, it gave no reason for making the outcome depend upon that fact. The court failed to recognize that Levy was the one making an investment—the toaster oven—in reliance upon the contract. The cost to Feld of granting the discretion was zero. The court, in effect, held that Levy promised that it would be willing to lose some money—but not too much—in order to protect Feld’s non-existent reliance. The contract priced Levy’s discretion at zero; the court trumped it for no good reason.

The essential point is that good faith, unguided by any understanding of the business sense of the transaction, is too blunt an instrument. Courts should start with the presumption that commercial parties are capable of balancing the quantity discretion against the counterparty’s reliance. The role of good faith can be limited to cases involving opportunistic behavior. I recognize that there would be disputes as to what constitutes opportunistic behavior, but at least it suggests a broader range of acceptable behavior than that embodied in the Code and its Comments.

There remain a few other items on my wish list. I would like to see a more sensible resolution of the battle of the forms<sup>34</sup> than the knockout rule; I have proposed what I believe to be a more sensible rule—the “best shot” rule.<sup>35</sup> That would at least force parties, when drafting their forms, to take account of the concerns of their counterparties. I would also like to see the resurrection of the “tacit assumption” approach to the question of the recovery of consequential damages. I take some solace from the fact that the House of Lords did finally recognize the tacit allocation of risks in

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31. *Id.*

32. *Id.* at 323.

33. *Id.*

34. U.C.C. § 2-207 (2002).

35. See GOLDBERG, *supra* note 2, at ch. 8.

rejecting a claim for consequential damages in *The Achilleas*.<sup>36</sup> Further down the wish list, I would like to see that, in the event that contract performance is excused (impossibility, impracticability, frustration), the default rule should be that the parties are left where they were at the moment the excusing event occurred. The current default rule of restitution of prepayments possibly offset by reliance expenditures “if necessary to avoid injustice”<sup>37</sup> has little to recommend it. Since parties almost always contract out of the default, it does not do much harm. But the rule’s emphasis on justice and fairness is out of step with the commercial needs of parties.

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36. *Transfield Shipping Inc. v. Mercator Shipping Inc. (The Achilleas)*, [2008] UKHL 48, [2009] 1 A.C. (H.L.) [61] (appeal taken from Eng.). For analysis of the decision and the tacit assumption approach, see Victor P. Goldberg, *The Achilleas: Forsaking Foreseeability*, 66 CURRENT LEGAL PROBLEMS 107, 130 (2013).

37. RESTATEMENT (SECOND) OF CONTRACTS §§ 272, 377 (1974).



## A Eulogy for the EULA

*Miriam A. Cherry\**

Rakoff shook his brightly dyed red hair as he shivered alongside the others waiting for the bullet train. It was a miserably cold morning, but Rakoff's fellow passengers didn't seem to mind. Most of those standing on the platform were taking their spare moments to work in the global workspace. It looked like they were talking to themselves, typing on invisible keyboards, or blinking, but in fact they were working, completing crowdsourcing tasks. Other waiting passengers were interacting with business contacts by projecting their avatars out into the virtuality. It was cold, but there was not long to wait now; smart sensors gathered a continuous stream of data about riders to re-route the trains according to where they were needed. About two minutes later, the bullet train arrived and Rakoff's implant chimed as train fare was automatically deducted from his UCoin crypto currency account.

As Rakoff's kilt brushed past the doors, terms, conditions, and limited liability provisions from the train downloaded into his implant and flitted across his vision in an exhausting and unreadable blur, leaving him dizzy and nauseated. Such a tedious, useless, and annoying waste of perfectly good computing power made him figuratively (as well as literally) ill. Multiple times per day, every minute of the day, in every city across the global village, every netizen was bombarded with legal terms that no one could negotiate, let alone understand, even if they had tried. Which they hadn't, because who would waste their time so pointlessly? Such terms were a particular source of frustration because their lengthy and cumbersome files interfaced especially poorly with the visual implant that had become so popular during the last year. Not only were these legal documents tedious and impossible to avoid seeing, but they often left implant users with a terrible headache that lasted for hours. In response to consumer complaints, companies blamed these types of headaches on bugs in the interface with the implant. Whatever the cause, ouch!

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Just last week over a sushi lunch, Rakoff's sister Margaret, an attorney, had tried to explain to Rakoff why those contractual provisions existed, giving so many people with visual implants—and even those without—headaches. She explained that all the fine print and legalese, which she called “an adhesion contract,” was an old-fashioned effort by businesses to limit their legal liability.<sup>1</sup> Generally, Margaret told him, the terms did not allow for negotiation—they were on a “take-it or leave-it basis.”<sup>2</sup> Most people never read them—because they were difficult to understand and it took too long, for only a tiny benefit, perhaps.

As Margaret tied back her long hair so it didn't get into the wasabi, she explained that back last century, when national governments still had more power than transnational corporations, a United States Supreme Court case had strengthened the enforceability of such adhesion contracts.<sup>3</sup> The case involved language printed on the back of a cruise ship ticket, and the plaintiff was forced to bring suit in a port on the other side of the country based on the fine print.<sup>4</sup> When the influential and business-friendly Seventh Circuit had also decided to enforce adhesion contracts against people who (today it seemed antiquated) bought software in a box, it opened the door even further for these contracts.<sup>5</sup> In the 2000s, “End User License Agreement” or “EULA” contracts became quite common.<sup>6</sup> These “contracts” required scrolling through terms and clicking “I AGREE.” Other websites had the terms and conditions linked on their website. Courts dithered

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1. See generally Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

2. See Rakoff, *supra* note 1, at 1177.

3. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding a forum selection clause that was part of the printed boilerplate on a cruise line ticket).

4. *Id.* at 593-95.

5. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir.1996) (where a purchaser of software ignored license terms inside the software box, the Seventh Circuit concluded that “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends) may be a means of doing business valuable to buyers and sellers alike.”); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

6. See, e.g., *Licensed Application End User License Agreement*, APPLE, <https://www.apple.com/legal/internet-services/itunes/apptore/dev/stdeula/> (last visited Apr. 24, 2014).

over the next two decades about whether to enforce these so-called “shrinkwraps,” “clickwraps,” and “browsewraps.”<sup>7</sup>

Of course, Margaret explained, if the terms of an EULA or any other adhesion contract became so one-sided or overreaching that the terms were oppressive or constituted an unfair surprise, a doctrine called “unconscionability” protected the consumer.<sup>8</sup> But those cases had to involve really outrageous conduct, like forbidding a lawsuit altogether, waiving gross negligence, requiring the customer to travel to Mongolia to bring a case, or a complete waiver of any damages.

Between bites of his favorite veggie roll, Rakoff had asked why any business would put an unenforceable term in a contract, when it was, well, unenforceable? Margaret explained that in the case of some consumers, just reading a contract provision that prevented a lawsuit or made it more difficult would be enough to put them off from bringing a lawsuit or even contacting a lawyer. Although market economics would dictate that firms would compete and the harsh terms would disappear, the opposite seemed to have happened.<sup>9</sup> When one firm increased the harshness of its terms, other firms actually copied the harsh terms. And so the terms and conditions grew longer and longer and harsher and harsher on consumers. The cost savings were (mostly) not passed along to consumers but rather seemed to be kept as additional profits for the companies implementing them.

While a group of law professors, lawyers, and consumer advocates had discussed, debated, and mostly complained about one-

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7. Shrinkwraps are agreements encased in plastic wrap that typically accompany software compact discs. Clickwraps and browsewraps are digital agreements. A clickwrap requires clicking agreement in some manner, such as on an “accept” box. A browsewrap is a hyperlink that is designated as an agreement by the words “Terms of Use” or similar language. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 3 (2013). For further discussion of courts’ movement to accept these types of agreements in light of *ProCD*, see Nancy S. Kim, *Contract’s Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327 (2011).

8. U.C.C. § 2-302(1) (2012) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”).

9. See *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992-93 (7th Cir. 2008) (“[I]t has been hard to find decisions holding terms invalid on the ground that something is wrong with non-negotiable terms in form contracts . . . . As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices.”).

sided terms and conditions and unequal bargaining power for decades,<sup>10</sup> inertia largely carried the day. Courts and legislatures were either captured by the business lobbies or else had not seemed to think this a particularly pressing issue. Since no one thought they'd have a problem when they entered a contract or engaged in a routine, mundane transaction, such as paying a delivery drone, people still viewed these terms and conditions as largely irrelevant, or perhaps a necessary evil.

Until last year. Google Glass and the Microsoft Bracelet had satisfied the technocrati for the past decade, enabling a visual or tactile overlay and eye-click searching or touch-zooming throughout the virtuality. But just in the last year, an embedded implant promised far more speed, agility, and above all, an employment advantage. If you had an implant, steady employment and economic security were within reach. If you didn't, you might get stuck on the wrong side of the digital divide, or maybe doing random dead-end, no-benefit, poorly paid part-time work on crowdsourcing websites. Perhaps it spoke to the situation that in the last ten months alone, twenty million people had decided to try the visual implant. It was an amazing change that sped up all the innovations of the 'net and the virtuality from a generation before. Information was largely costless now and people could work, share knowledge, and connect with each other easily all around the globe. But the terms and conditions hadn't changed. No, they were as frustrating and intractable as ever as they created implant headaches for millions.

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Knowing the history of the useless and annoying terms was only partially satisfactory as Rakoff stumbled onto the bullet train, still reeling from the blinding headache. He almost tripped from the after-aura left behind as he shuffled to his seat, struggling to sit down and simultaneously accommodate his kilt. It was unusual

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10. See JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS 204 (5th ed. 2011) ("Economists, however, recognize that situation-specific monopolies created after parties of unequal bargaining power agree on a price are particularly likely to suggest inefficient terms."); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1265 (2003) ("After the purchase, however, the buyers had already invested in the particular products, and returning them would have required expending additional time and effort. Although the sellers were not monopolists at the time of sale, they enjoyed a situation-specific monopoly vis-à-vis customers who had already purchased their merchandise. Of course, they could not have taken advantage of this by charging a higher price, because the price term had already been agreed upon (and paid). Unable to renegotiate price, the sellers had an incentive to try to capture benefits of their monopoly position by providing low-quality terms.").

that he had talked with Margaret about this topic . . . because Rakoff wasn't a lawyer. Oh, no. Unlike his straight-laced sister, he tended to skate on the edge of the wrong side of the law.

Now, Rakoff wasn't exactly a hacker either. No, he preferred to call himself a "disruptivist technological innovator." Okay, he'd done his share of prank hacks with friends back when he was a teenager—who hadn't? Most of them with his friend Nancy and her jet black hair hacking along with him, before she decided to follow her dad's example and started medical school. Nancy was the better hacker of the two of them, if Rakoff was entirely honest with himself. When Rakoff had hacked in his twenties, well, that was only because of a sense of outrage. Big data monitoring of bathrooms through biological sensors (even if it was the best way to figure out which bathrooms to service) was a ridiculous invasion of privacy. And then there was that "innocent" virus that ended his last employer's surveillance of workers' off-duty web activity. And ended his time there, too. But lately Rakoff had sworn off his hacktivist ways. He had promised Nancy that he'd stop. Granted, she wasn't talking to him much lately, but Rakoff was still trying to keep his word to her.

Forget thinking about Nancy, he told himself. Get productive, get back to working. Rakoff transported a holographic avatar of himself to catch up with his coding supervisor. But after only ten minutes in the global workspace, he was rudely interrupted with a shock and what was almost a blinding bolt of unpleasantness. Those damn terms and conditions from the train. Again! Glancing around the train car, about seventy percent of the passengers were wincing in pain. Rakoff seethed with annoyance. Bad enough to get a headache when first getting on the train, but now a second time too? This was unusual. What in the web was going on?

Rakoff projected several data search bots into the virtuality and had them drill down for some big data crunching. The first bot showed nothing strange.

The second bot picked up a data trail through a paid big data stream and it promised to be juicy—data from an online retailer and its executives. Well, this called for more drilling. Rakoff spent the rest of his train ride following and directing the second bot's trail through the paid data stream. There were passwords and company firewalls that impeded him, but Rakoff didn't care and didn't stop until he found it. And there it was. The e-mail exchange between the CEO of the online retailer and the compa-

ny's attorney. Turns out that the terms and conditions headache was not a "bug" at all. Rakoff gasped at what he read next.

The headache was programmed in on purpose. In fact, the headache was a deliberate feature of the terms and conditions. In an e-mail exchange that Rakoff quickly scanned, it seemed that the attorney was actually approving of his client's actions. The attorney noted that if there ever was a problem and the company needed to prove that the customers knew about the terms, they could easily prove it in court through the existence of the headaches. It looked like the actual programming of the headache had been divided up into small pieces and crowdsourced, so that none of the workers would know what was going on. Huh. So giving millions of people blinding headaches was apparently a purposeful liability avoidance strategy. Rakoff swore under his breath. Unbelievable, to cause people so much pain and then lie about its cause. He would have cursed again but it was time to get off the train.

As he jumped off, Rakoff pinged Margaret.

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Luckily Margaret was free for dinner. Rakoff paid a special "privacy bar" three times the amount he'd normally spend on dinner, because he wanted a restaurant free from bugs and surveillance cameras. If you wanted privacy these days, you could have it, but it came at a price. Despite paying a drone and a leg, Rakoff swept the area carefully, for safety's sake. Shady characters and avatars flitted by him, partially cloaked. A holographic electronic New Orleans-style jazz band was playing a peppy funeral dirge in the corner. Rakoff did his sweep quickly so that he wouldn't have to endure Margaret chiding him for paying all the extra money and being paranoid at the same time.

"So. How do I do it, sis?"

"Do what?" asked Margaret.

"Stop the headaches. Stop these ridiculous terms that no one reads and everyone hates. I just want them to go away."

"Well, I've told you about that, Rakoff. The courts think it's more efficient this way.<sup>11</sup> Either the legislatures are being lobbied by businesses, or they just don't care. It's been this way so long that everyone gripes about it but no one does anything."

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11. See *ProCD*, 86 F.3d at 1451 ("Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.").

“Margaret, I understand that. But it’s not sustainable anymore. They lied to us. It’s not a bug. The terms give us those headaches on purpose. For consumers, the system is broken, if it ever worked to begin with . . . which it sounds like it hasn’t since some-time in pre-industrial Britain.”

“Can’t argue with you there, Rakoff.”

“Well, what’s the issue, the loophole? How do I get it to stop?”

Margaret thought carefully before leaning in closely.

Maybe Margaret was paranoid about surveillance too, Rakoff thought. As Margaret whispered into his ear, Rakoff started to grin. Sometimes you just needed good legal advice. This was going to be great.

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A week later, and Rakoff was waiting for the bullet train again. He and Margaret had read the terms and conditions for train service extremely carefully, checking and rechecking every provision.

The bullet train pulled up, and the terms and conditions download started. Rakoff stayed calm and practiced his yoga breathing exercises. Yes, this was the way to do it. As Rakoff exhaled, the terms and conditions download froze. Seventy percent of those boarding the train looked at each other, in the real world, in real time, in real surprise . . . at not being hit with a blinding headache.

Now the question, Rakoff pondered, is what would happen next? Would the train shut down, now that the terms and conditions were disabled? If the train was dead on the tracks, then Rakoff’s strategy wouldn’t have worked and he’d have to hightail it out of there and cover his tracks very carefully. Forget the breathing exercises, Rakoff was now literally holding his breath to see what would happen.

The automated announcer came on, as usual, and guided typical boarding procedures, minus the terms and conditions. Rakoff couldn’t believe his luck. The other passengers seemed strangely elated at skipping the headache-inducing download. Rakoff slowly sauntered onto the next train car, his kilt freshly ironed, and with his bouquet of hyacinths, ready to finish the train ride that would take him to his date with Nancy.

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Even before the train ride was over, the crowdsourced news about the terms and conditions knock-out hit the ’net. Passengers wrote and uploaded whole reports and stories to the ’net detailing what had happened on the train. It was so unusual to not be

bombarded by terms-induced headaches that the story of the “free ride” went viral. Rakoff could trace the story spreading across the virtuality as he walked down two familiar side streets.

Not only that, but hackers across the web had also picked up the story about the headaches being deliberate, not a bug in the system.

Netizens were outraged at how many unnecessary headaches they’d had to endure. Bullet train passengers in all cities across the globe were now demanding, through their implants, an end to the terms and conditions. Since the trains could obviously run without the terms, the passengers were getting their way. Within only ten minutes, stories were trending upward about the proper way to handle terms and conditions in the new technological age.

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Nancy put the hyacinths in a vase and sighed.

“Okay. I accept what you did. I think I even understand why and support your actions. Everyone is tired of those terms and who wants headaches? But what I want to know is, how did you and Margaret do it?”

Rakoff thought quickly. It was no good trying to cover things over with Nancy. She knew this had his handiwork all over it. After a year since they’d reconnected—granted, some of that on and some off—she just knew him too well for him to try to hide anything. Probably a good sign.

“Margaret and I scrutinized both the terms and conditions of the visual implant that I and most of the passengers had, and then the terms and conditions that were being downloaded from the bullet train.”

As he was about to finish his explanation, a story came across the virtuality from the crowdsourced media. They explained Rakoff’s plan better than even he could, so he sent the news link to Nancy’s bracelet.

“Ah,” she said. “Smart. So you had your visual implant jack everyone else’s and send the implants’ terms and conditions to the train at the same instant that the train was trying to download its terms and conditions to its passengers. Says here that the conflicting and inflexible contract terms caused some type of infinite loop in the train’s processing core. But because the terms were never a vital component of actually running the train, the programming could skip them and still keep the trains running. Meanwhile, because the entire crowd on the train had their visual



implants involved, you weren't implicated in the subsequent data trace. Very clever."

Rakoff nodded. "My implant had a term demanding resolution of any claims by a virtual arbitrator, and the train's terms forbade virtual arbitrators. It essentially created a 'dueling EULA' situation, which couldn't be resolved by the computers and resulted in a meltdown. Now that people know about this, the EULAs are history."

A minute later, both Rakoff and Nancy watched as groups of implant users banded together in both Tokyo and Nairobi to find the conflicts in the EULAs and to take down the terms and conditions on three crowdsourcing work websites.

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The next morning, Margaret appeared as legal advisor on "Talk of the Net." She noted that adhesion contracts had not been kind to consumers, even before the 'net, the virtuality, and implants.

She analogized the "dueling EULA" situation to an old legal doctrine called the "Battle of the Forms" where old-time merchants used to send each other differing printed forms in the mail.<sup>12</sup> The last version that was sent was the "last shot," and it controlled the terms.<sup>13</sup> Later, more complicated rules arose that compromised between the merchant forms, but even the best lawyers barely understood the rules, that was how complex they were.<sup>14</sup> All that said, consumers never had the same kind of bargaining power or access to counsel that merchants did. Consumers didn't even have their own forms. That was, until now.

Netizens around the globe had started a crowdsourcing website to create forms. Margaret noted that people were working around the clock, from Oslo to Vanuatu, to come up with consumer-friendly forms that would, in the process, conflict with the existing forms to invalidate them temporarily. Margaret was acting as legal counsel. With technology as an equalizer, there would be a way to establish a set of default terms that would be more visible and more democratic for consumers and merchants. A system could be established that was both fair and efficient.

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12. See MURRAY, *supra* note 10, at 172-73 ("Winning the 'Battle of the Forms' at Common Law – the Last Shot Principle").

13. *Id.* at 173 ("The seller 'won' the 'battle of the forms' simply because it fired the last shot in the battle.")

14. U.C.C. § 2-207 (2012); MURRAY, *supra* note 10, at 176 (explaining that the "celebrated" or "infamous" Section 2-207 was designed to remedy the possible injustice in the application of the "last shot rule").

Rakoff smiled as he watched the news and stepped onto the bullet train to head back home, with Nancy's bracelet on his arm, and without a headache.

# The Death of Contracts

Franklin G. Snyder & Ann M. Mirabito \*

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## INTRODUCTION

In 1897, writer Mark Twain read a newspaper account that reported that he had become seriously ill and died. In response, he wrote the *New York Journal*, “The report of my death was an exaggeration.”<sup>1</sup> The response caused a good deal of humor at the time, and it is a joke so good that it is still quoted today. But Twain, at the time, was sixty-two years old, in deep depression, and frequently ill.<sup>2</sup> Nearly all of his best work was behind him. He went on to live for another thirteen years, and even wrote at least two highly acclaimed pieces—*The Man Who Corrupted Hadleyburg*<sup>3</sup> comes to mind—but he was already on the downhill slope. The *Journal*’s only mistake was in being premature.

In 1974, Grant Gilmore created something of a tempest in the world of contract law scholarship with the publication of *The Death of Contract*.<sup>4</sup> “We are told that Contract, like God, is dead,”<sup>5</sup> he wrote. “And so it is.”<sup>6</sup> The book was derived from a series of lectures Gilmore had given in 1970. The lectures and the book were developed against the background of the legal revolution of the 1960s, with the Warren Court,<sup>7</sup> the rise of class action litigation,<sup>8</sup> the vast court-wrought revolution in products liability,<sup>9</sup> the rise of promissory estoppel<sup>10</sup> as an alternative to contract, and even court-ordered busing for desegregation.<sup>11</sup> This was the zenith of enthusiasm for the idea that creative, idealistic lawyers and

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1. 2 MARK TWAIN, AUTOBIOGRAPHY OF MARK TWAIN 11 (Benjamin Griffin et al. eds., 2013).

2. See RON POWERS, MARK TWAIN: A LIFE 563-98 (2005).

3. Reprinted in THE MAN THAT CORRUPTED HADLEYBURG, AND OTHER STORIES AND ESSAYS (Oxford Mark Twain 1996) (1899).

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

5. *Id.* at 1.

6. *Id.*

7. See generally MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE (1998).

8. See generally Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

9. See generally PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1990).

10. The doctrine at its zenith was enshrined in RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

11. See generally CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (2004).

disinterested, legally expert judges—relying on the work of brilliant, cutting-edge legal academics—could solve even the bitterest social problems through litigation in the courts. That thinking is apparent in Gilmore’s arguments. After all, the losses caused by a breach of a contract can in some cases dwarf the losses caused by even the most egregious torts,<sup>12</sup> and in each case the responsible party is made to pay for the losses. Why should contract be treated differently than any other area of law in which injured people are compensated? The nineteenth century insistence on “the agreement,” “consent,” and “the intent of the parties,” and the peculiar set of doctrines that embodied them, was out of date. Gilmore theorized that “Contract”—by which he meant classical American contract common law and its assorted doctrines—would be “reabsorbed” into the common law of torts,<sup>13</sup> and that the judges who had done so much to alter and extend tort law to create massive new areas of liability<sup>14</sup> would wash away the doctrinal detritus and dictate a new and improved approach to contractual liability.

As things turned out, Gilmore’s funeral oration for contract law was about as accurate as the *Journal’s* report of Twain’s death. The enthusiasm for judicial revolutions was already starting to wane, and hardly survived the 1970s. State courts that had shown some early infatuation with reliance-based theories began to move away from them. Observers noted that courts were becoming even more doctrinaire in their allegiance to classical contract theory.<sup>15</sup> Reliance as an alternative to the traditional bar-

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12. See, e.g., *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987), *cert. dismissed*, 485 U.S. 994 (1988) (affirming award of \$7.53 billion for interference with a merger contract).

13. GILMORE, *supra* note 4, at 95.

14. The period saw the invention of strict liability for manufacturers of products, the decline of venerable defenses like contributory negligence and assumption of risk, and the invention of the modern class action lawsuit. There was considerable enthusiasm for these developments at the time, but a half-century later opinions are less favorable. See, e.g. ERIC HELLAND & ALEXANDER TABARROK, *JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL* 1-22 (2006) (noting “explosion” of tort liability since 1970 has doubled the percentage of GDP devoted to tort litigation).

15. See, e.g., *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley ed. 1999); Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE UNIV. L. REV. 1 (2004); Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995); Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153 (1995).

gain theory of contract seemed to wither almost into desuetude.<sup>16</sup> On the surface, at least, contract law was very much alive.

But Gilmore, like the New York *Journal*, was merely premature. “Contract” in 1974, like Mark Twain in 1897, was old, sick, and unlikely to burst back into full youthful vigor. It had a few good decades left, but, like the ageing writer, it was on the downhill slope. There were important cases and doctrinal innovations still to come, as a quick perusal of any contemporary contract law casebook will show. Just as with the old codger who everybody recognizes is still an inventive writer and humorist, the handwriting is already there on the wall.

Our thesis here is that contract law as a distinct, coherent, and important body of law—the law generated through the appellate decisions of American courts and taught in American law schools for nearly a century and a half—is dying. The last few decades have seen a steady erosion of its importance, and it functions today less as a tool that enables a rich vein of private ordering than as a series of arbitrary traps that lie in wait for the unwary. Because sophisticated commercial parties are always free to opt out of contract regimes they do not find helpful,<sup>17</sup> much of the current law school contracts course, in our view, is likely to become almost entirely irrelevant to practicing lawyers and their clients. And in a world in which most law schools will face considerable pressure to adapt their curricula to meet the needs of the profession and the clients, it will become, for all practical purposes, dead.<sup>18</sup>

Our argument rests upon general observations of the disconnections between the structure of contract law and the realities of

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16. The extent of its decline is a matter of some debate, but all seem to agree that it has made little progress since 1980 and has been relatively unsuccessful in the courts. See Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998); Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191 (1998). It also seems that to the extent “promissory estoppel” claims find success, enforcement seems to be based not on Gilmore’s tort-based reliance theory, but on a version of contract-based promise. See Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531 (2002).

17. See JONATHAN MORGAN, CONTRACT LAW MINIMALISM 87-88 (2013).

18. Another article predicting the demise of contracts is Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369 (2004). Professor Scott accurately points out the problems caused by the consistent push of judges and legal scholars to turn informal norms of fairness and cooperation into binding legal obligations, and suggests that sophisticated parties may opt to bifurcate commercial relationships in such a way that only a portion of the relationship is subject to legal enforcement. We believe this is entirely consistent with the broader argument we are making here.

modern commercial transactions. Most of these observations, we believe, are not controversial, although the conclusions we draw probably will be so. We begin with the insight that the processes and rules humans use to carry out commercial transactions and to resolve disputes over those transactions are *technologies*,<sup>19</sup> or, more precisely, as we will call them here *techniques*,<sup>20</sup> the materials and processes of problem-solving. Like other techniques, these processes are subject to becoming outdated by changes in the world that make them less effective. That legal rules of contract become “outdated” and must be revised in light of current needs was, in fact, a principal argument made by the Legal Realist contracts professor Karl Llewellyn,<sup>21</sup> and is nearly a truism today. Thus, contract law has regularly been “updated,” most notably by adoption of the Uniform Commercial Code in the 1960s. But, we argue, contract law’s adaption over the last century and a half has been mostly tinkering with a basic offering, and so contract law has become less and less valuable to contracting parties themselves and less and less important to those (government actors, primarily) who would regulate those transactions.

The argument here will proceed in six steps. In Part I we explore in more detail the idea of law as technique. We then examine two interrelated strands of technique, the judicial *structure* for resolving disputes (Part II), and the body of legal *rules* that govern contract disputes (Part III). In Part IV we look at current contract law technique and ask, “What kind of world does this technique seem to assume exists, and for what kind of world does it seem appropriate?” Part V then examines how closely the world implied in current technique matches the world that actually exists today and that we will likely see in the future. We find that contract law as we think of it today corresponds very little with the *actual*

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19. In modern international trade, for example, such legal constructs as irrevocable letters of credit, policies of marine insurance, negotiable bills of lading, and *force majeure* clauses are as much “technologies” in the broad sense, as the ships, trains, trucks, and planes that carry the goods. They are tools developed to help humans solve the problems of moving goods from one place to another in the most efficient manner.

20. We explain the use of the term in part I, *infra*.

21. See, e.g., Karl Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 728-36 (1939); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 468 n.13 (1987). Llewellyn often tended to use “outdated” to describe rules he really meant were socially undesirable on other grounds, see Franklin G. Snyder, *Clouds of Mystery, Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11 (2007) (critiquing Llewellyn’s version of Legal Realism as applied to his work on the UCC), but that he realized the power of “outdated” as a criticism only reinforced the point.

world of today, and even less so with that of the future. Finally, Part VI looks at the body of contract law as taught in the standard law school course on the subject and explains why, in our view, most of it is doomed to practical irrelevance.

### I. CONTRACT LAW AS TECHNOLOGY

All human societies have “law” in its broad sense: a set of norms that are generally regarded as binding by members of the society and which cannot be transgressed without being subject to some penalty. Law is a human artifact.<sup>22</sup> The precise artifact we call “law,” like the artifact we call “agriculture,” varies widely across time and space. “Law,” like “agriculture,” is simply the general term we apply to a specific set of functions carried out in a society. Like all such functions, the legal function varies depending on: (a) the *knowledge* available to that society, (b) the specific *needs* of the given society, and (c) the degree of *infrastructure* available to translate the knowledge into a solution to the need.<sup>23</sup> Just as a society’s agricultural techniques are the way it solves particular food production problems at particular times, the law techniques society uses for dispute resolution are also developed at particular times for particular situations.

We use the term “technique” rather than “technology” because, in English usage, the latter has come to connote the practical use of applied science, progressive improvement, and often a specific business sector, the “technology industry.”<sup>24</sup> Moreover, the French

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22. See H.L.A. Hart, *Bentham and the Demystification of Law*, 36 MODERN L. REV. 2 (1961), reprinted in H.L.A. HART, *ESSAYS ON BENTHAM* (1982).

23. For example, we can assume that the cultivation of grain is a technology superior to that of traditional hunting and gathering. But a given society will not be able to deploy the cultivation technology if it is ignorant of it. It will have no motive to adopt it, even if it has the knowledge, if it is living in an area where food is already abundant. And it will not adopt the cultivation technology, even if it has the knowledge and would like to do so, if the natural environment and its available social structures (such systems for coordinating work and keeping rival tribes away from the harvest) prevent the society from doing so.

24. This was not always the case. The term “technology”—derived etymologically from the Greek *logos* (discourse) and *tekhne* (skill or art)—became a cultural keyword during the Second Industrial Revolution of the mid- to late nineteenth and the early twentieth centuries. In contemporary American usage, the term is often related to applied science and frequently implies the progressive improvement born of the late nineteenth century idea that modern history is a record of progress. In English, “technology” originally referred merely to the study of the industrial arts or the useful arts, a usage that was exemplified in the naming of Massachusetts Institute of Technology in 1861. The English meaning of technology expanded around 1930 to include not only the study of the useful arts (*Technologie*, in German) but also the object of the study, that is, the materials and processes of problem solving (*Technik*). While the two terms were distinct in German, American social



philosopher, sociologist, and law professor Jacques Ellul has to some extent popularized the term “technique” with respect to the legal system.<sup>25</sup> Ellul uses “technique” to describe “any method adopted by humans to achieve a goal more efficiently in any field of human activity,” including “not only physical artifacts, but also methods and organizational structures, among other things.”<sup>26</sup> This definition clearly encompasses the body of rules, processes, and systems that we call “contracts.”

Contract law technique in the United States is, in fact, made up of at least two different techniques, which work together to form the whole. It is made up of (a) a particular set of rules and principles for decision-making that are (b) carried out through a particular bureaucratic apparatus, the court system. Contract disputes make up only one relatively small part of the work done by the court system. The court system is a technique designed to process a vast range of disputes, while the rules of contract law are a technique that governs decision-making by the court system in a particular range of cases. To use an inexact metaphor, the American legal system resembles a computer system that uses both hardware and software to achieve its results. The basic hardware technology remains the same even though different software programs (themselves technological products) are used to do different things. Similarly, the same software may run on different kinds of hardware. Hardware and software are always to some extent intertwined and interdependent, but they are different things.

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thinkers, most notably Thorstein Veblen, fused the two meanings into the single term technology. See Eric Schatzberg, “*Technik*” Comes to America: Changing Meanings of “Technology” before 1930, 47 *TECH. & CULTURE* 486 (2006); see also RUTH OLDENZIEL, MAKING TECHNOLOGY MASCULINE 19-50 (1999).

Sociologists trace the enthusiasm for the concepts of *Technik* and *Technologie* to German engineers who sought to distinguish their work from ordinary mechanical labor. Leo Marx notes that practical arts have been inferior to fine arts since antiquity, with distinctions made between objects and ideas, the physical and the mental, the enslaved and free thinkers. During industrialization, the mechanical arts were evidenced in the locomotive, the steam engine, the water mill—important agents of social change and more abstract than traditional artisanal work. German engineers pointed to the creative character of invention, blurring the distinction between *Technik* and *Kultur*. See Leo Marx, *Does Improved Technology Mean Progress?*, 90 *TECH. REV.* 33 (1987), reprinted in *TECHNOLOGY AND THE FUTURE* (Albert H. Heich ed., 2006).

25. See JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* xxv (John Wilkinson trans. 1964); JACQUES ELLUL, *THE THEOLOGICAL FOUNDATION OF LAW* (Marguerite Wieser trans. 1960).

26. Jennifer A. Chandler, *Technological Self-Help and Equality in Cyberspace*, 56 *MCGILL L.J.* 39, 48 (2010).

We see the same in law, where systems in different societies that are procedurally similar may operate under very different rules, while the same basic rules may be deployed in other societies through very different procedures. Hence we will draw a distinction between the technique of the decision-making system itself (the people, resources, and procedures involved), which we will call here *structural technique*, and the mental constructs (the body of legal rules) used by the structure to arrive at results, which we call *rule technique*. Both structural and rule technique are driven primarily by the perceived needs of the society in which they are embedded, and they may influence each other. A society may dictate certain rules to which the structure must necessarily conform (for example, the American constitutional requirement of jury trials<sup>27</sup>), while the structure may drive rule technique to make the structure more efficient or to remedy some of the structure's perceived flaws.<sup>28</sup>

Changes to *structural* technique tend to be driven primarily by efforts to improve efficiency. A court system, like other functional human systems, tends to have efficiency (broadly defined) as one of its principal aims. We say "broadly defined" because the goals of its designers may range from efficiently administering justice to efficiently liquidating enemies of the ruling regime.<sup>29</sup> Potential improvements in structural technique are traded off with their potential costs. Changes to structure tend to be justified by the fact that they improve the processes, without regard to the particular rules being applied. Thus, most of the developments in American structural technique in the last hundred years have been justified as improving the fairness and accuracy of the proceedings.<sup>30</sup>

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27. U.S. CONST. amend. VI.

28. Thus, the constitutional requirement of a jury in the federal and many state constitutions requires that structural technique incorporate it, even if the jury system is inefficient. The use of the jury may then force the rule technique to develop means of limiting the perceived problems with juries through rules removing decisions from juries (such as the meaning of a given contract), or putting limits on their range of decision-making (such as the measure of damages for breach), and by rules preventing certain kinds of evidence from reaching them (such as restrictions on parol evidence).

29. Or even, as some have charged, to enhance the power and wealth of those who control and manipulate the system, a charge frequently made by critics regarding the American legal system. See, e.g., WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* (2004). An excellent and temperate scholarly look at the way lawyers and judges benefit from operating the system is BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* (2010).

30. Thus, pretrial discovery was urged as a reform that would end the kind of trial-by-surprise that had previously been common; non-unanimous juries were designed to avoid

The results of these changes may not in fact result in greater efficiency, because changes to one part of a complex system often have unintended results in other parts, but the goal is still, broadly speaking, to make the process as efficient as possible.

Changes to *rule* technique, on the other hand, are driven by many competing factors. In the area of Contracts, for example, societies vary greatly in the extent to which private individuals have autonomy to shape their own commercial relationships. Some very complex societies that engage in substantial domestic and international trade—such as the Babylon of Hammurabi’s time<sup>31</sup>—leave relatively little scope for parties to make and enforce their own idiosyncratic bargains, while others—America in the decades after the Civil War, for example<sup>32</sup>—follow a *laissez-faire* approach that gives the parties vast autonomy to shape deals and have them enforced by the state. The social ethos shapes the appropriate contract law technique. Thus, rule technique constructs like “intent of the parties” in interpreting a promise might be critical in nineteenth century America, but presumably would hardly even be comprehensible in the Babylon of the eighteenth century B.C.

Tracing the development of structural and rule technique in the United States is far beyond the scope of this paper. But because our focus is on the death of that particular system called contracts in contemporary America, we will outline current aspects of both the structural and the rules techniques, with a few background notes on how these developed.

## II. THE STRUCTURAL TECHNIQUE OF CONTRACT LAW

As noted above, the structural technique of law in any society is dependent upon the knowledge, needs, and infrastructure of the particular society. The earliest English jurors, for example, were members of the community who knew the parties and already

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costs of relitigation; class actions were developed to permit more cost-effective resolution of claims that otherwise would be too small to warrant litigation.

31. Babylonian commercial law went into great detail as to the forms of agreements and specifies rules down to the level of fixing prices and mandatory terms for simple transactions such as leases and shipments and complicated ventures like caravans to distant markets. See generally C. W. JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* 227-86 (1904) (outlining aspects of sales, loans, wages, guarantees, leases, transportation, and trade).

32. See generally KEVIN M. TEVEEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 175-216 (1990).

knew the facts.<sup>33</sup> This was doubtless a very efficient system in a heavily localized world with poor transportation and communication systems and a fixed social structure. Jurors could rely on a set of virtually immutable norms widely shared by the whole community.

As transportation improved, communities grew larger and more interconnected. Status became more ambiguous, and disputes between members of different communities became more common. The parochialism of the old system became increasingly apparent and troublesome. As it happened, however, the improvements in transportation and communications that made the world more interconnected and fostered more disputes also promoted the creation of a more centralized procedure. Improvements in bureaucratic technique under the Plantagenet kings meant that courts could develop consistent and coordinated processes, in which trials could be conducted at a distance from the particular community by royal judges who made regular circuits. These “assizes,” which required judges to spend time each year both in the capital and in the hinterlands, allowed for an interchange of experiences. It also led to the rise in London of a group of paid legal specialists known as “serjeants-at-law,” who enabled parties to rely on professionals to plead their cases. This in turn drove the serjeants and the judges to become more systematic and professional, developing a body of specialized knowledge that would become valuable to clients. The modern English judicial system, ancestor to our own, was born.

A striking feature of that system, largely carried down to the American judicial system, was that legal matters of any sort were addressed by a structural technique that used standardized forms and processes. Central to this process was the jury, one of the unique features of legal systems based on English law. A dispute between two farmers over a cow and a prosecution for murder were different matters, but each passed through the same tribunals in much the same way. Every cause of action had to be cut to the Procrustean bed<sup>34</sup> of the system.<sup>35</sup> Although from time to

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33. This necessarily brief caricature of the early judicial procedures is taken from FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2 vol., 2d ed. 1898).

34. A Procrustean bed is a uniform standard arbitrarily imposed on a system. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 927 (10th ed. 2001). It is derived from the name of the legendary Greek bandit Procrustes, who “had an iron bedstead, on which he used to tie all travellers who fell into his hands. If they were shorter than the bed, he

time it was suggested that the handling of commercial law disputes might be better effected through some other procedure,<sup>36</sup> that step was never taken. Thus in contemporary America, the process for resolving contract disputes is virtually identical to that used in resolving disputes in most other areas of law. A contract claim is processed through the system in much the same way as claims for antitrust, employment discrimination, negligent operation of a motor vehicle, or any other private cause of action.

The process generally works this way. When a contract dispute arises, the services of a state or federal court are invoked to resolve it. Each party hires a lawyer or lawyers to represent it in court. The plaintiff's lawyer files a written complaint with the court,<sup>37</sup> which sets forth the claim, followed by service of process on the defendant, and then an answer filed by the defendant in similar form, denying the claim and setting forth defenses.<sup>38</sup> The matter is assigned to a judge, a government employee trained as a lawyer who has been appointed or elected to the office, and who is usually a generalist without detailed knowledge of the area of law that the claim entails. Upon motion of either party, the judge will review each claim or defense for legal sufficiency.<sup>39</sup> If the pleadings are sufficient, there is a period of delay, during which the parties investigate and prepare their cases. The chief innovation of the twentieth century in the American version of the process is formal discovery, which takes place at this point and involves exchanges of written interrogatories, requests for admission, and

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stretched their limbs to make them fit it; if they were longer than the bed, he lopped off a portion." THOMAS BULFINCH, *BULFINCH'S MYTHOLOGY* 137 (Richard P. Martin ed., 1991).

35. Under the constraints of the day, this was entirely natural. There were not enough judges or lawyers to allow for specialization, and the necessary bureaucratic technology allowing organizations to chart different paths for different matters and to keep tabs on all of them was lacking. Over time, English courts did develop some specialization by the simple expedient of having different court systems compete with each other. Thus, the Courts of Kings Bench, Common Pleas, and Exchequer, and later the Court of Chancery, each developed its own procedures and its own specialties. Interestingly, however, this specialization never took hold in the United States, where the same tribunals (state and federal trial courts) exercised jurisdiction over all types of claims. The system became even less specialized after the merger of law and equity in the latter part of the nineteenth century.

36. Most notably, by Lord Chief Justice Mansfield in the 18th century, who advocated using juries of merchants rather than laymen. See 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 93-99 (1992).

37. See FED. R. CIV. P. 3 (Commencing an Action).

38. See FED. R. CIV. P. 8(b)-(c) (Defenses; Affirmative Defenses); FED. R. CIV. P. 12(b) (How to Present Defenses).

39. See FED. R. CIV. P. 7 (Pleadings Allowed; Form of Motions and Other Papers).

formal depositions of witnesses.<sup>40</sup> During this period, various written motions may be submitted by the parties' lawyers to resolve certain matters before trial; these are ruled on by the judge.<sup>41</sup> All of this takes a great deal of time and a substantial amount of money. There may follow settlement discussions, often under pressure imposed by the judge.<sup>42</sup> A trial date is set, but may be moved several times at the convenience of the judge, who may often schedule several trials on the same day in the expectation that most or all will settle.

Once the actual trial date arrives, all parties and witnesses report to a specified courtroom before the judge. Lay people ignorant of the facts and generally unfamiliar with the law are summoned to serve as jurors, those who will make the ultimate decision. Jurors are selected to a panel by the lawyers for each party.<sup>43</sup> Witnesses are called and testify under formal rules of evidence, designed specifically to prevent jurors from hearing certain information, and are cross-examined on their testimony. Exhibits are introduced. Jurors listen to the testimony and receive the exhibits but do not take any active part in the process. When testimony ends, the lawyers for the two sides summarize the case in speeches to the jury. At this point, after the jury has heard the facts, the judge "instructs" the jury<sup>44</sup> on "the law," the rules of the dispute as derived from prior cases or from statutes, thus essentially channeling the jury's ultimate decision into a path that makes it consistent with decisions in similar disputes. After deliberation, the jury—often today by majority vote—issues a verdict<sup>45</sup> and assesses damages. The parties make written post-trial motions; the judge reviews the jury's verdict to ensure it is in accordance with its instruction, and the motions are granted or denied.<sup>46</sup> A judgment is issued.<sup>47</sup>

The losing party may then appeal the judgment to an appellate court of three or more judges. An entire written record of the pro-

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40. See generally FED. R. CIV. P. 26 (Duty to Disclose; General Provisions Governing Discovery).

41. See, e.g., FED. R. CIV. P. 56 (Summary Judgment).

42. In fact, mediation is often required by law in both federal and state courts before a case proceeds to trial.

43. See FED. R. CIV. P. 47 (Selecting Jurors).

44. See FED. R. CIV. P. 51(b) (Instructions).

45. See FED. R. CIV. P. 48(b) (Verdict).

46. See FED. R. CIV. P. 50 (Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling).

47. See FED. R. CIV. P. 54 (Judgment; Costs); FED. R. CIV. P. 58 (Entering Judgment).

ceeding is compiled and forwarded to the new judges,<sup>48</sup> along with extensive legal briefs prepared by lawyers for each party detailing the alleged errors in the proceedings below.<sup>49</sup> After reading the record and reviewing the briefs, the lawyers for each party are brought into the appellate court to give short speeches to the judges.<sup>50</sup> The judges then return to their chambers and decide the case. They write an opinion affirming or reversing the judgment, or various parts of it. If there is a reversal, the matter is sent back to the earlier judge to take up the proceedings again. In any event, the appellate judges prepare a written opinion detailing the reasons for their decision, which is subsequently recorded, printed and bound, and made available to later lawyers as precedent, which will be relied upon in subsequent disputes.

By and large, this structural technique is still in use today. A lawyer from 1914, transported magically to 2014, would—after replacing computers and printers for typewriters and bound volumes and after learning to put bar codes on exhibits—feel very much at home. Such changes to the technique have chiefly made it more drawn-out and much more expensive. In a world where the drive for efficiency has promoted fundamental changes in almost every sphere of life, the structural techniques employed by courts in contract cases today is an anomaly.

### III. THE RULE TECHNIQUE OF CONTRACT LAW

The rule technique of contracts developed as part of the common law of England, and was transported to the Americas with British settlers. It is conventional to start the story of the development of Anglo-American legal rules with the Norman Conquest in 1066.<sup>51</sup> In the first years after the Conquest, there was no real law “of” England at all.<sup>52</sup> The country was a hodgepodge of local communities, each with its own admixture of customary laws derived from the various waves of invaders who had swarmed over the island in the previous millennium—Celts, Romans, Picts, Angles, Saxons, Jutes, Norsemen, and finally Frenchmen—and from the local idiosyncrasies and practices that inevitably build up in isolated com-

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48. See FED R. APP. P. 10 (The Record on Appeal).

49. See FED R. APP. P. 28 (Briefs).

50. See FED R. APP. P. 28 (Oral Argument).

51. See POLLOCK & MAITLAND, *supra* note 33.

52. This is necessarily a caricature of a very complicated process. The chaotic situation in English law at the time of the Conquest is detailed in POLLOCK & MAITLAND, *supra* note 33.

munities. There was no tool to bring order out of this chaos until the development of the assizes.<sup>53</sup> That development in structural technique allowed for development of a new rule technique. The judges began to develop a “common” law of England out of the myriad rules the itinerant judges found in the hinterlands.<sup>54</sup> The branch of law we call contracts developed out of this common law.

But a body of contract law as we think of it today was not present in those early years. None of the invading groups except the Romans had ever had anything except the most rudimentary notions of “contract” beyond the most simple of exchanges.<sup>55</sup> There was little need for such law in a society with limited transportation and communications, and where most transactions were local and performed in accordance with local custom. In the few cities where trade was relatively important, merchants simply opted out of the crude legal system by developing their own bodies of customs and rules that they enforced themselves.<sup>56</sup> As the country grew and became more interconnected, however, the royal courts began developing a common law dealing with commercial transactions. Yet there was still no general law of contracts. On the eve of the American Revolution, there were, instead, laws relating to various specific types of transactions: feoffments, mortgages, bailments, loans, pledges of property, agreements under seal, and so forth. These were all brought under a variety of different forms of action and procedure such as action of covenant, debt, trespass, assumpsit, detinue, replevin, and ejectment. So unfamiliar was our contemporary concept of contract in those days that only a decade before the Revolution, the most influential English-language legal text, Sir William Blackstone’s *Commentaries*,<sup>57</sup>

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53. See part II, *supra*.

54. The traveling judges, exchanging notes, found themselves able to begin to categorize disputes and develop a set of “common pleas,” or standardized writs that could be issued by the courts in particular kinds of disputes. Thus, the judicial structure permitted standardization of rules across the realm. A detailed description of the process is found in ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* (1986).

55. 1 POLLOCK & MAITLAND, *supra* note 33, at 182-83.

56. The history of the process is set forth in LEON E. TRAKMAN, *LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983).

57. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (4 vol. 1765-69). On the eve of the Civil War, American lawyers were still relying heavily on later editions of Blackstone, which was held to be the best training for a new lawyer. See Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 4 (2010).



which otherwise deals with every aspect of English law, hardly mentions the idea of “contracts.”<sup>58</sup>

A. *Development of Contract Rule Technique*

The origins of the contemporary law of contracts and its rule technique lie in the first decades after the stirring events of 1776. The American Declaration of Independence taught that “all men are created equal.”<sup>59</sup> Adam Smith’s *The Wealth of Nations*, published that same year, taught that when all men are free and allowed to pursue their own private interests, society as a whole benefits from an increase in wealth, the concept that came to be known as “the invisible hand.”<sup>60</sup> The ideas that the law ought to allow men to organize their own lives by making their own bargains, and that the job of the state was merely to enforce those bargains, began to take root in society.

The first legal text to treat the notion of “contract” as a distinct subject separate and apart from all the various transactions to which it applies appeared in 1790. The author, an otherwise unknown barrister named John Joseph Powell, discerned that all of the hitherto-distinct bodies of law relating to transactions were unified by a single underlying principle: “[I]n all these transactions, there is a *mutual consent of the minds of the parties concerned in them*, upon agreement between them, respecting some property or right that is the object of stipulation.”<sup>61</sup> From that date a stream of treatises began to appear on the new subject of “contracts.”<sup>62</sup> Powell’s articulation of *consent* to be bound as a central theme began more and more to be reflected in judicial opin-

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58. See 2 BLACKSTONE, *supra* note 57, at 440-70 (treating contract chiefly as but one of the various ways of transferring title to chattels); see also 1 POLLOCK & MAITLAND, *supra* note 33, at 182 (noting that for Blackstone contract was a “mere supplement to the law of property”).

59. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

60. See ADAM SMITH, *THE WEALTH OF NATIONS* (Thrifty Books 2009) (1776).

61. 2 JOHN JOSEPH POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* vii (1790). See also *id.* at 9 (“it is of the essence of every contract or agreement, that the parties to be bound thereby should consent to whatever is stipulated; for, otherwise, no obligation can be contracted, or concomitant right created”).

62. See, e.g., JOHN NEWLAND, *A TREATISE ON CONTRACTS: WITHIN THE JURISDICTION OF COURTS OF EQUITY* (1806); ROBERT JOSEPH POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS* (William David Evans trans. 1806); SAMUEL COMYN, *A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS NOT UNDER SEAL* (1807); H. T. COLEBROOKE, *TREATISE ON OBLIGATIONS AND CONTRACTS* (1818); DANIEL CHIPMAN, *AN ESSAY ON THE LAW OF CONTRACTS: FOR THE PAYMENT OF SPECIFICK ARTICLES* (1822); JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* (1834).

ions. In these opinions, it should be noted, the concept seems to be treated as a principle so fundamental as almost not to need stating, let alone requiring any citation.<sup>63</sup>

It is common among legal scholars to attribute these changes in rule technique to the inventions of the treatise-writers and to the judges and lawyers who slavishly followed their theories.<sup>64</sup> But the truth is that the judges who began citing these treatises, like virtually all lawyers at all times, were *bricoleurs*. That is, they were men who set out to get to a certain result and they used whatever was at hand to cobble it together. This, of course, is the essence of legal brief-writing (“Find everything that supports our position!”) and is frequently seen in judicial opinions, where helpful facts and authorities are emphasized and bad facts and authorities are misrepresented or ignored.<sup>65</sup> The idea of free contract

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63. See, e.g., *United States v. Gurney*, 8 U.S. 333, 343 (1808) (“Contracts are always to be construed with a view to the real intention of the parties.”); *Barton v. Bird*, 1 Tenn. 66, 71 (1804) (“The assent of parties to a contract is essentially necessary to its obligatory force. The minds of parties having an equal view of the subject matter, should concur . . . . To discover this concurrence . . . is the first object of the court.”); *Bruce v. Pearson*, 3 Johns. 534 (N.Y. 1808) (where a buyer ordered six hogsheads of rum and the seller delivered only three, there was no meeting of the minds (“*aggregatio mentium*”) and hence no contract); *Mactier’s Adm’rs v. Frith*, 6 Wend. 103, 139 (N.Y. 1830) (“To make a contract there must be an agreement—a meeting of the minds of the contracting parties.”); *Chesapeake & Ohio Canal Co. v. Baltimore & O. R. R. Co.*, 4 G. & J. 1, 129-30 (1832) (a contract “is a mutual consent of the minds of the parties concerned”); *New-Haven Cnty. Bank v. Mitchell*, 15 Conn. 206, 218 (1842) (“Until . . . acceptance, it is not consummated into a contract, but remains a mere proposition, and there has been no meeting of the minds of the parties. It is the acceptance which constitutes such meeting and consummation.”); *Clark v. Sigourney*, 17 Conn. 511, 520 (1846) (“the meeting of the minds of the parties in the transaction . . . is the consummation of the contract”); *Planters’ Bank v. Snodgrass*, 5 Miss. 573, 639 (1846) (Sharkey, J., dissenting) (“In all contracts there must be an assent or meeting of the minds of the contracting parties, either actual or constructive.”); *Boston & Maine R.R. v. Bartlett*, 57 Mass. 224, 227 (1849) (“the meeting of the minds of the parties . . . constitutes and is the definition of a contract”).

64. This is a common theme, even among scholars who disagree strongly about how the process actually worked. Compare MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 160-210 (1977) (arguing that the change was sudden and driven by lawyers working to pave the way for the new industrialism of the nineteenth century), with A.W.B. SIMPSON, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) (arguing that the change was less dramatic than it is often scene, and finding various pieces of the new doctrine lying much further back in English history). Cf. James W. Fox, Jr., *The Law of Many Faces: Antebellum Contract Law Background of Reconstruction-Era Freedom of Contract*, 49 AM. J. LEGAL HIST. 61 (2007) (finding the legal landscape in the antebellum period to be more complex and varied than is usually thought).

65. Justice Cardozo, for example, is frequently used as an example of a “disingenuous judge” who massages and misstates law and facts. See, e.g., Dan Simon, *The Double-Consciousness of Judging: The Problematic Legacy of Cardozo*, 79 OR. L. REV. 1033, 1035 & nn. 17-24 (2000) (summarizing the view of Cardozo’s critics). The judge himself wrote, “I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement. Of course, one must take heed that the margin is not exceeded,

was in the air and the role of the lawyer when values change is to craft a reasonable explanation that can be translated into rule technique.<sup>66</sup> The judges did not adopt the new views because they relied on the treatise-writers, they quoted the treatise-writers because they supported the views that the judges had reached on other grounds. When Chief Justice Marshall wrote in 1827 that individuals had a “right to contract” that was “anterior to, and independent of society,” and that “like many other natural rights . . . [is] not given by human legislation,”<sup>67</sup> he was not making a doctrinal legal argument derived from any treatise writer, but was articulating a powerful social view that was coming to be dominant in many areas of society<sup>68</sup> including not only among business entrepreneurs, but also among freed slaves, abolitionists, wage laborers, and feminists.<sup>69</sup>

The ideology of contract as a human right fostered a body of legal doctrine that in turn shaped contract rule technique in the mid-nineteenth century. The ideology continued to be influential into the first few decades of the twentieth century. In some re-

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just as the physician must be cautious in administering the poisonous ingredient which magnified will kill, but in tiny quantities will cure.” Benjamin N. Cardozo, *Law and Literature*, 14 *YALE REV.* 699 (1925), reprinted in BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 7 (1931).

66. To take an obvious example, when society favored racial segregation, judges and lawyers had no trouble finding a legal rationale for it. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). When first baseball and then the military became integrated, and segregation began to be seen as a national embarrassment, lawyers had no trouble coming to the opposite conclusion. See *Brown v. Board of Education*, 347 U.S. 483 (1954). Legal doctrine—and the rule technique that embodies it—generally conforms itself to the world, not *vice-versa*.

67. *Ogden v. Saunders*, 25 U.S. 213, 345 (1827).

68. The point can be illustrated by the fact that Powell’s thesis can be traced to two works by a Frenchman, Robert Joseph Pothier, who articulated a “will theory” of contract more than a decade before the Revolution. See *Robert Joseph Pothier*, *TRAITÉ DES OBLIGATIONS* (1761); *Robert Joseph Pothier*, *Du Contrat de vente* (1762); see also Joseph M. Perillo, *Robert J. Pothier’s Influence on the Common Law of Contract*, 11 *TEX. WESLEYAN L. REV.* 267 (2005) (tracing the adoption of Pothier’s ideas in Britain and America). In the early 19th century, Pothier’s works “were avidly received by the 19th-century English courts,” REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 830 (1990)—so avidly, in fact, that Pothier’s bust adorns the United States Capitol as one of the titans of legal history. But they were eagerly received, in our view, in the way that a man with a nail eagerly looks around for anything that might be used to hammer it in. Pothier’s most influential work lay largely unnoticed in England until 1806, when it apparently became important to issue an English translation that went on to be regularly reprinted for several decades. See ROBERT JOSEPH POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS AND CONTRACTS* (W. Evans trans. 1806). In this history, the treatise writers seem to be the carts, not the horses.

69. For an account of the value put on the essential nature of freedom to contract in that period, see AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998).

spects, as we will see, it is still with us today. The rise of the new contract rule technique was remarkably rapid. By 1861, a prominent English lawyer, viewing the scene on both sides of the Atlantic, remarked that the *chief* difference between the new legal sensibility and the old was the vast scope now given to contract law.<sup>70</sup>

This was true enough, but that particular concept of contract, and the technique that embodied it, was in many respects narrow. It was a rule technique based on the concept of a formalistic, *laissez-faire* system that treated all individuals as formally equal and equally entitled to control their own decisions and be responsible for their own actions. It gave individuals great power over their own individual commitments, and the government (through its judges) very limited influence. In effect, it was a system in which an individual would be bound only if it was very clear that he intended to be bound—but which also held him strictly to the bargains that he made, no matter how bad they turned out to be. Courts viewed the contract as something that existed separate and apart from the legal system; their only job was to enforce the contract if one had actually been made.<sup>71</sup> Contemporary commentators usually call this, most with some scorn, the era of “classical contract law.”<sup>72</sup> It has been aptly described as “a world in which courts perform an essentially administrative role in contract, lending the coercive power of the state to back up indisputable private obligations.”<sup>73</sup> It was, *and was designed to be*, rigid, axiomatic, inflexible, clear, predictable, deductive, objective, standardized, insensitive to the specific facts of particular cases, and disengaged

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70. SIR HENRY SUMNER MAINE, ANCIENT LAW 179 (1861). He went on: Some of the phenomena on which this proposition rests are among those most frequently singled out for notice, for comment, and for eulogy. Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man's social position irreversibly at his birth, *modern law allows him to create it for himself* by convention; and indeed several of the few exceptions which remain to this rule are constantly denounced with passionate indignation. The point, for instance, which is really debated in the vigorous controversy still carried on upon the subject of negro [*sic*] servitude, is whether the status of the slave does not belong to bygone institutions, and whether the only relation between employer and labourer which commends itself to modern morality be not a relation determined exclusively by contract. *Id.* at 179-80 (emphasis added).

71. *See, e.g.*, Trustees of Parsonage Fund v. Ripley, 6 Me. 442, 447 (1830) (“it is not our province to make contracts for the parties, but to give effect to such as they have made”).

72. The term owes much of its popularity to GILMORE, *supra* note 4.

73. Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U.L. REV. 1397, 1439 (2009).

from the particular views of justice of judges or juror.<sup>74</sup> Rules of this nature allow prudent men to control the precise nature of their potential liability.

Thus, contract rule technique became what is today called “formalistic.” To bring a successful contract claim—that is, to cause the state to compel one unwilling private citizen to hand over money to another private citizen—the technique developed a series of categories and hurdles that had to be met. Even to demonstrate that an enforceable contract existed was not always easy.<sup>75</sup> There had to be mutual assent, as proved through acts of the parties; without that neither party would be bound.<sup>76</sup> The contract was made by an exchange of offer and acceptance. An offer had to be made in the proper form and it could be withdrawn freely at any time, even if a party had promised to keep it open.<sup>77</sup> Acceptance could be made only by the person authorized by the offer, and only if made in strict compliance with the terms of the offer; any variation, however slight, would result in the failure of the contract.<sup>78</sup> An acceptance that purported to vary the terms of the offer became, in turn, a counter-offer, which then had to be agreed to by the original offeror in the same manner as an acceptance if a contract were to be formed. The promise had to be supported by consideration, a notoriously tricky doctrine that let many promises slip through the cracks.<sup>79</sup> Some contracts required written memoranda to be enforceable, and the rules could be applied strictly.<sup>80</sup> Even if there were a proper offer, acceptance, and consideration, the contract might fail because there was a condition to its going into effect,<sup>81</sup> or the terms might be indefinite enough that the

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74. This is the accurate characterization given by a modern critic. See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1749 (2000). Eisenberg and many modern scholars prefer rules that are “supple,” “dynamic,” responsive to (what the judge or jury after the fact thinks were) “the actual objectives of the parties,” and sensitive to (what the judge later determines to have been) the “actual facts and circumstances of the parties’ transaction.” *Id.* As we will see, this latter view has become dominant in the rule structure of modern-day America.

75. For simplicity’s sake, these comments on classical contract law’s rule technique are taken from two well-known works of the classical period, C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (1880), and WILLIAM E. CLARK, JR., *A HAND-BOOK OF THE LAW OF CONTRACTS* (1894). Both were books designed for law students and general practitioners and provide a straightforward account of the rules during the classical era.

76. LANGDELL, *supra* note 75, at 193-94.

77. *Id.* at 197-204.

78. *Id.* at 1-23.

79. *Id.* at 58-122.

80. CLARK, *supra* note 75, at 87-146.

81. LANGDELL, *supra* note 75, at 205-39.

court could not be sure of what the agreement was.<sup>82</sup> In other words, getting into an enforceable contract required work and forethought.<sup>83</sup> The role of judges and juries was merely to carry out that to which the parties had agreed.

Like any other technology, rule technique is never entirely stable; as noted above it is changed to fit the perceived needs of the day. The rule technique of classical contract law, adapted to a social idea of personal responsibility, free enterprise, private ordering, and minimal government controls, was changed as social enthusiasm for those ideas waned. Exactly how and why contract rule technique changed is a matter of controversy.<sup>84</sup> Briefly stated, a great many groups found that the uncontrolled world of free contract was uncongenial. Laborers, farmers, and other groups resented the power that free contract gave to the new industrial enterprises. The new industrial enterprises, on the other hand, were concerned about being undercut by competitors who could compete with them on lower prices if they faced no restrictions on their agreements. Progressives sought more government control and social accountability over an economy that hitherto had been left almost entirely to private ordering. White workers in the North were worried about competition from African Americans and the flood of new Asian immigrants hired at very low wages. Working men were concerned about competition from women who would often work for less money. Segregationists, as part of the Jim Crow regime, sought to limit the contract rights of the recently freed slave population and thus keep them in bondage.<sup>85</sup> In

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82. CLARK, *supra* note 75, at 10-11.

83. A later commentator, looking at these hurdles, carped that classical contract law “seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything.” GILMORE, *supra* note 4. But this is hyperbole from a determined critic. It is more accurate to say that “ideally, the government should not make anyone liable to another under a theory of contract unless it was clear that he or she had agreed to be bound, and then only to terms that he or she had specifically agreed to.”

84. Traditional lawyer-based accounts are P.S. ATIYAH, *THE RISE AND FALL OF CONTRACT* (1979); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, 33-64 (1992); GILMORE, *supra* note 4. Less traditional, but still heavily lawyer-centered, is LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965). A radically different account, stressing the social forces that drove changes in the law, is DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 73-89 (2011). An examination of one aspect of the changes, the sale of goods under the Uniform Commercial Code, is Snyder, *supra* note 21. *See also* JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991) (focusing heavily on changes in underlying philosophical theories).

85. A case illustrating many of these mixed motives is *Lochner v. New York*, 198 U.S. 45 (1905), where a coalition of industrial bakeries, labor unions dominated by German-American men, and public health advocates pushed through laws restricting the working

short, after a brief fling with freedom, there came a powerful, overlapping consensus that people should *not* always be allowed to follow their own ends and make their own deals.

As the underlying social goals changed, contract rule technique was changed to keep pace. Tracing its changes over the course of the twentieth century is far beyond the scope of this paper. For our purposes it is enough to know that the changes were substantial.

### B. *Contract Rule Technique in Contemporary America*

On the surface, the rule technique of today looks remarkably similar to that of the classical period.<sup>86</sup> Virtually all of the old concepts are still there: offer, acceptance, mutual assent, consideration, conditions, writing requirements, and so on. But they have been changed to such an extent that almost none of them mean what they used to. The most fundamental change is probably theoretical—a change in the basic concept of *who* creates the contract. In the classical era, courts assumed that the parties created the contract and the courts merely enforced it, much like the old-time baseball umpire who said, “There’s balls and there’s strikes, and I calls ‘em the way I sees ‘em.”<sup>87</sup> In that view, the pitcher creates the ball or the strike, the umpire’s job is merely to try to determine what the pitcher did. The umpire might be right or wrong, but the umpire is focused on an external reality. The view today is radically different. Courts these days are like the modern umpire who says, “There’s balls and there’s strikes, but they ain’t nothin’ until I calls ‘em.” In this world, before the umpire’s decision there is nothing except a thrown ball—the “ball” or “strike” is created by the umpire’s decision, and thus the umpire can be neither right nor wrong as a matter of external reality. In contemporary contract law, it is the judge’s decision that *creates* the contract. There is no “thing” independent of the judge that consti-

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hours and other conditions of bakers in an effort to shut down rival small bakeries operated mainly by Jews, Italians, and other immigrants. See BERNSTEIN, *supra* note 84, at 23-39.

86. Cf. Jay M. Feinman, Essay: *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 833 (1983) (“modern law embodies both a rejection of classical law and a retention of key elements of it”).

87. The baseball metaphor for contract adjudication comes from Robert L. Birmingham, Book Review, *Teaching Contracts: Coming Home to Roost*, 69 B.U.L. REV. 435, 455-56 (1989) (review of P.S. ATIYAH, *ESSAYS ON CONTRACT* (1986)).

tutes a “contract.”<sup>88</sup> This change of view carries fundamental implications for every aspect of the technique, because it transfers power over the transaction from the parties to the judge (an agent of the state), and allows for the contemporary idea that judges have *discretion* in the way they deal with contracts. This discretion, embodied today in a variety of open-ended standards that provide little actual guidance for judges, allocates to them great power over the existence and scope of contractual obligations.<sup>89</sup>

### 1. *The Fragmentation of Contract Technique*

When we get to the nuts and bolts of contemporary contract rule technique, the first thing we notice is that the once unitary set of rules has fragmented. The common law of contracts still exists, but it applies only to certain types of transactions, chiefly contracts for real estate, services, and transfers of intellectual property. Those rules are largely set out in the *Restatement (Second) of Contracts*.<sup>90</sup> Contracts for the sale or lease of goods—that is, everything that is tangible and moveable—along with personal property mortgage contracts, sales of investment securities, bank deposits, and documents of title, are governed by the Uniform Commercial Code, which has eleven different sets of rules.<sup>91</sup> International sales of goods are governed by a U.S. treaty, the United Nations Convention on Contracts for the International Sales of Goods.<sup>92</sup> Whole areas of what traditionally was contract law have been overlain with so many other rules that they have become subjects of their own in practice and in law-school classrooms, such as employment law,<sup>93</sup> insurance law,<sup>94</sup> debtor-creditor law,<sup>95</sup>

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88. *Id.* at 456 (noting that God makes things like chickens, which exist apart from our human contemplation, but a “bargain” exists only if a judge thinks it does).

89. See generally Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

90. RESTATEMENT (SECOND) OF CONTRACTS (1981) (hereinafter “REST. 2D”).

91. See UNIFORM COMMERCIAL CODE (2012-13 ed.); see generally JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (6th ed. Hornbook Series 2010).

92. See The United Nations Convention on Contracts for the International Sale of Goods, Mar. 2, 1987, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3; ROALD MARTINUSSEN, OVERVIEW OF INTERNATIONAL CISG SALES LAW: BASIC CONTRACT LAW ACCORDING TO THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (2006).

93. See, e.g., TIMOTHY P. GLYNN, RACHEL ARNOW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING & ITS LIMITATIONS (2d. ed. 2011).

94. See, e.g., KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION (5th ed. 2010).

95. See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, LAW OF DEBTORS AND CREDITORS (6th ed. 2008).



pension and benefit law,<sup>96</sup> consumer law,<sup>97</sup> government contracts,<sup>98</sup> labor law,<sup>99</sup> and products liability law.<sup>100</sup> Other areas have been carved out by specialized legislative schemes, such as ocean carriage of goods,<sup>101</sup> and contracts for air transport.<sup>102</sup>

Common law contract thus has become a kind of catch-all area for the “leftovers” not covered by any of the specialized schemes,<sup>103</sup> yet it has remained—in the eyes of judges, lawyers, and legal scholars, at least—important. The category of “leftovers” is still quite large, and the principles of contemporary contract rule technique continue to play, to a greater or lesser extent, roles even in the separate sets of rules just mentioned. Because we are talking here about contracts as its own “subject” area, we will focus on what is considered to be the contemporary common law of contracts.

## 2. *The Elements of Contract Rule Technique*

The general rules are systematized in the *Second Restatement*.<sup>104</sup> Because we will be arguing that most of the rules embodied in current rule technique are likely to disappear as matters of practical concern in the years ahead, it is necessary to sketch the various pieces of the technique and how they fit together, and for this we will rely on the *Second Restatement* as a handy, though not always entirely accurate, statement of the rules. The technique breaks any contract dispute into twelve questions, all of

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96. See, e.g., KATHRYN J. KENNEDY & PAUL T. SHULTZ III, *EMPLOYEE BENEFITS LAW: QUALIFICATION AND ERISA REQUIREMENTS* (2d ed. 2012).

97. See, e.g., JOHN A. SPANOGLE JR. ET AL., *CONSUMER LAW, CASES AND MATERIALS* (4th ed. 2013).

98. See, e.g., CHARLES TIEFER & WILLIAM A. SHOOK, *GOVERNMENT CONTRACT LAW IN THE TWENTY-FIRST CENTURY* (2012).

99. See, e.g., ARCHIBALD COX ET AL., *LABOR LAW* (15th ed. 2011).

100. See, e.g., DAVID A. FISCHER, WILLIAM POWERS, JR. & RICHARD L. CUPP JR., *PRODUCTS LIABILITY: CASES AND MATERIALS* (5th ed. 2013).

101. Several different federal statutes combine to form a fairly intricate scheme. See Harter Act, 46 U.S.C. §§ 30701-30707 (2013); Pomerene Act, 49 U.S.C. §§ 80101-80116 (2013); Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (note)-30707 (note) (2013); Shipping Act, 46 U.S.C. §§ 40101-40104; Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998). The interrelation of the various rules is described in Conte C. Cicala, *A Punic Web: Statutes and Contracts Affecting the Container Trade*, 25 U.S.F. MAR. L.J. 153 (2012/2013).

102. See Montreal Convention for the Unification of Certain Rules for International Carriage of Goods by Air, 28 May 1999, 2242 U.N.T.S. 350.

103. LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 193 (1965).

104. REST. 2D, *supra* note 90.

which a judge must answer on the way to a final determination that a contract has been breached.

1. *Did these particular parties have the power to make a contract?* This is called the question of “capacity.”<sup>105</sup> Today, most people and entities have the power to enter into contracts. The broad exceptions are “infants” (that is, minors below the legal age)<sup>106</sup> and those who are mentally infirm.<sup>107</sup> The latter category, in an age where psychiatric understanding and diagnoses of mental illness are rapidly evolving, can become complicated.<sup>108</sup> Both minors and the mentally infirm, however, are liable to pay for “necessaries” provided to them, although this is a restitution remedy that is outside the scope of formal contract law.<sup>109</sup>

2. *Did the parties reach an “agreement” for a contract?* This is the category traditionally called “formation.”<sup>110</sup> This covers the requirement that the parties demonstrate “mutual assent,”<sup>111</sup> the rules governing what counts as an “offer,”<sup>112</sup> how long offers remain open and thus available to be accepted,<sup>113</sup> and how “acceptance” must be effected.<sup>114</sup> The rules are highly detailed to meet a number of different scenarios.

3. *Was the contract supported by consideration?* In the classical age, all enforceable contracts were said to require consideration. It has always been a slippery concept, and contemporary technique has not made it simpler. Today the term is used to refer to a “performance or return promise” that has been “bargained for.”<sup>115</sup> That seems simple enough, but there follow a myriad of special rules relating to such things as promises to perform a preexisting legal duty,<sup>116</sup> promises made in settlement of claims,<sup>117</sup>

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105. *Id.* §§ 9-16.

106. *Id.* § 14.

107. *Id.* § 15.

108. Compare *Ortelere v. Teachers' Retirement Board*, 250 N.E.2d 460 (N.Y. 1969) (finding retiree to have been mentally incompetent to change her beneficiary designation), with *McGovern v. Commonwealth*, 517 A.2d 523 (Pa. 1986) (finding retiree in similar situation to be competent).

109. See REST. 2D, *supra* note 90, § 12 cmt. f (leaving the question of necessaries to coverage under the RESTATEMENT OF RESTITUTION §§ 62, 112-17, 139 (1937)).

110. *Id.* §§ 17-70.

111. *Id.* §§ 18-23.

112. *Id.* §§ 24-34.

113. *Id.* §§ 35-49.

114. *Id.* §§ 50-70.

115. *Id.* § 71.

116. *Id.* § 73.

117. *Id.* § 74.

conditional promises,<sup>118</sup> “illusory” and alternative promises,<sup>119</sup> and promises that are voidable or are for some reason unenforceable.<sup>120</sup>

4. *If there was no consideration, is the promise enforceable even without it?* Contemporary technique has taken various classes of promises outside the consideration requirement, calling them generally “contracts without consideration.”<sup>121</sup> There are many specific types of these, some of which are economically quite important, such as option contracts,<sup>122</sup> guaranties,<sup>123</sup> and modifications of executory contracts.<sup>124</sup> Others are traps that lie around the fringes, such as promises to repay indebtedness where the statute of limitation has lapsed or the debt has been discharged in bankruptcy;<sup>125</sup> subsequent promises to pay for things the party never asked for;<sup>126</sup> or promises to pay even though the other party has failed to perform a necessary condition.<sup>127</sup> By far the broadest exception to the consideration requirement is that called “reliance” or “promissory estoppel”<sup>128</sup> under which an unenforceable promise can become enforceable if reasonably relied on by the other party.

5. *Does the contract require a writing to be enforceable, and, if so, is there an adequate writing?* This area is usually known as the “Statute of Frauds.”<sup>129</sup> Most oral contracts are enforceable, but writings are required in a specified list of situations, including some contracts made by executor administrators of decedents’ estates,<sup>130</sup> suretyship contracts,<sup>131</sup> contracts in consideration of marriage,<sup>132</sup> contracts for the sale or lease of an interest in land,<sup>133</sup> and contracts that cannot be performed within one year.<sup>134</sup> The Uniform Commercial Code adds another category, sales of goods of a value of more than \$500.<sup>135</sup> These types of contracts require that

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118. *Id.* § 76.

119. *Id.* § 77.

120. *Id.* § 78.

121. *Id.* §§ 82-94.

122. *Id.* § 87.

123. *Id.* § 88.

124. *Id.* § 89.

125. *Id.* §§ 82-83.

126. *Id.* § 86.

127. *Id.* § 84.

128. *Id.* § 90.

129. *Id.* §§ 110-150.

130. *Id.* § 111.

131. *Id.* § 112-123.

132. *Id.* § 124.

133. *Id.* §§ 125-129.

134. *Id.* § 130.

135. U.C.C. § 2-201.

one or more written “memorandums” show that a contract between the parties exists.<sup>136</sup> The memorandum must be “signed” by the party whose promise is sought to be enforced.<sup>137</sup> The issues of what counts as a memorandum and what counts as a signature have turned out to be difficult at the margins and court decisions are not harmonious. If there is no signed writing, the contract is unenforceable<sup>138</sup>—unless a party has reasonably relied on it,<sup>139</sup> both parties have fully performed,<sup>140</sup> or an oral rescission is involved.<sup>141</sup>

6. *Is there some defense against the formation of the contract?* Assuming the parties had capacity, that they reached a valid agreement, that the agreement was supported by consideration (or falls in category where it is not necessary), and the writing requirement (if applicable) is satisfied, the technique provides a number of defenses that will nevertheless defeat the formation of the contract. There are two broad categories of these defenses: (a) those that are said to vitiate the assent of the parties, and (b) those that make contracts unenforceable on grounds of public policy. The former include defenses of unilateral and mutual mistake,<sup>142</sup> fraud and misrepresentation,<sup>143</sup> duress,<sup>144</sup> and undue influence.<sup>145</sup> The latter are all those cases in which the court refuses to enforce contracts because the parties’ bargain conflicts with some larger public policy.<sup>146</sup> Examples include contracts where parties have failed to comply with licensing requirements,<sup>147</sup> contracts in restraint of trade,<sup>148</sup> contracts relating to the custody of children,<sup>149</sup> contracts that exempt a party from its own intentional, reckless, or negligent harm,<sup>150</sup> or from its own misrepresentations,<sup>151</sup> and contracts that require a party to commit a tort,<sup>152</sup> vio-

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136. REST. 2D, *supra* note 90, §§ 131-133.

137. *Id.* §§ 134-135.

138. *Id.* § 138.

139. *Id.* § 139.

140. *Id.* § 145.

141. *Id.* § 145.

142. *Id.* §§ 151-158.

143. *Id.* §§ 159-173.

144. *Id.* §§ 174-176.

145. *Id.* § 177.

146. *Id.* §§ 178-199.

147. *Id.* § 181.

148. *Id.* § 186.

149. *Id.* § 191.

150. *Id.* § 195.

151. *Id.* § 196.

152. *Id.* § 192.

late a fiduciary duty,<sup>153</sup> or interfere with the contract of some third person.<sup>154</sup> If any of these defenses apply, the contract may be unenforceable, or some parts of it may be struck by the judge.

7. *Assuming that we have an enforceable contract, what does it require the parties to do?* This is a broad area that the *Second Restatement* calls “the Scope of Contractual Obligations.”<sup>155</sup> At its core is the traditional question of pure interpretation, in the sense of what the written or oral words used by the parties mean, and, in the event meanings are disputed, which of the meanings should prevail.<sup>156</sup> Anecdotally, at least, this is the most litigated part of contract law. One subsidiary part of this process is determining how much weight the judge should put on the document the parties have signed (if any), as opposed to their later oral testimony or other outside evidence—an intricate body of law known colloquially as the parol evidence rule.<sup>157</sup> Another is the question of what other kinds of outside evidence can be used for interpretation, including such things as course of performance, course of dealing, and usage of trade.<sup>158</sup> There are subsidiary rules that apply when all the other methods fail to provide a clear interpretation, such as the rule that documents are construed most strongly against the party that drafted the document,<sup>159</sup> and interpretations that favor the best interest of the public are preferred.<sup>160</sup> But all of that simply goes to determining what the parties meant by their bargain, and contemporary contract rule technique goes far beyond that. It provides tools for supplying “omitted” but “essential” terms that the parties themselves did not specify,<sup>161</sup> imposes a duty of “good faith and fair dealing” in all contracts,<sup>162</sup> and adds terms to the deal derived from trade usage.<sup>163</sup> It also allows the judge to strike from the agreement any term the judge finds to be “unconscionable” and to substitute a different term.<sup>164</sup> Finally, there is the question of conditions.<sup>165</sup> Conditions are things which

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153. *Id.* § 193.

154. *Id.* § 194.

155. *Id.* §§ 200-230.

156. *Id.* §§ 200-203.

157. *Id.* §§ 209-218.

158. *Id.* §§ 219-223.

159. *Id.* § 206.

160. *Id.* § 207.

161. *Id.* § 204.

162. *Id.* § 205.

163. *Id.* § 221.

164. *Id.* § 208.

165. *Id.* §§ 224-230.

must occur before a party's performance comes due.<sup>166</sup> When and how a term in a contract becomes a condition is matter of subtle reasoning—a party has no duty to perform until a condition is met,<sup>167</sup> that is, of course, unless the court, for any of a variety of reasons, “excuses” the party that failed to meet the condition.<sup>168</sup>

8. *Have any of the obligations been modified or discharged?* Various actions undertaken by one or both of the parties may cause an otherwise valid obligation to be discharged.<sup>169</sup> Discharges of obligations usually require consideration, unless they are the sort that are enforceable without consideration,<sup>170</sup> or a handful of special circumstances exist,<sup>171</sup> or unless a “renunciation” of the contract is made in writing, signed by the obligee, and delivered to the obligor.<sup>172</sup> But this rule applies only to *discharges* of obligations, and there are several other ways to change the requirements of a contract. The parties may agree to a substitute performance,<sup>173</sup> a substituted contract,<sup>174</sup> a novation,<sup>175</sup> or an “accord and satisfaction.”<sup>176</sup> A party that has not objected to an erroneous statement of account from the other party may, in certain circumstances, be bound to that statement.<sup>177</sup> The parties may also agree to rescind the entire contract,<sup>178</sup> and they will be bound by any releases<sup>179</sup> or contracts not to sue<sup>180</sup> that they sign.

9. *Have the parties performed, or was there a breach?* The *Second Restatement* calls this topic “Performance and Non-Performance.”<sup>181</sup> Every contract has its own idiosyncratic requirements for what the parties are supposed to do, and when those obligations are clear, courts will usually follow the parties’

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166. The paradigm example of a condition is the death of the insured under a life insurance policy. The insured has no legal obligation to die, while the insurer has no legal obligation to pay unless the insured dies. The insured's death is a condition of the insurer's liability.

167. *Id.* § 225.

168. *Id.* § 229.

169. *Id.* §§ 273-287.

170. *Id.* § 273.

171. *Id.* §§ 274-277.

172. *Id.* § 277.

173. *Id.* § 278.

174. *Id.* § 279.

175. *Id.* § 280.

176. *Id.* § 281.

177. *Id.* § 282.

178. *Id.* § 283.

179. *Id.* § 284.

180. *Id.* § 285.

181. *Id.* §§ 231-260.

agreement. But the fact that the parties have specified that they will do certain things does not mean that failure to do so will be a breach, or that it will allow the other party to suspend performance. The technique draws a distinction between “total” and “partial breaches,” with different rules for each.<sup>182</sup> In the absence of explicit agreement, the rules provide answers to such questions as when and how performances are to be exchanged<sup>183</sup> and in which order are the parties supposed to perform.<sup>184</sup> The rules also provide guidance as to whether judges will consider particular failures to be “material” or not,<sup>185</sup> whether certain conduct by a party amounts to a “repudiation” of the contract,<sup>186</sup> and whether a particular failure of a party to perform discharges the other from further performance.<sup>187</sup> While the parties’ agreement may be given some weight in these issues, the judge will weigh these various factors independently.

10. *Assuming a party has not performed, should the party be excused from performance?* One of the major innovations in contemporary, as opposed to classical, contemporary contract rule technique is the concept of *excuse* from performance in certain situations.<sup>188</sup> This is usually called the law of “impracticability and frustration.” Simply put, a party can be excused from performance if something that happened after the contract was formed makes it “impracticable” for the party to render its performance,<sup>189</sup> such as the death or incapacity of a necessary person,<sup>190</sup> destruction of a thing necessary for the performance,<sup>191</sup> or new government regulations on the practice.<sup>192</sup> Similarly, a party whose purpose in making the contract has evaporated due to something that happened after the contract was signed may be excused based on “frustration” of its purpose.<sup>193</sup> To qualify, the subsequent event must relate to “a basic assumption on which the contract was made,” and the party claiming it must be without fault. In such case a party may be discharged, “unless the language or the cir-

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182. *Id.* § 236.

183. *Id.* §§ 231-233.

184. *Id.* § 234.

185. *Id.* § 241.

186. *Id.* §§ 250-251.

187. *Id.* § 242.

188. *Id.* §§ 261-272.

189. *Id.* § 261.

190. *Id.* § 262.

191. *Id.* § 263.

192. *Id.* § 264.

193. *Id.* § 265.

cumstances” indicate that it should not be. There are special rules for temporary<sup>194</sup> and partial<sup>195</sup> impracticability and frustration.

11. *Are the particular plaintiff and defendant the correct parties in the lawsuit?* That there is a valid and enforceable contract with an unexcused breach does not end the matter. The question is whether *this* particular plaintiff and *that* particular defendant are “parties” who have the power to bring a contract claim.<sup>196</sup> There are several situations in which the question of who can bring an action is more complicated. These include the issues of joint and several promisors<sup>197</sup> and promisees,<sup>198</sup> which can ordinarily be determined by looking at the transaction. Two other groups, however, create more problems. The first group is called “third party beneficiaries.”<sup>199</sup> In any contract, there may be people who benefit by performance of the contract but who are not parties to it. These nonparties are divided into two types, “incidental” and “intended” beneficiaries.<sup>200</sup> Whether a beneficiary is intended depends on whether the judge determines that recognizing the beneficiary’s right to sue “is appropriate to effectuate the intention of the parties” and “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”<sup>201</sup> Only intended beneficiaries have the right to bring suit on the contract.<sup>202</sup> The second group of nonparties who can sue are assignees and delegees.<sup>203</sup> Ordinarily rights under contracts can be assigned to third parties, who then have the right to sue on those rights.<sup>204</sup> Similarly, duties of performance under a contract can ordinarily be delegated to a third party.<sup>205</sup> A mass of detailed rules delineates the exceptions to these basic principles, and other rules for construing assignments and delegations. Separating these various categories can be a formidable task.

12. *If there was a breach, what remedies are available?* One of the trickiest and most important areas of contract law is that of

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194. *Id.* § 269.

195. *Id.* § 270.

196. Because a contract is a private agreement among those who have consented to it, a third party does not ordinarily have any power to enforce a contract.

197. *Id.* §§ 288-296.

198. *Id.* § 297-301.

199. *Id.* §§ 302-315.

200. *Id.* § 302.

201. *Id.* §§ 304.

202. *Id.* §§ 304, 315.

203. *Id.* §§ 316-333.

204. *Id.* § 317.

205. *Id.* § 318.



remedies.<sup>206</sup> Briefly speaking, there are two broad categories of remedies, one of which has three alternatives. The first category of remedies is specific performance, which is an order from the court compelling the losing party to do what it had promised to do.<sup>207</sup> Specific performance is available only in limited situations and is hedged about with a host of restrictions. It is not available if monetary damages would make the party whole,<sup>208</sup> if the judge believes that granting the remedy would be “unfair,”<sup>209</sup> if granting it would be contrary to the judge’s view of public policy,<sup>210</sup> if it would be difficult to enforce or supervise,<sup>211</sup> or if it requires the performance of personal services.<sup>212</sup> In light of these limitations, specific performance, as a practical matter, is reserved for very unusual situations. The second, and much more common, category of remedies is an award of damages, which can come in one of three forms, known as “expectation,” “restitution,” and “reliance” damages. Expectation damages are calculated by trying to put the non-breaching party in the position it would have been in had the contract been performed.<sup>213</sup> Restitution damages return to the non-breaching party any benefit it has conferred on the breaching party.<sup>214</sup> Reliance damages seek to make the non-breaching party whole by giving it the amount it has expended or lost to date on the contract.<sup>215</sup> The non-breaching party in each case gets to choose which measure it wants, but it can get only one of the three. The damages will also be reduced if the damages were reasonably avoidable by the non-breaching party,<sup>216</sup> if they were not reasonably foreseeable by the breaching party,<sup>217</sup> or are too uncertain to measure accurately.<sup>218</sup> Certain categories of damages are not available for breach of contract at all, including damages for emotional disturbance<sup>219</sup> and punitive damages.<sup>220</sup> If the parties

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206. *Id.* §§ 344-385.

207. *Id.* §§ 357-369.

208. *Id.* §§ 359-360. This is almost always the case in practice, because the vast majority of contracts are reducible to monetary values, and thus there is an amount of money that can make the individual whole.

209. *Id.* § 364.

210. *Id.* § 365.

211. *Id.* § 366.

212. *Id.* § 367.

213. *Id.* §§ 346-347.

214. *Id.* §§ 370-377.

215. *Id.* § 349.

216. *Id.* § 350.

217. *Id.* § 351.

218. *Id.* § 351.

219. *Id.* § 353.

choose, they can specify in the contract the amount of damages that should follow from a breach, but if the judge believes these “liquidated damages” are too high or too low, the judge will invalidate the agreed-upon remedy and apply the general law instead.<sup>221</sup>

Note the complexity here. There are rules, and exceptions to rules, and exceptions to the exceptions. There is an elaborate system of what seem to be solid and inflexible rules, overlaid with extensive flexible standards that allow judges to depart from those rules in situations that are defined only vaguely, with such terms as “reasonable,” “material,” “unconscionable,” “unless facts and circumstances indicate otherwise,” and so forth. A vast number of binary rules can result in cases being tossed out of court. The result is a system that is much less predictable than that of classical contract law.

#### IV. THE WORLD AS REFLECTED IN CONTRACT LAW TECHNIQUE

We have noted previously that the technique employed by a given society reflects the perceived needs of that society. It reflects a particular state of a society at a particular time. Having marched through the specifics of the structural and rule techniques of contract law, we turn to the question of what sort of world our contract law seems to presuppose.

##### A. *The World Reflected in Structural Technique*

It is fairly easy to see that the structural technique of contract law is almost ideally fitted not to the modern world but to the world of 1850-1950. This was an era in which there were virtually no competitors for the legal system, and no methods of determining truth more accurately than the method devised at the assizes centuries earlier. It seems to reflect an era when disputes often turned on he-said-she-said claims or on the construction of simple written communications, when live testimony and cross-examination were probably the best method of making such decisions. It presupposes an era in which transportation technology like railroads and buses made it relatively easy and inexpensive to assemble people together at a specific time, even at some distance, but in which live communications at a distance were virtually impossible. It seems to be a world in which courts can quickly and

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220. *Id.* § 355.

221. *Id.* § 356.

cheaply resolve disputes; courts are the preferred option of litigants; parties with disputes can obtain counsel easily and inexpensively; and no alternative approaches are more accurate or less costly. Indeed, the infrastructure to support the system – courtrooms, capabilities for providing notices, and recording capabilities—has been largely unchanged since 1850 with the exception of, in recent years, technological advances in word processing software and online legal research.

*B. The World Reflected in Rule Technique*

The architecture of classical contract rule technique was designed to fit a world in which the contracting process was extremely variegated and informal, and often hard to distinguish from any other kind of interpersonal agreement. A substantial slice of contract law claims seem to be of a relatively small financial value and based on informal exchanges of one sort or another, so a strong doctrine of consideration is needed to separate transactions intended to be actual commercial dealings from those that were merely mutual undertakings among family members or close friends. Those deals that are obviously commercial are taken to be either one-shot transactions that were individually negotiated by the parties, or supply arrangements of the commodity type where the parties seem to pay little attention to the terms of their agreements. Under modern contract theory, people are assumed to be very bad at making contracts, and not much better at performing them, and thus judges must have a great deal of leeway to adjust the outcomes of particular disputes. There is a pervasive sense that in doubtful situations it is better to have the parties bound (and their rights ultimately determined by a judge) than to let them go their own ways. In this world every dispute seems to be important in itself, and it seems critical that courts do everything possible to achieve the *right* result in a given case, regardless of cost.

The world of contract rule technique seems to assume that the tools for preparing full written agreements are limited and the process is so cumbersome that few parties use writings at all. It is thus natural that when they do incur the time and expense of preparing a written agreement, it should be given extra force. Hence the parol evidence rule. It also seems to reflect a situation in which even when there is detailed writing, it will be inadequate to cover all the important issues—perhaps reflecting the handwriting-to-typewriter technology of an early era. Thus there will likely

be all sorts of terms the parties have not agreed to, and therefore courts will need an arsenal of terms to deal with the “gaps” in the agreements. Since parties rarely thought about wars, floods, strikes, equipment breakdowns, and various other disasters, and these often had very serious impacts on contract performance, courts presumably needed ways to allow parties out of their deals, such as the doctrines of impracticability and frustration. Given the drive to find a contract in doubtful cases, it also became imperative for courts to have a ready set of terms to impose in such situations.

In the world implied by contract rule technique, there seem to be great numbers of disputes where parties do not have anything approaching a formal writing. When writings are used, they seem to be short, informal, and often either handwritten or in the cryptic language of telegrams. These writings are nearly always incomplete and very often badly worded. Lawyers are rarely involved in their drafting. This means that the words in these sorts of writings require interpretation not merely of the words themselves, but on what unsophisticated parties meant by the words they used. This naturally leads to a strong doctrine of “mutual assent,” to determine the parties’ own meaning of the terms. It also requires a mechanism for sorting out deals that have been made through correspondence, a situation in which the terms of the deal may vary over the course of the communications. Some method is obviously needed to sort out this problem, and thus rules of offer-and-acceptance would assume a major role.

The emphasis on the importance of usage and custom suggests a world where business is primarily still local, and in which each industry and each trading center have their own customs and idiosyncratic meanings for terms. Because any given term might have somewhat different meanings in different trading centers, and the terms as used by persons in a trade might differ from those used among the general public, courts need a mechanism for determining whether these particular parties meant words to be used in their common sense, or in an unorthodox manner—and, sometimes, which of two conflicting unorthodox meanings is the “correct” one to use in this particular agreement.

The picture of the world we draw from the rule technique also seems to be one where business is largely unstandardized and filled with players who are not much beyond the craft-production stage. In such a world, breaches would be very common—probably too common for parties regularly to resort to courts for remedies—

and thus parties routinely sigh, accept nonconforming performances and try to work things out among themselves. In this world, the types of items being bought and sold do not often seem to depend on highly detailed specifications, urgent drop-dead delivery deadlines, and precise quantities. In such a world, someone who stands on the letter of an agreement when the other party has come fairly close to what was called for seems unreasonable. Courts naturally seek to avoid what they called “forfeitures” in such situations, and hence doctrines of “substantial performance”—that is, performance that is close but not quite there—and of waiver, modification, and estoppel are necessary.

The rule technique further seems to assume that contract law is the only method for policing wrongdoing in commercial relations. It does not seem to be contemplated that bad conduct might be punished by legislative or administrative means, such as by consumer-protection regulations. Instead, contract law seems to see a world where judges are the only barriers between parties who are victimized by fraud, misrepresentation, and even the occasional case of gun-to-the-head duress. If courts cannot assume that other government agencies are on the lookout for sharp practices, they necessarily would want doctrines that would allow them to, if not punish the wrongdoers, to at least prevent the court from participating in the wrongdoing. This entails a detailed system of defenses (*e.g.*, mistake, misrepresentation, duress, undue influence, and unconscionability) that could be raised by the alleged victims. In the same vein, the technique seems to assume a world in which there is very little government regulation of economic matters, and thus, absent some restraints from contract law, parties would be free to rig bids, fix prices, form cartels, point-shave sporting events, sell custody of children, corrupt fiduciaries, bribe agents, and so forth. If courts assume they cannot rely on outside help to stop cheats, swindlers, and sharp dealing, they will naturally develop tools that allow them to strike down certain contracts as unenforceable on grounds of “public policy.”

Finally, this world of contract rule technique seems to be one in which accurate assessment of likely damages is extremely difficult. The structural technique, recall, assigned the job of assessing damages to the jury, with review by the judge. The rule technique tells the jurors to put the nonbreaching party in as good a position as if the contract had been performed, and asks them to assess the “loss in value” that it suffered from the defective performance. This loss in value may itself be reduced if the damages

were reasonably avoidable, or are too uncertain, or were not “fore-seeable” at the time of the contract. Little explicit guidance is given as to how to go about assessing these things. It seems doubtful that today any rational business would use this approach—selecting six laymen picked at random, supervising them by a lawyer usually untrained in accounting, and asking them to come up with an estimate—to make reasonable predictions about its future prospects. The calculation of damages seems rooted in a different world, one that lacks any kind of sophisticated financial and accounting technology.

All of this can, with some simplification, be boiled down into a series of propositions about the world that contract rule technique seems to reflect:

1. Contract law has a vast domain and its principles apply over virtually the whole world of voluntary transactions.
2. Commercial transactions are frequently very difficult to distinguish from other sorts of interpersonal transactions.
3. Transactions are usually individually negotiated and reflect the specific intent of these specific parties.
4. Parties routinely enter into agreements in careless, sloppy, and idiosyncratic ways, so that it is frequently difficult to tell if they have made a contract and, if so, what it requires.
5. Merchants in every trade and locality deliberately use terms in ways that are understandable only to those in their own trade and locality.
6. Strict compliance with contract terms is frequently very difficult and parties rarely require exactitude in performance, so something less than what was agreed to is usually fine.
7. Asking six lay people without financial training to decide on the losses suffered under a contract, after listening to competing arguments made by counsel, is a perfectly reasonable way of determining damages.
8. It is critical to get the most accurate outcome in every given dispute, regardless of time or cost.
9. Courts deciding contract cases are the chief backstop against fraud and unfair practices in contracting.

In sum, contemporary contract rule technique seems to reflect a particular world, which looks very much like America in the century between 1850 and 1950. We still have in place the basic nineteenth century system designed for an unregulated free enterprise society that depended on private ordering and minimal regulation, and which valued personal autonomy, enterprise, and responsibility, but we have overlaid it with extensive judicial discretion and a quasi-regulatory system of rules seemingly designed for the industrial system of the 1950s.<sup>222</sup> The basic structure has stayed in place, but is now encrusted with bolt-on additions of whatever ideas were popular at any given time. The result resembles a 1882 Studebaker brougham horse-drawn carriage, modified with the whitewall tires of a 1904 Auburn, the seats from a 1917 Stutz Bearcat, the chassis of a 1926 Duesenberg, the fenders from a 1937 Mercedes, the Hydramatic transmission from a 1941 Oldsmobile, the V8 engine from a 1952 Lincoln, and the tail fins from a 1960 Cadillac Eldorado.<sup>223</sup>

## V. THE WORLD AS IT (REALLY) IS

How closely does the world of contract as reflected in the structural and rule techniques mirror the world as we see it today? The short answer is “not very.”

### A. *Structural Technique*

The incapacity of contemporary structural technique has been the subject of a great deal of study. Very briefly, parties have

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222. See, e.g., Snyder, *supra* note 21, at 25 (noting that the current UCC rules governing sales of goods reflect “a 1960s enactment of a 1950s statute largely written in the 1940s and reflecting the ideas of the 1930s”). It is often suggested that modern contract rule technique is much more attuned to modern business practices than was the classical law. See, e.g., Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1988). Modern technique certainly gives more scope to judges than did classical theory and thus on the surface may appear more accommodating to business practices, but this is probably an illusion. The rules are still a Procrustean bed against which claims must be measured. The chief difference is that in the classical period, if the facts did not fit the bed, there was no contract and the parties were sent their separate ways, while today the judge is empowered to chop and fit the facts to the bed or, if necessary, excuse a party from compliance. The latter has the major advantage of being more flexible to methods of contracting that do not meet classical standards, but it has the disadvantages of sometimes holding parties liable for things that they were unaware they had agreed to, and it also injects more uncertainty into the process.

223. Cf. Johnny Cash, *One Piece at a Time*, on ONE PIECE AT A TIME (Columbia Records 1976) (telling story of auto worker who assembled a car using pieces from a different Cadillac parts stolen from the factory over 25 years, with disappointing results).

been fleeing the traditional judicial system for decades.<sup>224</sup> Far fewer contractual disputes find their way into the litigation process than in the past, and even fewer of them actually proceed to the jury trial that is the centerpiece of the process. There are several reasons for this, all of which have combined to make the breach of contract jury trial—and the appellate opinions arising from those suits that make up the bulk of contract rule technique—less and less common.

First, the complexity and expense of the litigation system is such that a great many cases that traditionally would have made their way into the court system are priced out of the process. The process today takes years to work its way through the system and entails large legal fees that are not affordable to most people.<sup>225</sup> For an ordinary consumer with a contract dispute over a car or a lease, court-enforced remedies for breach of contract are virtually worthless.

Second, and as a partial result of the first, the rise of alternative dispute resolution has drawn much of the business away from the courts and into a quicker and frequently less expensive system. Unlike the Procrustean system of contract structural technique, arbitration and other methods for resolving disputes can be tailored to the needs of the parties. These can range from informal telephone hearings before volunteer attorneys in minor consumer disputes, to full-fledged, wide-open litigation and trial by giant international firms in front of distinguished experts in the relevant fields. Both small players who cannot afford to hire lawyers and large players who are dubious about having complex matters resolved by nonspecialist judges and amateur jurors often find arbitration to be preferable to filing a complaint in court.<sup>226</sup>

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224. See Scott, *supra* note 18, at 378 (noting the “mass exodus from the public enforcement regime by important classes of contracting parties”).

225. The dean of one well-regarded law school, whose compensation almost certainly puts him in the upper echelon of American income-earners and who obviously has both much greater knowledge of his rights and much more access to a range of lawyers than most Americans, has publicly stated that he does not think he could afford to litigate a mere \$100,000 dispute because the fees would be too high. See Frank H. Wu, *The Perils of Ranking*, UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF THE LAW (Apr. 5, 2012), <http://www.uchastings.edu/news/articles/2012/05/wu-perils-of-ranking.php> (reprinted from the Apr. 4, 2012 edition of *The Recorder*).

226. There are, to be sure, some motives for avoiding courts that may be less benign. It is frequently asserted that large firms want to impose arbitration on consumers and employees because these firms—who are repeat players in the process—have an advantage in arbitration because arbitrators do not want to rule against the companies who might hire them again. It is also argued that these repeat players prefer the secrecy of arbitration to having their own dirty laundry aired in a public judicial proceeding. And still others note



Third, the courts themselves are abandoning contract law. With a handful of exceptions, American courts have come down solidly on the side of encouraging alternative dispute resolution.<sup>227</sup> Arbitration clauses are routinely enforced, even with respect to statutory or constitutional claims like racial discrimination and sexual harassment. The Supreme Court has held not only that nearly every kind of claim is arbitrable, but that even the decision as to whether a claim is arbitrable should be left to the arbitrator to determine in the first instance.<sup>228</sup> But discouraging parties from filing contract claims in the first place is only part of what is happening. At the other end of the process, published judicial opinions on contract law are decreasing in number. We are unaware of any specific studies, but our own review of appellate opinions from California, for example, suggests that at least three-quarters of the contract law opinions actually written by the courts are designated as unpublished and may not be cited. What is even more interesting is that many of these cases are not simple *per curiam* memoranda affirming decisions, but are original rulings involving novel issues and considerable legal exegesis.<sup>229</sup> In an age where novel issues are arising out of massive shifts in the world's economies and the ways in which business is conducted, courts deliberately are providing *less* guidance to would-be parties. Without some massive changes in the structural technique of contract—

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that using arbitration rather than the judicial system allows big firms to sidestep the protections built into the system to protect the interests of consumers and workers, such as the class action. Assuming all of these to be true, for our purposes the relevant point is merely that even large companies with wealth and access to the best lawyers see very little advantage in resorting to the legal system.

227. See, e.g., *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (allowing for waivers of class action rights in contract litigation).

228. See *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

229. A Lexis search of California cases mentioning "breach of contract" and decided in the first two weeks of April 2014 turns up 23 cases, 20 of which are designated as unpublished and thus may not be cited in California courts. Many of these are substantial opinions with scores of citations, and dozens of citations, often running as long as 50 pages. See, e.g., *WFP Securities, Inc. v. Davis*, 2014 Cal. App. Unpub. LEXIS 2656; *Shaham v. Tenet Healthsystem QA, Inc.*, 2014 Cal. App. Unpub. LEXIS 2666; *Cuccia v. Purcell*, 2014 Cal. App. Unpub. LEXIS 2675; *Smally v. Nationwide Ins. Co.*, 2014 Cal. App. Unpub. LEXIS 2437; *San Jacinto Z, LLC v. Stewart Title Guaranty Co.*, 2014 Cal. App. Unpub. LEXIS 2318; *Danesh-Bahreini v. JP Morgan Chase, N.A.*, 2014 Cal. App. Unpub. LEXIS 2284. A particularly interesting example is *Cheroti v. Harvey & Madding, Inc.*, 2014 Cal. App. Unpub. LEXIS 2588, a 57-page discourse on California unconscionability law with respect to arbitration clauses in light of a fairly recent U.S. Supreme Court decision. *Cheroti* cites more than 50 authorities, comes with 19 footnotes, and reverses a trial court judgment refusing to enforce an arbitration clause because while there was minimal procedural unconscionability in a consumer's purchase of a car from an auto dealership, the provision, upon examination, was not substantively unconscionable.

which there is no reason to believe are imminent—it seems likely that the rules adopted by appellate courts will play less and less of a role in contract rule technique going forward.

### B. *Rule Technique*

As for rule technique, we laid out in Part IV some basic propositions about the world on which it seems to be based. We will take up those propositions serially.

1. *Contract law has a vast domain and its principles apply over virtually the whole world of voluntary transactions.* The assumption underlying the current contract rule technique is that there is a general body of law that applies to all types of voluntarily enforceable disputes, whether they involve building bridges, licensing software, or convincing your nephew not to smoke. We have already noted that there are different bodies of “contract” law for different classes of transactions,<sup>230</sup> but that only touches the surface of the issue. For example, most American lawyers were taught contracts through the use of a canonical body of cases learned in law school, and these cases still play prominent roles in our technique. The striking thing is that a great many of these cases have no apparent application in the contract law world of today. The heads of judges and lawyers are filled with contract doctrine rooted in cases that, if they arose today, would not even likely be governed by the ordinary rules of contract but by other and more specialized sets of rules. Some of the most widely-taught *contract* law cases involve workers injured on the job,<sup>231</sup> schoolteachers fired for being homosexual,<sup>232</sup> companies refusing to pay promised pensions,<sup>233</sup> promises made in franchise sollicita-

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230. See part III, *supra*.

231. See *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935), *aff'd* 168 So. 199 (Ala. 1936). Workplace injuries are today governed almost exclusively by state workers compensation laws. In Alabama, where *Webb* was decided, the statutory regime is found at ALA. CODE §§ 25-5-1 to 25-5-231 (2013).

232. See *Odorizzi v. Bloomfield School Dist.*, 54 Cal. Rptr. 533 (1966). Discrimination in employment against persons on the grounds of sexual orientation has been found to be unlawful by the Equal Employment Opportunity Commission. See *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012); *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011).

233. See *Feinberg v. Pfeiffer Co.*, 322 S.W. 2d 163 (Mo. Ct. App. 1959); *Katz v. Danny Dare, Inc.*, 610 S.W.2d 121 (Mo. Ct. App. 1980). There is now extensive federal regulation of pensions under the Employee Retirement and Income Security Act, at 29 U.S.C. §§ 1001-1461 (2013).

tions,<sup>234</sup> workers collectively refusing to work without more pay,<sup>235</sup> botched plastic surgeries,<sup>236</sup> contracts for land restoration after strip mining,<sup>237</sup> employees making unwise pension elections,<sup>238</sup> wages due employees who quit in the middle of a contract period,<sup>239</sup> child support agreements,<sup>240</sup> and convenience terminations of government contracts.<sup>241</sup> What the subsequent history of these

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234. See *Hoffman v. Red Owl Stores*, 133 N.W.2d 267 (Wis. 1965). Franchise offerings must today be made by written offering circulars in compliance with regulations issued by the Federal Trade Commission. See 16 C.F.R. Part 436 (2013). Wisconsin, the state where *Hoffman* was decided, adopted its own law seven years after the decision. See Wisconsin Franchise Investment Law, WIS. STAT. §§ 553.01-553.78 (2013).

235. See *Alaska Packers Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902). Collective job actions against employers are today governed by provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2013).

236. See *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973); *Hawkins v. McGee*, 146 A. 641 (N.H. 1929). The expansion of the tort law of medical malpractice has made contract claims much less relevant in suits against physicians. A recent scholarly examination of the problems involved in resolving the problem of medical malpractice focuses entirely on tort, and does not even bother to mention contract warranties. See FRANK A. SLOAN & LINDSEY M. CHEPKE, *MEDICAL MALPRACTICE* (2008). Legislatures, moreover, have often restricted such claims by patients, requiring them to be in writing and signed by the physician. See, e.g., FLA. STAT. § 725.01 (2013); MICH. CONS. L. § 566.132(g) (2014); TEX. BUS. & COM. CODE § 26.01(b)(8) (2013); VT. STAT. § 181(7) (2013). Cf. *Gault v. Sideman*, 191 N.E.2d 436 (Ill. Ct. App. 1963) (dismissing warranty claim, noting that applying “the ordinary rules dealing with mercantile contracts to a contract entered into between a physician and a patient . . . is not justified,” and court should strike “a balance of the legal policies of protecting the public”).

237. See *Peevyhouse v. Garland Coal Co.*, 382 P.2d 109 (Okla. 1962). A decade after *Peevyhouse* the Surface Mining Control and Reclamation Act, §§ 1201-1279 (2013), gave authority to the Department of the Interior to regulate the restoration of strip-mined land. See Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U.L. REV. 1341, 1410 (1995) (noting that SMCRA was passed in response to cases like *Peevyhouse*). Oklahoma, where *Peevyhouse* was decided, passed its own Coal Reclamation Act in 1979. See OKLA. STAT. §§ 45-742.1-793 (2013).

238. See *Ortelere v. Teachers Retirement Board*, 250 N.E.2d 460 (N.Y. 1969). Pension benefit procedures are now generally subject to regulation under the Employee Retirement and Income Security Act, at 29 U.S.C. §§ 1001-1461 (2013).

239. See *Britton v. Turner*, 6 N.H. 481 (1834). Employee wages and hours are now extensively regulated by federal and state regulations. See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2013); N.H. REV. STAT. §§ 275.1-275-70 (2013).

240. See *Fiege v. Boehm*, 123 A.2d 316 (Md. 1956). The crimes of bastardy and fornication at issue in *Fiege* are no longer illegal in Maryland, and the family law that has developed in the last half-century makes it clear that courts are not bound by individual agreements made by putative parents. See Lawrence P. Hampton, *DISPUTED PATERNITY PROCEEDINGS* § 29.02 (2013). The unimportance of *Fiege* in the world of family law is illustrated by the fact that it appears to have been cited in a case only six times in the past thirty years, and one of those cases showed some dubiety about its current relevance. See *Jordan v. Knafel*, 880 N.E.2d 1061, 1073 (Ill. Ct. App. 2007) (finding *Fiege* “to lack any persuasive or instructive value where contract law has evolved and societal notions regarding intimate relationships have changed”).

241. See *Luten Bridge Co. v. Rockingham County*, 35 F.2d 301 (4th Cir. 1929). The case appears to have been fought out on basic principles of contract law damages rules, see Barak Richman, Jordi Weinstock & Jason Mehta, *A Bridge, a Tax Revolt, and the Struggle to*

cases tends to show, more than important doctrinal principles, is a consistent pattern of *removing* rule technique from the equation. As areas of “contract” law come to be seen as socially important (such as medical care, pensions, child support, workplace injuries, collective bargaining, and so on) it becomes less socially desirable to leave outcomes to the inevitably inconsistent contract-law decisions of individual judges and juries and the happenstance of individual facts. Instead, these areas are carved off from “contract” and treated with different, more universal schemes. The new scheme is designed to set the same rule for *everyone* who has a similar problem, not just the two parties before a given court. The role of contract shrinks accordingly.

2. *Commercial transactions are frequently very difficult to distinguish from other sorts of interpersonal transactions.* Current rule technique relies on a vision in which the courts receive steady streams of disputes that lie on the borders between contract and social relations. Thus, the classic canon of contract law cases is full of disputes involving uncles who promise to pay money to nephews,<sup>242</sup> nieces who promise to care for aunts,<sup>243</sup> grandfathers who make promissory notes to granddaughters,<sup>244</sup> fathers who promise to leave farms to their sons if they work for free,<sup>245</sup> bereaved widowers who promise to pay bequests to relatives,<sup>246</sup> fathers who promise to recompense tavern owners for the care of dying sons,<sup>247</sup> farmers who invite their sisters-in-law to move into vacant houses on their farms,<sup>248</sup> buyers who replevy cows from neighbors,<sup>249</sup> apartment tenants who rent their flats for parade viewing,<sup>250</sup> and drunken acquaintances who bluff each other in

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*Industrialize: The Story and Legacy of Rockingham County v. Luten Bridge Co.*, 84 N.C.L. Rev. 1841 (2006), but today sound construction practices and (frequently) government regulations require “termination for convenience” clauses in public contracts. See, e.g., American Institute of Architects Document A201, *General Conditions of the Contract for Construction* § 14.4 (2007), reprinted in THE AMERICAN INSTITUTE OF ARCHITECTS OFFICIAL GUIDE TO THE 2007 AIA CONTRACT DOCUMENTS 434 (2009); JOHN CIBINIC JR., RALPH C. NASH JR. & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 1049-1124 (4th ed. 2006).

242. See *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

243. See *Davis v. Jacoby*, 34 P.2d 1026 (Cal. 1934).

244. See *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

245. See *Hertzog v. Hertzog*, 29 Pa. 465 (1857).

246. See *Schnell v. Nell*, 17 Ind. 29 (1861).

247. See *Mills v. Wyman*, 20 Mass. 207 (1825).

248. See *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

249. See *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887).

250. See *Krell v. Henry*, [1903] 2 KB 740.

bars.<sup>251</sup> These are quintessential one-shot deals, most of them hardly involving true commercial relations at all, and remarkably atypical of the general run of modern commerce. While we still see some versions of these cases moving through the justice system,<sup>252</sup> they make up little of the current contract case docket. The vast majority of business-to-business and business-to-consumer transactions in 2014 look nothing like them.

3. *Transactions are usually individually negotiated and reflect the specific intent of these specific parties.* Review of the contract law cases in any given court during a particular period shows a very different world from the one-shot, quasi-commercial relationships forming the classic canon of contract law cases. At one time it may have been that most individuals haggled with shop owners over prices and terms of sale, with idiosyncratic terms relating to payment, warranties, rights of return, and so on. And today, while terms continue to be negotiated for big-ticket transactions—for example, buying a fleet of Boeing 787 Dreamliners—the vast majority of both consumer and commercial transactions in America are entirely standardized and non-negotiated. These include face-to-face purchases on fixed terms from retailers, where transactions are highly routinized and individual products bear detailed warranties from manufacturers that cannot be altered;<sup>253</sup> purchases from large scale providers of services like telephone, entertainment and life insurance, nearly all of which are made subject to detailed contractual terms designed for mass use; contracts of employment, which are increasingly subject to detailed employee handbook regulations; and online commerce, where customers face lengthy lists of terms and are required to indicate their acceptance of the standard terms provided on the web site. The common factor is the lack of negotiation and the usual clarity and certainty of the terms.<sup>254</sup>

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251. See *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

252. See, e.g., *Conrad v. Fields*, 2007 Minn. App. Unpub. LEXIS 744 (holding enforceable on grounds of promissory estoppel a generous neighbor's voluntary promise to pay a law student's tuition).

253. See e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (holding consumer bound by conditions included inside closed computer box).

254. Indeed, one of the most vexing issues in modern contract law theory today is that modern commerce does *not* fit the old paradigm. Rather, transactions occur under standard non-negotiable “boilerplate” terms. See, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2012); BOILERPLATE: *THE FOUNDATION OF MARKET CONTRACTS* (Omri Ben-Shahar ed. 2007).

4. *Parties routinely enter into agreements in careless, sloppy, and idiosyncratic ways, so that it is frequently difficult to tell if they have made a contract and, if so, what it requires.* Many of the leading cases relied on as a basis for contract rule technique involve situations in which the parties' agreement was made up of exchanges of asynchronous oral and written communications that left a puzzling muddle about whether they had intended to be bound to anything at all, and if they had, what exactly it was. Well-known examples in the canon include *Harvey v. Facey*,<sup>255</sup> *Owen v. Tunison*,<sup>256</sup> and *Lonergan v. Scolnick*,<sup>257</sup> all of which involved real estate transactions. As we just noted, however, standardized transactions in which the parties must actually signal their affirmative intent to be bound make up the vast majority of transactions today. There are still, of course, cases where parties are in court arguing that a contract was (or was not) made based on a quirky set of individualized facts, and where a creative court can tinker with contract law to find one.<sup>258</sup> But they seem to be quite rare. Certainly in the real estate context, contemporary buyers and sellers almost always rely on detailed written agreements and not on cryptic exchanges of telegrams.

5. *Merchants in every trade and locality deliberately use terms in ways that are understandable only to those in their own trade and locality.* It is a staple of contract rule technique that contract interpretation depends on understanding the peculiar local jargon used by merchants in particular trades and localities. In a world of highly localized trade, this was perhaps a reasonable approach. Over the years, therefore, courts have found that, depending on the trade and the locality, "1,000" actually means 1,200,<sup>259</sup> "4,000"

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255. [1893] AC 552 (P.C.).

256. 158 A. 926 (Me. 1932).

257. 276 P.2d 8 (Cal. Ct. App. 1954).

258. An example is *Nora Beverages, Inc. v. Perrier Group of America, Inc.*, 269 F.3d 114 (2d Cir. 2001), a relatively recent favorite in the contract law canon, where a court found a contract based on a series of vague back-and-forth communications. But the situation in *Nora Beverages* is very different from old chestnuts like those just noted. In the latter cases, the parties' exchanges were made up entirely of ambiguous communications that courts had to piece together, while in *Nora Beverages*, the parties were deliberately exchanging drafts of detailed written contracts that were never signed. The court was thus not trying to piece together the agreement, but was using the concepts to get around the fact that the parties had detailed writings that had simply not been agreed to. The plaintiff in *Nora Beverages* was not a party who faced a loss because of sloppy contracting practices, but rather a party who wanted to recover even though the detailed agreement had never been actually agreed to.

259. *Smith v. Wilson*, 3 B. & Ad. 728 (K.B. 1832).

means 2,500,<sup>260</sup> and 49.5 percent is actually “not less than” 50 percent.<sup>261</sup> Goods required to be “free from tin” can, in fact, have tin in them.<sup>262</sup> “Guaranteed 50 percent” actually means “guaranteed at least 45 or 46 percent.”<sup>263</sup> A requirement for “full bills of lading” can be satisfied by only partial ones.<sup>264</sup> Whatever the merits of such holdings at an earlier stage of commerce—and one of the authors has expressed doubt about them previously<sup>265</sup>—they seem strangely out of step in a world of buyers and sellers intimately linked together in an increasingly global market. “Year by year,” points out one recent study of global contract practices, “economies are more globalized, work more delocalized, and information more decentralized.” The result is a powerful drive toward a single international language for business.<sup>266</sup> Yet while students from Afghanistan to Zimbabwe are learning English as a *uniform* international language, contract rule technique clings to a vision of a world where merchants deliberately use terms in ways contrary to their ordinary meanings. As business strives toward language that means the same thing in Taipei that it does in Terre Haute or Tangier, there will be less and less room for claims that, for example, the peculiar community of “horse meat scrap dealers” in Portland, Oregon—as opposed to everyone else in the English-speaking world—deliberately write “minimum 50 percent protein” when they really mean “minimum 49.5 percent protein.”<sup>267</sup> It seems to us highly unlikely that in the modern world competent

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260. *Soutier v. Kellerman*, 18 Mo. 509 (1853).

261. *Hurst v. W. J. Lake & Co.*, 16 P.2d 627 (Ore. 1932).

262. *Electric Reduction Co. v. Colonial Steel Co.*, 120 A. 116 (Pa. 1923).

263. *Guillon v. Earnshaw*, 32 A. 545 (Pa. 1895).

264. *Dixon, Irmaos & Cia, Ltda. v. Chase National Bank*, 144 F.2d 759 (2d Cir. 1944), *cert. denied*, 324 U.S. 850 (1945).

265. See Snyder, *supra* note 21, at 48-50. There are substantial external costs in a regime that relies on trade usage evidence. If courts enforce language as written, no matter what the individual parties themselves happened to contemplate, an individual party in an individual lawsuit may suffer. But in that event the party (and similarly situated parties) will likely act to change their contract terminology to make it understandable to others. A merchant who has once been burned by specifying “1,000” when it really meant “100 dozen” will likely not be caught the same way twice; next time it will specify “100 dozen.” Moreover, everyone else in the industry will begin to understand that using standard language is the best way to ensure that they get what they want. This has the additional social benefits of improving predictability in transactions and of reducing litigation costs. On the other hand, if the meaning of an otherwise clear term (e.g., “50 percent”) can always be contested, no party can ever be certain what a contract provides until after it is litigated, and litigation will thus proliferate.

266. 2013 *English Proficiency Index*, EDUCATION FIRST 5, <http://www.ef.edu/~media/efcom/epi/2014/full-reports/ef-epi-2013-report-master-new.pdf> (last visited Apr. 25, 2014).

267. See *Hurst v. W. J. Lake & Co.*, 16 P.2d 627 (Ore. 1932).

merchants would deliberately use language that might be confusing.<sup>268</sup> To the extent that courts insist on letting individual parties provide their own subjective definitions, it is likely that the number of merchants fleeing the regime of contract law technique will only accelerate.<sup>269</sup>

6. *Strict compliance with contract terms is frequently very difficult and parties rarely require exactitude in performance, so something less than what was agreed to is usually fine.* Despite the existence of a few anomalies—such as the “perfect tender” requirements for sales of good in the U.S.<sup>270</sup>—contract rule technique assumes that parties who insist on specific terms are never-

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268. A frequent example used in defending trade usage is the instance of gold and other precious metals, which are always sold by troy ounces rather than avoirdupois ounces. The court in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 n.12 (3d Cir. 1980), used the following hypothetical in explaining the necessity for parol evidence on trade usage:

For example, a contract might provide for a party to pay “\$10,000 for 100 ounces of platinum.” A judge might state that the quoted words are so clear and unambiguous that parol evidence is not admissible to vary their meaning. That judge might never learn that the parties have a consistent past practice of dealing only in Canadian dollars and follow a standard trade practice of measuring platinum in troy ounces (12 to the pound instead of 16). This is because that judge’s linguistic frame of reference includes the dollars and the ounces he or she encounters in daily life. That is not the linguistic frame of reference of the commercial parties.

This is true enough, but in the first decades of the 21st century it seems doubtful that any parties reasonably sophisticated enough to make a deal for 100 ounces of platinum—worth about US\$145,000 as these words are written—would not have contracts using terms like “troy oz.” and “C\$” or “CAD,” rather than trusting to the courts’ ability to decide what the terms were *ex post*.

269. There are instances of the courts’ declining to recognize industry-specific language. For two hundred years, London’s Savile Row tailors have made “bespoke” suits. These were custom fitted to the wearer, and no doubt when custom fitting was required, human hand labor had to do it. Accordingly, the Savile Row tailors developed a technique that required hand-cutting and hand-sewing every detail of the suit. This formally came to be embodied in a set of standards for “bespoke” suits, each of which had to have fifty hours of actual cutting and sewing labor by qualified tailors to carry that title. When competitors developed technology that allowed machines to custom-cut and sew individually fitted suits, which are virtually identical and one-tenth the price, the Savile Row tailors sued to prevent them from calling the suits “bespoke.” They lost before the British agency responsible for trade names, on the ground that “bespoke” meant “custom-made,” not “hand made.” See Stephen Adams, *‘Bespoke’ suits can now be made by machines after Savile Row tailors lose legal battle*, DAILY MAIL, June 18, 2008, at 15. What is interesting is the tailors’ reaction. “The Advertising Standard Authority is a shoddy organization which has made a bad decision,” said one. “They accept that the word ‘bespoke’ means something special and then concluded that it doesn’t matter because people misuse it. A perfectly good word is being undermined.” Vidya Ram, *Savile Row Cut Down A Notch By ‘Bespoke’ Ruling*, FORBES, June 20, 2008, available at [http://www.forbes.com/2008/06/20/savile-row-bespoke-life-style-cx\\_vr\\_0620lifesavile.html](http://www.forbes.com/2008/06/20/savile-row-bespoke-life-style-cx_vr_0620lifesavile.html). The tailors, like craftsmen of many ages, are focused on the *process* (the technique), and not the *outcome*.

270. See UCC § 2-601; Joseph M. Perillo, CALAMARI & PERILLO ON CONTRACTS § 11.20 at 438-38 (5th ed. 2003).



theless usually satisfied with something that is “close enough.” The “substantial performance” standard of the famous *Jacob & Youngs v. Kent*<sup>271</sup> case has been universally adopted in American jurisdictions.<sup>272</sup> *Jacob & Youngs* rested on the twin ideas that (a) parties who had specified one thing (e.g., the “Reading pipe” specified in that case) would ordinarily be satisfied with something that was “just as good” as what was specified (e.g., “Cohoes pipe”), and (b) that judges and juries are capable of deciding what is, in fact, “just as good.” Both of those assumptions might well have been true in 1922, but the world of 2014 is not dominated by an ethos of “close enough,” but by one that demands absolute, strict adherence to standards.<sup>273</sup> The “quality revolution” of the last thirty years has fostered awareness that one flaw in a thousand can be devastating and that a delay of even an hour in delivery time can be enormously expensive. Many modern business techniques such as supply chain management,<sup>274</sup> lean production,<sup>275</sup> Six Sigma quality,<sup>276</sup> and continuous process improvement<sup>277</sup> are designed to maximize productivity by eliminating every kind of unnecessary variance in every aspect of the business. It is a world where “close

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271. 129 N.E. 889 (N.Y. 1921).

272. See Perillo, *supra* note 270, § 11.18 at 433-35; see also *id.* § 11.20, at 437 (noting that “[t]he doctrine of substantial performance . . . is almost universally applied”).

273. The business literature on the topic of continuously increasing quality and value is enormous, but leading texts include PHILIP B. CROSBY, *QUALITY IS FREE: THE ART OF MAKING QUALITY CERTAIN: HOW TO MANAGE QUALITY SO THAT IT BECOMES A SOURCE OF PROFIT FOR YOUR BUSINESS* (1979); THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST RUN COMPANIES* (1995); MASAOKI IMAI, *KAIZEN: THE KEY TO JAPAN’S COMPETITIVE SUCCESS* (1988); KAORU ISHIKAWA, *WHAT IS TOTAL QUALITY CONTROL?: THE JAPANESE WAY* (1988); KEKI R. BHOTE & ADI K. BHOTE, *WORLD CLASS QUALITY: USING DESIGN OF EXPERIMENTS TO MAKE IT HAPPEN* (1999); PETER S. PANDE, ROBERT P. NEUMAN & ROLAND R. CAVENAGH, *THE SIX SIGMA WAY: HOW GE, MOTOROLA, AND OTHER TOP COMPANIES ARE HONING THEIR PERFORMANCE* (2000); MICHAEL L. GEORGE, *LEAN SIX SIGMA FOR SERVICE: HOW TO USE LEAN SPEED AND SIX SIGMA QUALITY TO IMPROVE SERVICES AND TRANSACTIONS* (2003); JEFFREY LIKER & GARY L. CONVIS, *THE TOYOTA WAY TO LEAN LEADERSHIP: ACHIEVING AND SUSTAINING EXCELLENCE THROUGH LEADERSHIP DEVELOPMENT* (2011); JAIDEEP MOTWANI & ROB PTACEK, *PURSuing PERFECT SERVICE: USING A PRACTICAL APPROACH TO LEAN SIX SIGMA TO IMPROVE THE CUSTOMER EXPERIENCE AND REDUCE COSTS IN SERVICE INDUSTRIES* (2011); DAVID L. GOETSCH & STANLEY DAVIS, *QUALITY MANAGEMENT FOR ORGANIZATIONAL EXCELLENCE: INTRODUCTION TO TOTAL QUALITY* (7th ed. 2012).

274. See, e.g., SHOSHANAH COHEN & JOSEPH ROUSSEL, *STRATEGIC SUPPLY CHAIN MANAGEMENT: THE FIVE CORE DISCIPLINES FOR TOP PERFORMANCE* (2d ed. 2013).

275. See, e.g., JOHN NICHOLAS, *LEAN PRODUCTION FOR COMPETITIVE ADVANTAGE: A COMPREHENSIVE GUIDE TO LEAN METHODOLOGIES AND MANAGEMENT PRACTICES* (2010).

276. See, e.g., PANDE ET AL., *supra* note 273.

277. See, e.g., MASAOKI IMAI, *GEMBA KAIZEN: A COMMONSENSE APPROACH TO A CONTINUOUS IMPROVEMENT STRATEGY* (2012).

enough” is not a value that many companies can tolerate, let alone embrace.

7. *Asking six lay people without financial training to decide on the losses suffered under a contract, after listening to competing arguments made by counsel, is a perfectly reasonable way of determining damages.* In 1814 it was probably reasonable to assume that a jury of ordinary lay Americans was competent to determine how much money their neighbors—farmers, blacksmiths, sawmill operators, horse-copers, apothecaries, chandlers, dry-goods dealers, small merchants, sellers and buyers of real estate—would have made on a given transaction. But even by 1914, in a world increasingly dominated by sophisticated international businesses, this was probably a shaky assumption. And in the world of 2014 it seems entirely absurd. As we noted previously, it is unthinkable that even the least sophisticated business person would try to figure its profits on a prospective deal by calling together a group of strangers who know nothing about the business and conduct a focus group on the subject. In fact, one of the terrors of the litigation process for many potential defendants is the possibility of damage awards that are almost entirely irrational.<sup>278</sup> There are sophisticated analytical tools available today that allow for predictions with vastly more confidence than there were even twenty years ago. A system that continues to rely on a kind of trial-by-battle rather than on modern financial approaches is not likely to be popular or influential.

8. *It is critical to get the most accurate outcome in every given dispute, regardless of time or cost.* In some kinds of cases, such as criminal trials, it is obviously important to make sure that the result of the trial is as close to perfectly accurate as possible. There are powerful personal and societal interests in making sure both that the guilty are punished and the innocent are freed. When an individual is on trial for capital murder, we willingly supply procedures and resources nearly inexhaustibly to try to ensure that the verdict is correct. The cost of that kind of procedure is substantial—some \$400,000 in defense costs alone.<sup>279</sup> But the vast majority of businesses are repeat players in the world of

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278. See, e.g., *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987).

279. See KANSAS JUDICIAL COUNCIL, REPORT OF THE JUDICIAL COUNCIL DEATH PENALTY COMMITTEE 1 (Feb. 13, 2014), <http://www.kansasjudicialcouncil.org/death%20penalty%20cost%20report%20final.pdf>.

contractual disputes,<sup>280</sup> and the vast majority of contract disputes cannot possibly justify that amount of legal expense. Moreover, the vast majority of contract litigation in the contemporary world is not made up of unusual, one-shot matters involving enormous stakes. Rather, litigation is a simple cost of doing business. Any given company may have dozens or even hundreds of disputes going on at the same time, with customers, suppliers, employees, competitors, regulators, and so on. The results of very few of these are significant in themselves. What matters is the total cost of the disputes. Thus, modern businesses may well prefer an inexpensive system that is ninety percent accurate to an expensive system that is ninety-nine percent accurate. The same is likely true of consumers and employees, at least those not involved in class actions or those whose claims are so large that they are very nearly life-or-death. A free or very inexpensive arbitration process that gives a consumer a reasonable likelihood of collecting \$2,500 in a dispute over a car warranty might be far preferable to one that gives the same consumer a certainty of collecting that sum if the consumer would have to pay hourly legal fees in the latter situation. Yet contract rule technique, with its elaborate doctrines and its reliance on the sort of general standards required where lay juries are involved, seems not to grasp this issue at all.

9. *Courts deciding contract cases are the chief backstop against fraud and unfair practices in contracting.* Contract rule doctrine is full of rules designed to protect one party from the predation of the other. Many of these were doubtless important in the early formation of the common law of contracts. When contract law was taking shape, there were no regulatory agencies, no consumer protection statutes, and no family law as we know it today. There were hardly even police forces in the sense we use them today, to prevent or punish deliberate fraud or classical gun-to-the-head duress. In the absence of virtually any other mechanism for protecting people against unfair practices, courts no doubt quite reasonably saw themselves as the chief mechanism for policing such bad actions. But that is hardly the world of today, where every state has elaborate mechanisms governing proper and improper methods of doing business. These bodies of law, such as state deceptive trade practices acts (DTPA), give aggrieved consumers far more tools than does contract law, and as a result have as a prac-

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280. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

tical matter become the primary source of consumer relief.<sup>281</sup> Contract law permits a consumer who has been defrauded or coerced to *defend* herself if she is sued by the bad actor—so long as she can find a lawyer and can afford to pay the hourly fees—so it provides little help for those who have already paid, and does little to discourage the bad actors, who at worst find themselves unable to collect on a single contract. But that same consumer can bring a DTPA claim *on a contingency basis* and recover *multiple* damages and attorneys' fees. And this is only one remedy; state and federal agencies of every sort—nearly all of which are better suited than are nonspecialist judges to determine what kinds of practices ought to be prohibited or regulated—are actively involved in preventing precisely the same sort of unfair practices that contract rule technique tries to govern.<sup>282</sup>

### C. *The Shape of Things to Come*

There are two common views of the future. One is that it is likely to be “much like the present, only longer.”<sup>283</sup> The other is that “the only thing we know about the future is that it is going to be different.”<sup>284</sup> Both, of course, are true: The future will be similar to today, only different. The difficulty is determining where the differences lie.

Looking forward over the coming decades, it is impossible, of course, to tell precisely what will happen, but there are certain trends that will very likely accelerate, and looming new technologies that may bring radical changes. Several of the trends we identified earlier will probably continue. Contract cases will continue to flee the judicial system. The use of standardized contracts and practices will keep growing. Globalization will reduce variations in contracting practices around the world. The drive for

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281. See G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198 (1988) (describing growth of state deceptive trade practices acts as substitutes for common-law contract restraints); Donald R. Stroud III, Comment, *Beyond Deception: Finding Prudential Boundaries Between Breach of Contract and Deceptive Trade Practices Act Violations in Wisconsin*, 93 MARQ. L. REV. 1157, 1164 (2010) (noting how such acts allow courts to police sharp dealing without relying on the specific terms of contracts).

282. A sample of the host of non-contractual remedies available to consumers with complaints can be found at *Consumer Protection*, USA.GOV, <http://www.usa.gov/topics/consumer.shtml> (last updated Mar. 31, 2014).

283. THE GIGANTIC BOOK OF BASEBALL QUOTATIONS 579 (Wayne Stewart & Roger Kahn eds., 2007) (quoting Dan Quisenberry).

284. PETER DRUCKER, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES 44 (1973).

efficient processes and improved quality in goods and services will intensify. The view of contract disputes not as discrete legal matters but as a simple cost function within a larger system will gain even more strength. This is in effect the present, only longer.

But there are also changes that will raise new issues and will likely make our current contract law techniques even less adequate. We mention only a few here, from the relatively simple to the mind-bogglingly complex.

*Nonlegal Self-Help Remedies.* One of the striking features of the past decade is the rise of various extralegal systems for consumer self-help. The meteoric rise of social media on the Internet has restored the concept of public shaming—once limited to insular communities where reputation was particularly important—to a prominent position. Traditionally, weaker parties who lacked the resources to litigate in court often had no way to retaliate against the stronger parties who they believed had breached their agreements. Today, ubiquitous ratings systems on popular web sites, sometimes with free and open (and often virulent) commentary, allow individual consumers to extract a measure of vengeance on the businesses that they believe have wronged them.<sup>285</sup> Contracting parties who once were able to view each customer as an isolated transaction, and who saw the harm of dissatisfaction as limited, now face a world in which a handful of disgruntled consumers can seriously affect their reputations and their businesses. Systems like these are today only in their infancy, but they will doubtless play a substantial role in regulating commercial behavior in the years to come.

*Do-It-Yourself (DIY) Contracting.* The days when it was difficult for an ordinary person to be able to generate a sophisticated written contract are quickly passing. Web sites like LegalZoom and Rocket Lawyer have been providing DIY contracts for a few years now, but the launch in 2013 of the Shake application for smartphones marks such a huge step forward that one early reviewer titled his piece, “We (Lawyers) Just Got Replaced By a Contract-Drafting App.”<sup>286</sup> Shake is a phone app that allows ordinary people—small businesses, freelancers, buyers and sellers—to

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285. See, e.g., Wayne R. Barnes, *Social Media and the Rise in Consumer Bargaining Power*, 14 U. PA. J. BUS. L. 661 (2012) (noting rise in consumer self-help remedies using social media).

286. William Peacock, *We (Lawyers) Just Got Replaced By a Contract-Drafting App*, FINDLAW (Sept. 16, 2013), <http://blogs.findlaw.com/technologist/2013/09/we-lawyers-just-got-replaced-by-a-contract-drafting-app.html>.

generate surprisingly sophisticated contracts in a few moments and to have them signed digitally on their devices. The spread of such simple-to-use technologies means that even for small transactions the parties will have written documentation of their promises, and the documentation will consist of standardized terms developed over millions of transactions, not the often confusing quasi-legalisms lay people often employ when writing “contract” terms. The tools as presently designed are suitable for smaller transactions. ShakeLaw, for example, advises using the product for selling your computer on Craigslist, not for selling your company. But the products are likely to become more sophisticated as designers and users gain experience.<sup>287</sup>

*Spend Analysis and Integrated Source-to-Settle Procurement.* The very concept of contracting has changed in many cutting-edge businesses. Instead of thousands of individual contracts that are individually issued, monitored, paid, disputed, and resolved, most businesses are aiming to integrate the sourcing of materials, components, and labor.<sup>288</sup> These procurement processes are governed by highly detailed specifications that are designed to reduce variation and disputes, and to resolve matters efficiently. Modern supply chain management is aiming to do for the contracting process what modern production techniques have done for manufacturing: to eliminate human variance and resulting errors.

*Big Data.* People have used computers to process data for half a century, but the idea of “big data”—the process of using artificial intelligence to harvest insights from standard databases, click-stream data from the Web, social network communications, sensor data and surveillance data—only entered the popular lexicon a few years ago.<sup>289</sup> Yet in that short period we all now are beginning to feel the effects of the “Age of Big Data.”<sup>290</sup> The sheer volume of

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287. One leading firm already has a much more sophisticated free product available to clients who are putting together term sheets for venture capital deals. See *WSGR Term Sheet Generator*, WILSON, SONSINI, GOODRICH & ROSATI, <http://www.wsg.com/wsg/display.aspx?sectionname=practice/termsheet.htm> (last visited May 5, 2014).

288. See, e.g., KIRIT PANDIT, *SPEND ANALYSIS: THE WINDOW INTO STRATEGIC SOURCING* (2008); FRED SOLLISH & JOHN SEMANIK, *STRATEGIC GLOBAL SOURCING: BEST PRACTICES* (2011); FRED SOLLISH & JOHN SEMANIK, *THE PROCUREMENT AND SUPPLY MANAGER'S DESK REFERENCE* (2d ed. 2012).

289. Steve Lohr, *Amid the Flood, A Catchphrase Is Born*, *NEW YORK TIMES*, Aug. 12, 2012; Steve Lohr, *The Age of Big Data*, *NEW YORK TIMES*, Feb 11, 2012.

290. See Joshua Gruenspecht, “Reasonable” *Grand Jury Subpoenas: Asking for Information in the Age of Big Data*, 24 *HARV. J. L. & TECH.* 543 (2011); Omer Tene & Jules Polonetsky, *Privacy in the Age of Big Data: A Time for Big Decisions*, 64 *STAN. L. REV. ONLINE*

data is mind-numbing; the total amount of digital information available in 2013 was estimated at 4 ZB (zettabytes), or roughly twenty-five times the sum total of all the information stored on all the computer drives in the world in 2006. The 2013 figures are nearly double those of 2012 and four times those of 2010.<sup>291</sup> What is more important is that with artificial intelligence this data can be mined and put to use to predict not only behavior, but how different rules will affect behavior. Simply put, big data enables better predictions, and better predictions yield better decisions.<sup>292</sup> If the law, in Holmes's famous dictum, is nothing more than the prediction of what results the judicial system will produce,<sup>293</sup> big data will almost certainly yield better predictions than will the study of appellate cases.<sup>294</sup> As agreements and the outcomes of those agreements are captured in databases, transactional lawyers will better predict which language will reduce disputes, protect their clients' interests, and yield the best results in the ultimate event of a dispute. Judges and juries, instead of relying on gut instinct and vague notions of "reasonable" contractual behavior will have hard data as to what parties routinely do in any possible situation. Big data looks to be the key to understanding and optimizing business processes. Contracting is as much a business process as manufacturing, marketing, and distribution, and it seems fair to say that the impact of Big Data on how contracts are written, performed, and interpreted will be substantial.

It is impossible to tell exactly what form these developments will take, but together we believe that they will have an enormous impact on the way commercial transactions are conducted and thus will continue to eat away at our existing contract law technique.

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63 (2012); Nicolas P. Terry, *Protecting Patient Privacy in the Age of Big Data*, 81 UMKC L. REV. 385, 388 (2012); Neil M. Richards & Jonathan H. King, *Three Paradoxes of Big Data*, 66 STAN. L. REV. ONLINE 41 (2013); Nolan M. Goldberg & Micah W. Miller, *The Practice of Law in the Age of "Big Data,"* NAT'L L.J. (Apr. 11, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489457214>.

291. Frank Gens, *IDC Predictions 2013: Competing on the 3rd Platform*, IDC (Nov. 2012), <http://www.idc.com/research/Predictions13/downloadable/238044.pdf>.

292. Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV., Oct. 2012, at 60-67.

293. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

294. See Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909 (2013).

## VI. IMPLICATIONS FOR “CONTRACTS” AS A SUBJECT

In this part of the paper we look at the implications of our previous observations on the legal subject traditionally called “Contracts.” What parts of the subject will likely still be important a decade from now? Which parts will fall into desuetude? Which parts, having outlived their usefulness, will linger on to inflict occasional damages on the unwary? We believe that for the two most important categories of contracting parties—consumers purchasing from merchants (what businesses call business-to-consumer or “B2C” transactions) and business engaged in mercantile exchanges with other merchants (business-to-business or “B2B”), the rules are worthless at best and pernicious at worst.

For consumers in an age of standardization there are three problems with contemporary contract law. First, the time, expense, and uncertainty necessary in employing the contract technique mean that most consumers are priced out of the system.<sup>295</sup> Even if the technique was useful in dealing with their claims, they cannot afford to use it. Second, the great bulk of the technique is simply irrelevant in consumer disputes over standardized products. Third, the technique does a remarkably bad job addressing the three questions that *are* important to consumers: (a) to what extent the consumer is bound to the merchant’s standard form terms; (b) what precisely those terms mean, and (c) in the absence of a writing—as in the case of a purchase at a store—what obligations the merchant assumes. All are questions on which it is highly desirable to get predictable, standardized answers that all consumers can rely on, and yet our technique assigns them to be resolved case-by-case, leaving individual consumers at the whim of the particular trial judge or jury.

As for merchants in B2B transactions, the technique is slightly more relevant. There certainly are one-shot negotiated contracts which fit the model assumed by the technique, so if we assume that parties and their lawyers have done an unusually bad job in the contracting process—or some other set of circumstances raises

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295. The primary exceptions are the consumers who act as mascots in lawyer-driven class action litigation, where potential settlement values make the litigation profitable and provide rewards to the plaintiffs beyond their ordinary breach of contract remedies. But the very existence of the class action remedy is an admission that the ordinary contract law remedies for consumers are worthless. *See, e.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005) (“Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action . . .”).



an unusual question—resort to the courts will sometimes be necessary. But this is a very small slice of the field of contractual commercial transactions. To the extent that the technique has any relevance in most transactions, it is as a hidden land mine waiting to explode. In the modern world, rule technique is much less a way of determining the parties' intent when evidence is lacking, and more as a way of undermining written agreements that have carefully been prepared by lawyers.<sup>296</sup> Far from the simple, clear, rational, and certain system that Karl Llewellyn thought would help businesses and lawyers avoid problems and plan carefully for the future,<sup>297</sup> we have one that they are fleeing like patrons from a burning theater.

In what follows, we will take a brief look at each of the basic conceptual building blocks of contract rule technique—the subsets of rules that make up the traditional subject—and give our thoughts on how they will evolve or disappear in the years ahead.

#### A. *Consideration*

The consideration doctrine is what contract technique traditionally uses to decide if the parties have made a bargained-for exchange (in which case they have a “contract” that courts will enforce), or if they have done something else, such as made gratuitous promises or exchanged gifts. It is already the conventional wisdom in the modern world that the doctrine is used chiefly in contracts as a pedagogical tool rather than something that will ever likely arise in practice.<sup>298</sup> There are still rare cases where

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296. Well-known modern cases include *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981) (using disputed trade usage testimony to override express, negotiated price term in written contract); *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996) (mangling rules of interpretation to hold that employees who had expressly declined certain benefits had nevertheless contracted for them); *Nora Beverages, Inc. v. Perrier Group of America, Inc.*, 164 F.3d 736 (2d Cir.1998) (finding buyer who had not agreed on either quantities or length of the agreement and who had not signed contract was bound anyway). Prominent cases that involve similar but less successful attempts to avoid explicit and very carefully drafted language include *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

297. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1146-47 (1985). “Llewellyn believed businessmen needed rules on which they could rely, rules that would produce predictable results. The existence of predictable rules would make commercial activity more rational and would thereby encourage its expansion.” *Id.* at 1147.

298. “With luck,” write the authors of a leading contract law casebook, “you will be able to practice years without ever seeing a contract that lacks consideration, since nearly all commercial contracts and most non-commercial ones involve reciprocal, bargained-for

doctrine plays a role, and a few more where it is manipulated by courts to achieve a desired result that cannot be justified on other grounds, but as an important part of the technique its days are over.<sup>299</sup>

### B. *Reliance*

The primary alternative to consideration-based contract theory is the piece of doctrine known historically as “promissory estoppel” and more commonly today as “reliance.” Reliance is a concept lifted from tort (where it is an element of the tort of fraud) and equity jurisprudence (from whence the terminology was taken), which imposes liability without regard to bargain. In other words, a promise can become enforceable, even if the promisor does not intend it to be such, if the promisee relies on it. At one point, as we noted at the beginning of this paper, it seemed poised to swallow up contract law whole. That did not happen, for a variety of reasons.<sup>300</sup> But while reliance ultimately did not conquer, it left enough of itself around to create substantial problems for the unwary.

Over the coming years, whatever little justification reliance ever had as a theory is likely to disappear. The drive to standardize contracting processes and make them efficient and predictable requires a system that allows firms to determine the extent to which their contracts will be legally enforceable *before* they begin performance. A reliance system, like a tort system, is inherently unpredictable because liabilities cannot be reliably ascertained until after the event happens. In tort the threat of substantial *ex post* liability is sensible, because we want to deter parties from engaging in the kind of activity that might harm others. But the point of contract law is to encourage commercial transactions, not

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promises.” BRUCE W. FRIER & JAMES J. WHITE, *THE MODERN LAW OF CONTRACTS* 33 (3d ed. 2012).

299. See James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 *CORNELL L. REV.* 987, 1006 (1990) (“Perhaps someday contract law will more closely reflect common sense and modern commercial practice, business people will not have to seek legal advice reflecting irrational rules from centuries long past.”).

300. One in particular is that enforcement based on reliance quickly becomes circular. Traditionally, it was reasonable to rely something identifiable as a “contract” because courts would enforce it if the other party reneged. The new approach turned that on its head, finding that any promise might create was a “contract” if the other party reasonably relied on it. In the 19th century, one relied on a promise that one expected the state to enforce; in the 20th, the state enforced a promise on which one relied. Shortly after the doctrine reached fully iconic status with its inclusion as § 90 of the *Second Restatement*, courts begin backing away from it. See note 10, *supra*.

to deter them, and a reliance regime that makes liability dependent not on the agreement but on unpredictable conduct of the other party is antithetical to that. The lingering remains of the doctrine only encourage further exodus from the courts to arbitration and the continuing decline of contract technique.

### C. Formation

The contract formation principles embedded in the technique—which make up fifty-three of the 385 sections of the *Second Restatement*—can for our purposes be divided into three broad parts. The first is the *doctrinally* important dance of offer, acceptance, rejection, revocation, counter-offer, and so on, which makes up the bulk of the relevant doctrine, but in practice is largely irrelevant. The second is the *practically* important treatment of how standard form contracts are made and enforced, with which the doctrine hardly engages at all. The third is the confusing question of when parties who anticipate signing written agreements may be bound before they sign them, which is practically dangerous and doctrinally a mere hash.

The great bulk of the *Second Restatement's* treatment of formation is made up of the first category, including such well-known doctrinal chestnuts as the “mailbox rule” and the “overtaking acceptance” and such peculiar one-shot cases as *Adams v. Lindsell*<sup>301</sup> (what happens when you mail the offer to the wrong address?) and *Dickerson v. Dodds*<sup>302</sup> (at what point does the offeror’s repeated attempts to avoid you indicate that an offer has been withdrawn?). Most of them seem to reflect the quaint problems of a bygone world, as can be seen by the titles of many: “Necessity That Manifestations Have Reference to Each Other”;<sup>303</sup> “To Whom an Offer Is Addressed”;<sup>304</sup> “Form of Acceptance Invited”;<sup>305</sup> “Methods of Termination of the Power of Acceptance”;<sup>306</sup> “Indirect Communication of Revocation”;<sup>307</sup> “Purported Acceptance Which Adds Qualifications”;<sup>308</sup> “Effect of Performance by Offeree Where Offer Invites

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301. 106 ER 250 (K.B. 1818).

302. 2 Ch. Div. 463 (1876).

303. REST. 2D, *supra* note 90, § 23.

304. *Id.* § 29.

305. *Id.* § 30.

306. *Id.* § 36.

307. *Id.* § 43.

308. *Id.* § 59.

Either Performance or Promise”,<sup>309</sup> “Reasonableness of Medium of Acceptance”,<sup>310</sup> “Effect of Receipt of Acceptance Improperly Dispatched”,<sup>311</sup> and “Effect of Receipt by Offeror of a Late or Otherwise Defective Acceptance.”<sup>312</sup> These reflect a world in which most contracts are made by individual one-to-one correspondence on individualized terms. But the world of tomorrow, as we note above, is one where contracting is dominated by supply chain management, source-to-settle procurement, master supply agreements, online purchasing, standardized service contracts, in-store retail sales, machine-to-machine or machine-to-person ordering, and even by sophisticated written agreements prepared by consumers and microbusinesses on smartphones. There will be clear, standardized written documents to which parties have clearly indicated agreement, leaving little scope for the elaborate dance of offer-and-acceptance and its doctrinal subtleties.<sup>313</sup>

The second, and much more important issue in contract formation, is the one that the doctrine paradoxically ignores. There are many important and contentious issues involving the question of when a party manifests consent to standard terms,<sup>314</sup> but no answers will be found in the current technique.<sup>315</sup> The rules are not designed for current situations. “Mutual assent” simply requires “that each party either make a promise or begin or render a performance,”<sup>316</sup> but the tough question is whether downloading a coupon or clicking “like” on a Facebook page should be counted as “promise” or a “performance,” and guidance on this issue is entirely lacking. Nothing in current rule technique suggests any meth-

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309. *Id.* § 62.

310. *Id.* § 65.

311. *Id.* § 67.

312. *Id.* § 70.

313. We are not saying that there will be *no* cases in the future where rules like this might have to be resorted to. There is probably no body of law, however arcane, that does not need to be dredged up from time to time to deal with unusual cases. But as a part of rule technique, it is headed toward desuetude.

314. As these words are being written, the Internet is ablaze over the issue whether merely visiting a web site, clicking “like” on a social media board, or downloading a coupon is “assent” to standard terms that the seller has posted somewhere. See Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES, April 16, 2014, at B1; Stephanie Strom, *General Mills Reverses Itself on Consumers’ Right to Sue*, N.Y. TIMES, April 20, 2014 at A17.

315. The concept of standard-form contracts is almost entirely absent from the formation sections; the only place in the *Second Restatement* that it bubbles to the surface enough to be noticed is in connection with the parol evidence rule. See text at note 298, *infra*.

316. REST. 2D, *supra* note 90, § 18.

odology for providing intelligent answers.<sup>317</sup> It is of obvious importance that both businesses and consumers be able to understand clearly what counts as assent and what that assent means. Doubtless such rules will be developed in the coming decade, but they will almost certainly come from regulatory agencies, not from courts relying on contract technique.

The third important area of formation doctrine is the body of rules regarding when parties are bound to contracts *before* they have formally signified their assent. Most lay people—and probably most business people—have a “Big Bang”<sup>318</sup> view of contract: liability attaches when the party “signs on the dotted line.” Everything before that point is negotiation, while everything thereafter carries legal liability. But contract technique reflects the opposite rule. The default position is that the contract is formed when “manifestations of assent” are exchanged during discussions, and that a contract will be found unless “the circumstances show” that the parties did not intend to be bound until the writing was signed.<sup>319</sup> This approach rests upon the observation that parties “necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agreeing upon all the terms which they plan to incorporate therein.”<sup>320</sup> This is doubtless true—it is difficult to imagine a situation in which parties have neither talked about nor generally agreed to terms before they are asked to sign a written agreement—but that is not the question. The question is whether the law should enforce the alleged oral promises (which will doubtless involve the conflicting

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317. It may seem unfair to criticize the technique for failing to come to grips with the intricacies of modern internet commerce. Law necessarily is always behind the technology curve, and the drafter of the *Second Restatement*, for example, can hardly be faulted for not foreseeing such phenomena as internet commerce. Yet standard-form contracts have been important, and known by legal scholars to be important, for well over half a century. The problems raised by internet commerce are not much different from those raised by technologies—such as door-to-door sales, direct marketing, catalogue sales, and telemarketing—that have been employed for at least that long. As long ago as the Second World War scholars were criticizing the fact that the contemporary doctrine did not deal adequately with standard forms. See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (noting that “our common law of standardized contracts is highly contradictory and confusing, and the potentialities inherent in the common law system for coping with contracts of adhesion have not been fully developed”).

318. The term is from Jeff C. Dodd, Essay, *Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts*, 36 HOUS. L. REV. 195 (1999).

319. REST. 2D, *supra* note 90, § 27.

320. *Id.* cmt. a.

testimony of the two parties long after the fact) or simply wait until there is a signed agreement. In the days when preparing the written agreement was a costly and cumbersome procedure and parties routinely began performing before anything was signed, the rule may have made some sense. Today, the rule exists merely to trip up parties who are not sophisticated enough to make the proper disclaimers at the beginning of negotiations. As such, it is yet another hazard for those who are trying to use contract law to achieve some predictability in commercial transactions.

#### D. *Writing Requirements*

We have noted previously that the arcane rules involving the statute of frauds and the parol evidence rule are relics of the days when writings were rare and carried substantial value. Paradoxically, however, the very ubiquity of written agreements may make the requirements and effects of writings even more important. To be at all useful, however, the technique will have to change substantially.

In the days when the vast majority of contracts were oral, it made sense for certain types of contracts—those particularly susceptible to fraud and abuse—to be in writing before they would be enforced.<sup>321</sup> Hence, the writing requirements known collectively as the statute of frauds were created. These statutes were never popular with judges, and over time became “riddled with exceptions.”<sup>322</sup> The result is a mess which manages simultaneously to make planning less certain and to drive up the cost of ultimate litigation. There are two obvious ways to get rid of the mess. One is simply abolishing the statute of frauds, as the United Kingdom did in 1954.<sup>323</sup> The other is to require the writing and eliminate the encrusted exceptions. Predictability would likely be enhanced and litigation costs reduced by the latter—a simple rule that if it

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321. These included most of the kinds of contracts that the ruling elites of England in the late 17th century would find troublesome: contracts for sales of jealously hoarded family land; promises by heads of the family to pay the debts of poor relations, either live (as sureties) or deceased (as executors); promises allegedly made in the course of carefully arranged dynastic marriages; and contracts with tenants and servants who claimed their contracts were longer than the customary one year.

322. Ronald K. L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 532-33 (1992). A good account of the various exceptions is found in JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS §§ 75-81 (5th ed. 2011).

323. *Id.* at 33.

is not in writing, it isn't enforceable—but the point is that whichever solution is adopted, this part of the technique is irrelevant.

The same problems plague the issues of parol evidence in contracts. The basic rule is that where parties have a writing that sets out the terms of their agreement, they will not be allowed to introduce outside testimony to show that the deal was something other than what was included in the writing. Like the statute of frauds, the parol evidence rule is so infested with limitations and exceptions<sup>324</sup> that it serves as little more than a vehicle for driving up legal fees in litigation.<sup>325</sup> Again, the only two apparent solutions are keeping the rule and eliminating the exceptions or eliminating the rule and allowing all writings to be contradicted by outside testimony in all cases. In a world of ubiquitous and carefully crafted writings, eliminating the exceptions and giving conclusive effect to the written terms is probably the better course. But whichever course is ultimately adopted, this part of the technique will likely wither.

#### *E. Defenses*

Current technique has developed two broad categories of defenses to contract formation: defenses said to go to the quality of the mutual assent, and those derived from public policy. The former include duress, undue influence, fraud, misrepresentation, nondisclosure, mutual mistake, and unilateral mistake, the presence of which will make a contract unenforceable due to lack of "consent." The latter include contracts that are illegal, are contrary to public policy, or seem to be "unconscionable" to the judge. These contracts are unenforceable even if the parties knowingly consented to them. Both categories date to the days when most contracts were negotiated face-to-face, and refusing to enforce a tainted contract was the state's only tool for reaching socially harmful activities like coercion, fraud, and high-pressure sales.

Today few contracts involve the kind of face-to-face situations involving relatively high stakes where duress and undue influence might possibly be employed. To the extent these tactics are used

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324. *See id.* § 86.

325. To show that the parol evidence rule should not apply in a particular case, a party must produce and the other party must defend against the same evidence that would come in if there were no such rule. In fact, costs are often increased because the parties must battle over the same evidence twice, once at the stage of admissibility and once again at trial.

by merchants, there exists a bevy of much more effective tools for consumers and regulators to reach the bad conduct.<sup>326</sup> These tools include explicit consumer protection regimes and even criminal prosecutions. Fraud, misrepresentation, and nondisclosure, on the other hand, obviously can flourish in a world of mass transactions, but the problem is that individual one-shot non-enforcement of the resulting contracts is perhaps the least effective way of dealing with the problem, because most of the defrauded will likely pay up rather than endure the costs and uncertainties of litigation. These undesirable practices seem to be precisely the sort of thing that consumer agencies with fact-finding procedures and regulatory authority should address on a mass basis. It is likely that there would be very little effect—except for a reduction in uncertainty and litigation costs—if all of these defenses were removed from contract law and the issues handled by competent regulatory bodies.

The issues are different with respect to public policy defenses. These involve situations in which the legislature has not prohibited particular agreements, but courts on their own decide that the activity should be barred. In many cases, the issue is not whether a particular agreement is contrary to public policy, but whether judges or legislatures get to decide what that policy is. By far the most common areas where courts invoke public policy concerns relate to: (1) employee covenants not to compete,<sup>327</sup> (2) employee and consumer arbitration agreements,<sup>328</sup> (3) failure to comply with regulatory licensing requirements,<sup>329</sup> (4) clauses that limit liability for negligence or other harm,<sup>330</sup> and (5) agreements relating to family relationships.<sup>331</sup> Each of these involves issues that are remarkably unsuited for resolution on a case-by-case basis based on vague factors of the “public policy.” They are ideally suited for legislative or administrative resolution. If legislatures and regulatory authorities have not barred certain types of con-

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326. Private coercion or undue influence in family-related transactions—such as the quintessential case of the care-giver who pressures an elderly relative to change her will—will still arise and certainly will need to be dealt with, but that can be done without overarching contract doctrines like duress and undue influence. Family and probate courts presumably are the better venues for dealing with such problems.

327. *See, e.g.*, *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 982 P.2d 1277 (en banc 1999).

328. *See, e.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005).

329. *See, e.g.*, *U.S. Nursing Corp. v. Saint Joseph Medical Ctr.*, 842 F. Supp. 1103 (N.D. Ill. 1994).

330. *See, e.g.*, *Hanks v. Powder Ridge Restaurant Corp.*, 885 A.2d 734 (Conn. 2005).

331. *See, e.g.*, *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).



tracts, judicial invalidation on an *ad hoc* after-the-fact basis provides little regulatory effect—ski slopes still put negligence disclaimers in their contracts even when courts have found them invalid, and consumers continue to believe that they are enforceable—and adds significant uncertainty and cost to the process. There is little likelihood that a technique appropriate for the future would assign this task to the courts enforcing contracts.

#### *F. Interpretation*

It is ordinarily not difficult in contracts to determine what the contract language means. But because language is an imperfect tool, questions arise with some frequency about exactly what a contract requires. Thus, contract technique necessarily must deal with issues of contract interpretation. The problem is that the technique historically has focused on what *these* particular parties meant when they used particular language. That may have been a plausible approach when contracting was local, usage was idiosyncratic, and the tools for crafting clear written documents were unavailable, but it makes little sense in a world where the very language of business is, as we noted above, being standardized.

Courts and legal scholars for years have pointed out, quite correctly, that the plain meaning of a written agreement may not necessarily reflect what the parties actually agreed. Where they have erred is assuming that courts routinely should try to enforce the latter – the underlying intentions—rather than the former—the actual agreement. In the world to come, the pressure for standardization means that words must acquire meanings that are reliable and predictable, and parties must assume responsibility for using them correctly. For example, a manufacturing process for a product designed to work in complex systems must conform exactly to what is required. A manufacturer whose products do not meet the specifications will suffer. Similarly, we expect that the contracting parties of the future will take on the responsibility of using precise language.

This is particularly true given that standardized contracts are used for mass transactions. It is highly desirable that the same term used in contracts by two separate suppliers be interpreted in the same way, and that it be interpreted the same way in every court in the United States. It would also be helpful if ordinary words in a cell phone contract and a construction contract were held to have the same meaning, so that unsophisticated buyers who have experience with one are not led astray by the other.

There will be increasing pressure for standardized agreements to converge, so that clauses that have proven clear and effective supersede those that are less so. But this process can only proceed if courts are willing to adhere to a concept of plain meaning that puts the onus on the *parties*, and not the *judge*, to specify what is meant.

These changes will likely require wholesale scuttling of the whole body of doctrine relating to trade usage. Where commerce is global and transactions among merchants in the same kind of goods is the exception rather than the rule, a system that leaves a party free to argue that 49.5 percent counts as “at least” 50 percent<sup>332</sup> invites confusion and wasted transactional costs at best, and abuse and sharp dealing at worst.

### *G. Performance and Breach*

Once the terms of the contract are determined, the key question in a contract dispute usually becomes whether the parties have done what they were supposed to do. If they did not, there is a breach. Unlike many of the other parts of contract technique, this is actually a factual question that necessarily must often be decided on a case-by-case basis. Determining exactly what was required and exactly what a party has done are questions that can only be answered after a full factual hearing. Determining facts like this is one of the things that the judicial system is reasonably good at doing. But current technique goes far beyond this straightforward task. There are two particularly pernicious doctrines.

#### *1. Substantial Performance*

The doctrine of “substantial performance” allows (even requires) judges to second-guess the parties and determine not whether the party has done what *it promised*, but whether it has done *what the other party needs*. Determining whether the party has done what it promised is a straight factual inquiry. Determining what the other party needs, on the other hand, invites judges who are often unfamiliar with commercial practices to remake the parties’ bargain based upon subsequent self-serving evidence produced by the parties long after the fact. It is possible that at the time the doc-

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332. Cf. *Hurst v. W. J. Lake & Co.*, 16 P.2d 627 (Ore. 1932).

trine first developed, judges and juries were able to determine, at least roughly, whether the value of a house was affected by the brand of pipe put in the walls of a residence.<sup>333</sup> But in the world of today—and still less of tomorrow—how can we expect a single judge supported by half a dozen lay people to determine whether a contractor whose human resources software installation has failed to comply with certain contract specifications is “close enough” to what was ordered to require the other party to pay?

Eliminating the doctrine of substantial performance would increase predictability and eliminate litigation costs. It would also have very little effect on parties for whom “close enough” actually is good enough. A party who wants to be paid even though it has installed the wrong brand of product can protect itself by inserting a clause that says “or equivalent.” Parties are free to include clauses that allow them to be paid even though there are defects. If parties choose not to indicate when they will be happy to agree to something less than what was bargained for, it is difficult to see why courts should bail them out, especially when it adds substantial transaction costs to the process.

## 2. *Impracticability and Frustration*

The second troublesome piece of the technique is the body of doctrine usually called “impracticability and frustration of purpose.” One of the key functions of contract is to allocate the unknown risks that lie in the future. Often, when the bets turn out badly, and either the cost of performance has drastically risen, or the value of the reciprocal performance has sunk, a party wants to get out of the deal. The party argues that performance is now “impracticable,” or that the return promise is so worthless that the purpose of the contract is “frustrated.”

Obviously, there are two broad categories of contracting parties. The first is made up of those who are deliberately using contracts to allocate risks—e.g., in a fluctuating market, specifying delivery of certain goods at a certain price in the future. It is critical to these parties that they get exactly what they bargained for, no matter how impracticable or frustrating it appears to the other party. The second is made up of those for whom that level of strictness is not required. It is relatively easy to tell these two categories of contracting parties apart. The second group routine-

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333. See *Jacob & Youngs v. Kent*, N.Y. 239, 129 N.E. 889 (N.Y. 1921).

ly includes *force majeure* clauses which allow parties to back out of the deal in the event of certain unforeseen problems like natural disasters, wars, shortages of raw materials, labor troubles, new government regulations, and so on. Where these clauses are part of the contract, courts should certainly give them full effect. But the first group, which specifies precise performance and does not provide for the disaster scenarios, ought to get what it bargained for. In a world where adding a *force majeure* clause is as simple as clicking a button on a smartphone, there seems little reason for courts to add another layer of difficulty for parties trying to enforce their agreements.

#### H. Capacity

Capacity to contract is an important concept, but it has very little practical significance in the contemporary world. Today it is relevant to only two classes of people, infants (people under the legal contracting age) and the mentally infirm. Neither group makes up a sizeable slice of actual contract litigation. As for infants, they engage in billions of dollars in commercial transactions daily.<sup>334</sup> Most of these are relatively small standardized transactions for goods and services and are virtually never litigated. Where there is litigation, it often seems to take the form of quasi-consumer-protection litigation, as courts rely on the doctrine to knock out particular provisions of contracts that seem unfair.<sup>335</sup> As for the mentally infirm, the issue of competence is raised relatively infrequently and is rarely successful. This is, in our view, probably because the doctrine generally does not provide relief if the transaction is on fair terms, the other party does not know of the infirmity, and it has already been performed.<sup>336</sup> In a world of anonymous transactions on standardized terms, there will be relatively few situations where one party is actually in a position to exploit knowledge of the other's mental defect.<sup>337</sup> As standardiza-

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334. See, e.g., *\$211 Billion and So Much to Buy— American Youths, the New Big Spenders*, HARRIS INTERACTIVE (Oct. 26, 2011), <http://www.harrisinteractive.com/NewsRoom/PressReleases/tabid/446/ctl/ReadCustom%20Default/mid/1506/ArticleId/896/Default.aspx>.

335. See, e.g., *Ex parte Odem*, 537 So.2d 919 (Ala. 1988) (holding that a minor was bound to pay for medical expenses incurred for her own minor child, but that she was not bound to specific provisions of the hospital contract that required her to pay the hospital's lawyers).

336. See REST. 2D, *supra* note 75, § 15.

337. One situation where there is still some scope for the doctrine to operate is in settlements of personal injury claims where the victim claims the other party took advantage

tion of processes and terms increases, the importance of the given individual's mental state is likely to decline.

### I. Damages

As we have noted above, the manner in which contract technique assesses damages is anachronistic. Legal scholars, applying the arcane set of rules, find it difficult to answer such simple questions as how much money a retail boat dealer loses if a customer backs out of a contract.<sup>338</sup> Thus, the assumption that this is simple for untrained lay people to figure out is probably misplaced. Outside the judicial system, parties in mediation and arbitration rely on the same kinds of sophisticated financial tools that any modern company uses to model and forecast its probable future, and have them evaluated by financial experts who can understand what they are being told. To the extent that the current technique allows for the wild range of speculative amounts that are inherent in the jury system, contracting parties will continued to prefer to opt out of the technique and the courts.

### CONCLUSION

In this paper we have been critical of contemporary contract technique and pessimistic about the role it will play in the future. But there are silver linings in this. First, contract law—like equity jurisprudence—is dying as a separate subject in part because issues that once were part of contract law have now become entirely new and distinct bodies of law, while other issues are sprouting. Regimes that mix the classic private-ordering orientation of contract law with a distinctive regulatory overlay have blossomed in areas as distinct as employment law, noted above, and closely held business enterprises.<sup>339</sup> To the extent that contract law is dying, it has given birth to new sprigs in other disciplines.

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of a mental infirmity. But even here, most claimants seem to lose. *See, e.g.*, *Marston v. United States*, 2012 U.S. Dist. LEXIS 141459 (D. Mass. Sept. 30, 2012) (finding worker who suffered on-the-job brain damage to have been competent to sign settlement agreement); *Adsit v. Wal-Mart Stores, Inc.*, 912 N.Y.S.2d 314 (Sup. Ct. App. Div. 2010) (finding injury victim who became light-headed when her oxygen tank stopped working during settlement discussions was nevertheless competent).

338. The permutations are set out in Melvin A. Eisenberg, *Conflicting Formulas for Measuring Expectation Damages*, 45 ARIZ. ST. L.J. 369 (2013).

339. *See, e.g.*, Del. Code § 18-1101 (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”); Myron T. Steele, *Freedom of Contract and Default Contractual*

Second, there are, in our view, a few areas described below where contract law—though probably not in its current form—will likely play a very important role in the years to come. That is the good news. The bad news is that these areas play very little role in the current contracts curriculum, and are unlikely to gain much traction in the years ahead. Still, whether this work is done inside contract technique or in some outside system of private ordering, these four areas will be important:

○ *Standardization of Agreements.* Lawyers are not the designers or architects of contracts; instead they are the engineers and construction workers who carry out the vision of the contracting parties. Those who are responsible for building and ensuring the safety of the airy skyscraper design, inked by architects, have developed standardized practices and procedures that help ensure that the structure does what it is intended to do.<sup>340</sup> Those who are responsible for creating the master agreements that will dominate the world of tomorrow are similarly in a position to develop agreements that are clear, efficient, and predictable. Pairing sophisticated legal judgment with modern technology offers the chance to create a world in which the same clause in the same contract means the same thing everywhere in the world. Part of this will be the critical function of standardizing contract language, so that contracting parties can reliably know in advance what they are agreeing to.

○ *Transaction Engineering.* In a world where more and more transactions, involving larger and larger sums, will be standardized, the ones that are not will become even more important. The success of a major deal relies on many things, both tangible and intangible, but the terms of the contract can be critical to the venture. This is another area where sophisticated legal knowledge and cutting-edge technology can be used to improve the process, yet relatively few scholars in the field of law even focus on this as a field of study, and even fewer law schools offer the kind of training that will be need-

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*Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221 (2009).

340. The manner in which builders use standardized, reliable process to translate the most innovative ideas into solid, practical buildings that do not collapse is outlined in ATUL GAWANDE, *THE CHECKLIST MANIFESTO* 48-71 (2009).

ed to engineer deals in the future. The chief assist that conventional contract technique can lend this process is to try to keep out of the way.

○ *Contracting System Design.* The growth of business-to-business contracting systems will only accelerate in the years ahead. Based on their training, lawyers are uniquely positioned to be able to imagine the areas of potential problems in advance, and to develop appropriate solutions. This will require a body of highly trained lawyers who are also technically competent to be involved in building these systems.

○ *Contract Assembly Software.* The world is moving to one where every individual transaction can be embodied in a well-drafted tangible agreement that the parties can rely on in planning for and carrying out their obligations. This will require not only the technological skills to allow for easy and simple assembly, but also the technical legal skill and judgment of lawyers involved in developing these programs. This is a particularly fertile area that few law schools are exploring.

The world of contract technique has had a dizzying run, from its birth at the dawn of the nineteenth century to it approaching extinction in the coming decades. It has helped to build one of the greatest engines of freedom and economic growth in history, and has contributed substantially to the development of the modern American state. The law owes a good deal to the traditional body of law known as “contracts,” as much, perhaps, as it owes to the traditional body of law known as “equity jurisprudence.” But neither independent body of law will likely be relevant to lawyers working a decade hence.

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The Violence Against Women Act and its Impact on  
the U.S. Supreme Court and International Law: A  
Story of Vindication, Loss, and a New Human  
Rights Paradigm

Cheryl Hanna\*

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I. INTRODUCTION – JANE CAMPBELL MORIARTY\*\*

Good morning and on behalf of Dean Ken Gormley and the faculty, I would like to welcome you to Duquesne University School of Law. We are so pleased you are able to join us for this conference commemorating the twentieth anniversary of the Violence Against Women Act.<sup>1</sup> This conference is one of many events being held

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\* Vice President and Professor of Law, Vermont Law School. This essay consists of two addresses delivered at a Continuing Legal Education program held at the Duquesne University School of Law on March 29, 2014. The program, entitled, *The Violence Against Women Act and Its Impact on the U.S. Supreme Court and International Law*, marked the twentieth anniversary of the Act. Dean Jane Campbell Moriarty of Duquesne University School of Law introduced Professor Hanna as the keynote speaker.

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1. Violence Against Women Act of 1994, 42 U.S.C. §§ 13925-14045d (2012).

across the state at every law school in Pennsylvania in conjunction with the Pennsylvania Coalition Against Domestic Violence.

The data about violence against women is disturbing and indeed, shocking. Every two minutes in America, someone is sexually assaulted.<sup>2</sup> Department of Justice statistics indicate that in 2012, more than 345,000 people suffered a rape or sexual assault, while over 1.3 million were the victims of domestic violence.<sup>3</sup> In Pennsylvania alone in 2013, approximately fifty women were killed by their intimate partners.<sup>4</sup> The effects of violence on women and families are often insurmountable: many suffer lifelong damage in the form of chronic pain, depression, anxiety, drug and alcohol abuse; the rate of drug and alcohol abuse is many, many times the number of those who have not been abused.<sup>5</sup> And the U.S. is not the most dangerous place for women; in other parts of the world, the numbers are far higher and the access to justice is far less. Yet many people are working at home and abroad to reduce the rate of violence against women, including Cheryl Hanna, our keynote speaker, who I am so pleased to introduce.

Cheryl Hanna is the Vice President of Enrollment Management, External Relations, and Communication and Professor of Law at Vermont Law School. She received her undergraduate degree from Kalamazoo and her J.D. from Harvard. She is the author of several articles relating to violence against women and girls and is the author of a widely used casebook entitled *Domestic Violence and the Law*.<sup>6</sup>

I have been reading Professor Hanna's work since 1998 when I came across an article called *The Paradox of Hope: Crime and Punishment of Domestic Violence*.<sup>7</sup> It was my favorite article at the time. It was the first article I selected for a book I had just

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2. See *How Often Does Sexual Assault Occur*, RAPE ABUSE & INCEST NATIONAL NETWORK, <http://www.rainn.org/get-information/statistics/frequency-of-sexual-assault> (last visited May 14, 2014).

3. Jennifer Truman, Lynn Langton, & Michael Planty, *Criminal Victimization, 2012*, U.S. DEPT OF JUSTICE 2 (Oct. 2013), <http://www.bjs.gov/content/pub/pdf/cv12.pdf>.

4. See 2013 Domestic Violence Fatalities in Pennsylvania, PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, [http://pubs.pcadv.net/website\\_Planning/WEB\\_TO\\_EDIT/LEARN%20MORE/FatalityReport\\_2013.pdf](http://pubs.pcadv.net/website_Planning/WEB_TO_EDIT/LEARN%20MORE/FatalityReport_2013.pdf) (last visited May 14, 2014).

5. *Domestic Violence and Substance Abuse*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/files/SubstanceAbuse.pdf> (last visited May 14, 2014).

6. ELIZABETH M. SCHNEIDER, CHERYL HANNA, EMILY J. SACK & JUDITH G. GREENBERG, *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* (3d ed. 2012).

7. Cheryl Hanna, *The Paradox of Hope: Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998).

begun editing called *Women and the Law*,<sup>8</sup> and it set the standard for all the other articles I included in the next decade. It's a fabulous piece of work by a wonderful scholar. Professor Hanna is speaking about violence against women and its impact on the U.S. Supreme Court and international law. It is a story of vindication, loss, and the human rights paradigm. Please join me in welcoming our keynote speaker, Vice President and Professor of Law, Cheryl Hanna.

## II. KEYNOTE SPEECH – CHERYL HANNA, PROFESSOR OF LAW, VICE PRESIDENT, VERMONT LAW SCHOOL

### A. *Introduction*

Thank you very much for having me. I'm delighted to be here. I am so appreciative of Jane for having me here. I can't believe it's been twenty years since the Violence Against Women Act passed, and I'm very grateful and humble to have been able to spend so much of my career working on issues of gendered violence. Despite all the work that's left undone, I think we should take a moment to pause and really be grateful for all the progress that's been made.

What I'd love to do is share with you a little bit of the history of litigation around domestic violence, particularly at the United States Supreme Court and in the international law to get up to the 50,000-foot view of what's happening and where I think we have yet to go. My work, as well as my work in gender and domestic violence, is as a constitutional scholar, so I am going to try to bring those two perspectives together.

I thought it would be good to start by reflecting back on the Violence Against Women Act, which, of course, passed in 1994. And I came across this quote from Senator Joe Biden, now Vice President Biden, who said:

Through this process I have become convinced that violence against women reflects as much a failure of our nation's collective moral imagination as it does the failure of our nation's laws and regulations. We are helpless to change the course of

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8. WOMEN AND THE LAW (Jane Campbell Moriarty ed., 2009).

this violence unless and until we achieve a national consensus that deserves our public outrage.<sup>9</sup>

So we can ask ourselves as we go forward, how can we achieve that goal? How do we create the kind of regulatory scheme and laws, as well as the public outrage, against violence against women and girls?

Since the Violence Against Women Act passed—and even before the act passed, but certainly since—at least before the Supreme Court (so again, at that 50,000-foot level), we have seen a significant number of cases involving violence against women: either cases that directly implicate questions of the Violence Against Women Act or related statutes, or cases involving violence against women more generally. If you look at the Supreme Court’s docket, perhaps with the exception of federal preemption, there has probably been no greater growth area in the Court than cases involving gendered violence. This term alone, the Court has three cases before it involving the Violence Against Women Act or domestic violence. One, *United States v. Castleman*,<sup>10</sup> just came down on Wednesday; the Supreme Court ruled that a state conviction for “misdemeanor domestic assault” qualifies as a “misdemeanor crime of domestic violence” under federal law, thereby prohibiting the defendant from having a gun.

When we think about domestic violence, we think, “Well, this is really an issue that’s happening in the local and state level. These are small cases.” But the issue is *not* about small cases. It’s about big cases. We’ve seen these cases since the Violence Against Women Act began to trickle up to the Court. The question I want to contemplate is a particular one, however. And that question is, to what extent should the State—the government, “We the People”—bear responsibility for and the burden of alleviating violence against women and girls? That’s a very important and particular question, because historically when we think about violence against women and girls, we often think of it as a private family matter that should be resolved between the parties. It’s historically been thought of as something that happens within the privacy

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9. MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 1 (Comm. Print 1993), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-legislative-history/violence-against-women-act-hearings-and-reports/vawa-related-hearings-and-reports-1993/Majority%20Staff%20Report-%20May%201993.pdf>.

10. 134 S. Ct. 1405 (2014).

of home or in the privacy of the family. The fundamental question that we have to wrestle with, both from the perspective of law and policy but also from a broader perspective of human rights, is: “What is the role of the state?” When I look back over the last twenty years, I want to ask that question with two different ideas: one, an idea of vindication, and one, an idea of loss.

### *B. Vindication*

Vindication. What does it mean to be vindicated? To be vindicated means not to be blamed; to not bear responsibility that was not yours in the first place. Vindication means that you are not the one who is at fault. When we think about violence against women as not just an intimate family problem or something that’s personally related, but when we think of it as part of the status of women and girls in the United States, I always like to go back to the Declaration of Sentiments<sup>11</sup> and the first Women’s Rights Convention at Seneca Falls in 1848.

For those who may or may not know, the Declaration of Sentiments was one of the first declarations about what women’s rights—and human rights—in the world and the United States ought to be. This is Elizabeth Cady Stanton and Lucretia Mott. One of the sentiments expressed at the Seneca Falls was to have women *vindicated*.

It says he has made her morally an irresponsible being; that she can commit any crime with impunity provided that it be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, with him becoming for all intents and purposes her master, and the law giving him the power to deprive her of liberty and to administer chastisement.<sup>12</sup>

When we think all the way back, when we think to violence against women emanating from the relationship of husband and wife—and the justification for non-state intervention was that men had to control their wives and that she could be chastised because of her behavior. She was blamed. The first women’s rights convention demanded she be vindicated.

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11. Elizabeth Cady Stanton, Women’s Rights Activist, Presentation to the Seneca Falls Convention: Declaration of Sentiments and Resolutions (July 19, 1848).

12. *Id.*

*C. Loss*

That's vindication. Let me talk about loss. Loss is the experience of having something taken from you or something destroyed. I don't use the term "loss" as in winning and losing, like in a court case. "*Loss*": something that is actually taken from you, something about your personage that is no longer your own. Whenever I think about loss and the law, I have to think about Myra Bradwell, who was the first woman who was actually admitted into the practice of law in the United States. Myra Bradwell's husband was an attorney, and she studied for the bar under him. At that time, you didn't have to go to law school. You could read for the bar, and she had spent many years helping her husband. She wanted to take the Illinois Bar exam, but the State of Illinois said that only men could be lawyers. Ultimately, her case went all the way up to the United States Supreme Court, and the Court upheld the Illinois ban, although eventually Illinois did allow her to become a lawyer. But when her case went to the Supreme Court, it refused to vindicate her, but instead imposed a loss. In a concurring opinion by Justice Bradley, he wrote, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for the many occupations of civil life. The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator."<sup>13</sup>

So again, when we think about vindication and loss in the context of gender violence and then gender discrimination, we have to think about not just that Myra Bradwell lost her case, but that she lost the right to full citizenship. She lost the right to pursue one's own occupation, to pursue one's own passion. I also am always struck about the tenacity of somebody to bring their case all the way to the United States Supreme Court and then lose—and I think that all women, particularly those who are attorneys, should reach back and thank Myra Bradwell for sticking to it and ultimately becoming the first woman to pave the way for the rest of us.

Let me tell you a couple of stories of both loss and vindication at the United States Supreme Court, and then some ultimate stories of vindication in the human rights context. In order to tell you

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13. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring in the judgment).

these stories, I need to start a little bit before the Violence Against Women Act was passed.

*D. Joshua DeShaney: Loss*

This is a story about Joshua DeShaney, a four-year old boy. Joshua's parents were divorced, and custody was awarded to his father in Winnebago, Wisconsin. There had been numerous allegations and documentation of child abuse of Joshua by his father. Joshua had been hospitalized. For a very short period of time he was in state custody, but he was returned to his father under state supervision. So his father was under state supervision, but Joshua was living with his father. And I could go through all the facts that would lead you to say you couldn't possibly believe that the State of Wisconsin and that County of Winnebago did nothing to protect Joshua, but let me just say that they did nothing to protect Joshua, even after having serious, serious evidence of ongoing child abuse.

One day, Joshua's father beat Joshua so badly that Joshua ended up severely disabled and was confined for the rest of his life in an institution for those with profound disability. Joshua's mother brought a lawsuit against Winnebago County, and she said, "You had an affirmative duty to protect Joshua, particularly because you knew his father was abusing him and you did nothing. You kept sending him back. You didn't follow up. You didn't do anything to remove him from the home. You essentially turned a blind eye. And because you knew, and because he was already in the system, you should have protected him." The legal theory in that case, for the lawyers in the room, was that the state had deprived Joshua of his liberty interest in bodily integrity, in violation of his rights under the substantive component of the Fourteenth Amendment's Due Process Clause, by failing to intervene to protect him against his father's violence.

The Court, in a 6-3 decision,<sup>14</sup> rejected that argument holding that it would have been one thing if Joshua was actually in a state facility. That would have created a special relationship if he was actually under state control. But the state otherwise has no affirmative duty to provide members of the general public with adequate protection from harm imposed by others. In other words, Joshua had no right—none of us has any right—to have the state

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14. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

protect us from the violence of private actors. If the State of Wisconsin wants to impose a secondary law that holds itself liable, it is certainly free to do that. But from the concept of rights and liberties that emanate from the Constitution, Joshua has no right to be protected by his state.

Now, Justice Blackmun is most famous for two things: one is authoring *Roe v. Wade*,<sup>15</sup> and a second is his dissent in *DeShaney*. Bill Clinton, by the way, read it at his funeral, so I thought I would share it with you as well. Justice Blackmun wrote:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about “liberty and justice for all,” that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.<sup>16</sup>

We have very different, contrasting views about what the affirmative state duty is. By a margin of just two votes, the Supreme Court’s jurisprudence set off on the path away from affirmative state duties, away from the obligations of the state, and toward the continued privatization of violence.

That’s not to say that the entire Supreme Court history on violence against women has been one of loss. And so let me talk briefly about vindication. I couldn’t help but do this because I’m in Pennsylvania and, you know, there are many special things about Pennsylvania. This is the birthplace of *Planned Parenthood v. Casey*,<sup>17</sup> and it is also the first state that had a statewide domestic violence coalition. I don’t know if you know that, but Pennsylvania was the first state that had a *statewide* coalition, which, I think, actually plays very importantly into this decision.

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15. 410 U.S. 113 (1973).

16. *Id.* at 213 (Blackmun, J., dissenting) (internal citation omitted).

17. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).



*E. Planned Parenthood v. Casey: Vindication*

I like to collect cartoons about the Supreme Court. This one says, “Senate Judiciary Committee hearing”; and that’s Senator Dianne Feinstein. This is during Judge Alito’s confirmation hearings and she says, “Judge Alito, I need to ask you some questions about your views on women’s rights.” And Justice Alito responds, “Do you have your husband’s permission to do that?” Now, why is that funny? Or *not* funny, but why do we laugh? Because Pennsylvania had passed a law regulating abortion in 1992, so this case went up to the Court in 1992, just a few years before the Violence Against Women Act passed. This was part of the reaction to *Roe v. Wade* and an attempt on the part of the states to limit abortion rights. And so one of the provisions in Pennsylvania’s law was that in order for married women to have an abortion, they had to *notify* their husbands, which essentially acted as a permission. One of the things I think is interesting about Pennsylvania and its history is that one of the arguments against that provision was created by the Pennsylvania Coalition Against Domestic Violence, and the argument they submitted in an amicus brief was that the notification requirement would harm women who are in abusive relationships because of the risks involved in notifying their husbands.

This is the first time, by the way, that I can document that the Supreme Court actually acknowledged not only the *existence* of domestic violence, but also its impact on broader public policy. So it was very significant. Now, of course, because it was Pennsylvania, that case came out of the Third Circuit Court of Appeals, where Judge Alito was serving at the time, and he upheld the notification provision despite the arguments to the contrary. That’s just a little Supreme Court “back history.”

In the plurality opinion, the Court acknowledged there are millions of women in this country who are victims of physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. That’s now the law. The Supreme Court has said that because that provision can affect significant numbers of women who are victims of gendered violence, you cannot require the notification provision. This opinion is notable because it suggests that she is not to be blamed and that the state bears some responsibility when it crafts laws and policies, to take into account the reality of gender violence. Yet, *Planned Parenthood v. Casey* is one of the

few instances of true vindication, I believe, in Supreme Court jurisprudence.

*F. Christy Brozankala: Loss*

So let me tell you a few more stories of loss, including a story about one of the provisions in the Violence Against Women Act when it was originally passed. The Violence Against Women Act, as you know, does many, many things. It is primarily a funding statute. It provides money for organizations and states to engage in different kinds of strategies to curb violence against women, including many grants for coordinated community responses. It does provide for some other kinds of federal regulation. In the original bill was what was called a “civil rights remedy,” similar to civil rights remedies that are commonplace in the context of discrimination on the basis of race. This was about a civil rights remedy on the basis of *gender*. What it said is that, if I am victimized by somebody who is motivated by gender bias, I can take my case directly to federal court, and I can do so because we know that the states have turned a blind eye to crimes like domestic violence and sexual assault. The states have allowed violence against women to occur, and so you can think about this as parallel to civil rights in the racial context. Because the states have done nothing, the federal government is now going to step in and ensure that victims have a legal remedy for the violence. They can sue their assailants in federal court.

Christy Brzonkala was a student at Virginia Polytechnic Institute, a state university. In her freshman year, she was sexually assaulted and raped by two students who were varsity football players. She reported the rapes and the university held disciplinary proceedings. The students admitted to having sexually assaulted her. One was temporarily suspended but then the university reversed that punishment. Nothing happened to the other student, and Christy eventually dropped out of school, and sued her assailants and the school under the Violence Against Women Act. The United States joined her in the lawsuit against the state, so it became a federal case.<sup>18</sup>

The United States Supreme Court struck down the civil rights provision of the Violence Against Women Act on two theories. First was that Congress lacked the authority to enact the provi-

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18. *United States v. Morrison*, 529 U.S. 598 (2000).

sion under the Commerce Clause because there was not regulate activity that sustainably affected interstate commerce. The Court reasoned that if you make *this* a federal crime, everything becomes a federal crime. The Court essentially said, “Don’t make a federal issue out of violence against women.” When I teach this case, my students don’t even realize that it has anything to do with violence against women. They think it all has to do with congressional power and when the federal government can regulate noneconomic behavior. I find this notable because the issue of violence is deeply obscured by the Court’s discussion of federalism. The inability of Christy to seek vindication against her assailants is loss.

The second theory was that Section 5 of the Fourteenth Amendment authorizes Congress to enforce legislation to guarantee that no State shall deprive any person life, liberty, property, or equal protection of the law. But the Court again said that the federal government cannot regulate private actors. It can only regulate states. Because it was two private individuals who raped Christy Brzonkala, there’s no duty; there’s no way the state can get involved here, because this is about two people and not about any affirmative government duty. This is loss. Not just a loss in court, but the loss of Christy Brzonkala’s ability to have her own integrity, to pursue her profession and her passions. There’s no way for her to remedy the wrong that is done to her. The Court won’t do anything. The school won’t do anything, and she has no ability to go to the federal government for her remedy. She has no way to enforce her integrity, her personhood. This case was in 2000 and it was a big defeat. This is the biggest blow to the Violence Against Women Act because absent that federal remedy women often have nowhere else to go.

#### G. *Castlerock v. Gonzales: Loss*

That leads us to *Castle Rock v. Gonzales*.<sup>19</sup> Jessica Gonzales, now Jessica Lenahan, was married to a man named Simon Gonzales, who had serious mental health issues and serious issues around being psychologically abusive to her and their three girls. As part of her splitting up with Simon, Jessica got a restraining order, which many of us are familiar with, and Colorado requires the state to enforce restraining orders. It says you *must* arrest.

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19. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

The order allows Simon to have some very limited visitation with the three girls at very defined times. The girls are outside playing one afternoon. They don't come in. Jessica realizes that Simon has kidnapped them. He actually kidnapped a friend, too, and then let the friend go. That's always a part of the story that people don't hear about.

Jessica Gonzales begins calling the Castle Rock Police station, saying, "My husband has taken the girls. You need to go get him. I have a restraining order. This is not part of the visitation. I'm very concerned." She called seven times to the police station and visited twice, each time saying, "I'm concerned for their safety." She had heard from Simon. He had taken them to an amusement park. She said, "Go get them." And the Castle Rock Police's response, by and large, was, "Look, they're with their father, what could be safer?"—despite the restraining order. And they said, "Look, he'll bring them back. Don't worry. This is a private family dispute, not one which, as the state, we're going to be involved in." Around three o'clock in the morning, Simon Gonzales showed up at the Castle Rock Police Department and began opening fire with the gun he had bought earlier that day. The police returned fire, and Simon Gonzales was killed. When they looked in the truck, the three girls were dead inside. Originally, the police had said that the girls were killed by their father earlier that evening, although that evidence is inconclusive, and we don't know whether, when the police returned fire, they were the ones who killed the girls.

Jessica Gonzales sued the Castle Rock Police Department, and she did so under two theories. One was the theory from Joshua DeShaney's case, which is, "I have a right to be free from violence, and you had a duty to protect me under my liberty interest." But creative lawyers knew that that was not likely to fly because of *DeShaney*, so they came up with a much more novel theory. That novel theory was that she had a property interest in that restraining order. If the state was going to take that away, if the police weren't going to enforce it, they had to tell her that so she could have made other arrangements in her life. Because she relied on that property interest, if they were not going to do what they said they were going to do, she needed to be told that.

The Supreme Court ultimately disagreed with her. It said that, essentially, a restraining order was just a piece of paper. Even though the word "must" was on the restraining order, the Court said that there's no constitutional right to be protected from pri-

vate violence and no constitutional right to have the state order enforced.

Advocates working in the field of domestic violence know that the restraining order is often the first step toward a woman's safety. If there's no ability to have it enforced, it then really does just become a piece of paper, and we are all left to our own devices to protect ourselves. That is where this case could have ended. It could have ended in loss, if not for so many wonderful advocates, including a woman named Carrie Bettinger-Lopez, who is a faculty member now at the University of Miami. She and her law students got together and they said, "There must be a way to remedy this. This is so bad. This is so wrong. There must be a way to vindicate the loss." And so they brought the case to the Inter-American Commission on Human Rights.

#### *H. International Human Rights Cases: Vindication*

But before I get to that, let me talk about a couple of cases that happened in the interim. As Jessica Gonzales's case is now being reframed by lawyers and law students as an international human rights case, other cases around the world are tracking a similar path. There were two cases that happened between Jessica Gonzales's case at the Supreme Court and the ultimate decision in that case that I just want to briefly share with you. One is called the *Cotton Field Case*<sup>20</sup> and one is *Opuz v. Turkey*.<sup>21</sup>

Let me start with the *Cotton Field Case*. In Juarez, Mexico, for over fifteen years, significant numbers of women and girls had either disappeared or been murdered—literally hundreds of them. Juarez, Mexico is just over the Texas border, and the State of Mexico did nothing to stop it. *Hundreds* of women and girls. Finally, advocates brought a case to the Inter-American Court of Human Rights. Mexico, as well as many North and South American countries, are signatories to an international treaty<sup>22</sup> that provides that states have an affirmative duty to provide for the life of their citizens and an affirmative duty to end gender-based discrimination.

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20. González v. Mexico (*Cotton Field*), Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf).

21. *Opuz v. Turkey*, \_\_\_ Eur. Ct. H.R. \_\_\_, App. No. 33401/02 (2009), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{"itemid":\["001-92945"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{).

22. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36.

In that case, the Inter-American Court of Human Rights said that Mexico was in violation of its treaty obligations. It was in violation of international human rights law for failure to investigate, for failure to intervene, and for failure to have policies that were geared toward protecting women and girls. This was critical because international human rights tribunals were starting to say, “The state has to do something. It just can’t simply turn a blind eye when you have so many women and girls being victimized by gender-motivated violence.”

At just about at the same time, interestingly enough, there was a case involving Turkey at the European Court of Human Rights.<sup>23</sup> The United States is not a signatory to the European Declaration of Human Rights, which is a compact among the European nations proclaiming their own human rights obligations. The case involved Nadia Opuz. She was in a very abusive relationship. Her husband not only beat her and her children, but also her mother. And she had gone to the police many times seeking remedy. Sometimes they tried to prosecute him, but sometimes Nadia did not go forward with the case.

Sometimes she would seek state help; sometimes she wouldn’t. Eventually, he killed her mother, for which he was sentenced to two years, when Nadia was attempting to leave him. He beat Nadia extremely badly. So victims’ rights advocates brought her case to the European Court of Human Rights, saying that Turkey also had an affirmative duty to protect her. What Turkey said, which I thought was very interesting, was that, “Well, she didn’t want our help sometimes. So, if she doesn’t want our help, there is nothing we can do about that.” To which the Court responded, “The reason she doesn’t want your help is because your justice system is so screwed up. It doesn’t respond to the victims of gender violence.” The husband only got two years. The legal system is set up to condone, and in some ways even to invite, violence against women and girls. Therefore, you, the State, have failed in your affirmative duty to protect this woman and her family. And therefore, you, State, are responsible for this.

### *I. Jessica (Gonzales) Lenaham: Vindication*

Those two cases came out at the same time Jessica Gonzales, by then remarried and using the name of Jessica Lenaham, brought

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23. *Opuz v. Turkey*, \_\_\_ Eur. Ct. H.R. \_\_\_, App. No. 33401/02 (2009).

her case against Castle Rock to the Inter-American Human Rights Commission. It was a long, long road. Jessica never even got to testify because everything was decided on motions in the American system. So the first time she actually gets to tell her story is to the Commission. The United States is not a signatory to many human rights documents, but it is a signatory to the American Declaration<sup>24</sup> and while the Commission doesn't really have enforcement power, it does have the power of persuasion. The Commission concludes that even though the state recognizes the necessity to protect Jessica, and her daughters Leslie, Katheryn, and Rebecca Gonzales from domestic violence, it failed to meet this duty with due diligence. The state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic violence by adequately and effectively implementing the restraining order issued. This failure to protect constituted a form of discrimination in violation of Article Two of the Declaration. And that discrimination was gender discrimination. It's a failure to protect Jessica and her children. It's not about a private family matter or Simon having mental illness that should be treated privately. This was really about fundamental, structural gender discrimination that was embodied in the state's failure to act with due diligence and to do the right thing on behalf of the victims.

*J. Beyond Vindication and Loss to a New Human Rights Paradigm*

When we think about human rights, we often think about it being a problem in other countries, that human rights are somewhere across our borders, and that in the United States, we don't have human rights problems. This is the first time an international court has in essence said, "You know what, United States Supreme Court? You know what, United States government? You are now in violation of the human rights of your own citizen because you have failed to protect them from gendered violence." The Inter-American Commission ultimately suggested that we reimagine the future of VAWA within the context of broader hu-

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24. *American Declaration on the Rights and Duties of Man*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (Apr. 1948), <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>. Although the declaration is not a legally binding treaty, the jurisprudence of both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights holds it to be a source of binding international obligations for the OAS's member states.

man rights principles. Indeed, the Special Rapporteur on Violence Against Women of the United Nations, concluded, at the close of a recent visit to the United States, that:

Although Violence Against Women Act's intentions are laudable there is little in terms of actual legally binding federal provisions which provide substantive protection or prevention for acts of domestic violence against women. The challenge has been further exacerbated by jurisprudence emanating from the [United States] Supreme Court. The effect of such cases as *DeShaney*, *Morrison* and *Castle Rock* is that even where local and state police are grossly negligent in their duties to protect women's right to physical security, and even where they fail to respond to an urgent call for assistance from victims of domestic violence, there is no constitutional or statutory remedy at the federal level.<sup>25</sup>

This should give us pause. Twenty years after the Violence Against Women Act, we still have failed to provide victims federal remedy for gendered violence. We have failed to insist that we impose upon ourselves, as a nation, the duty to protect women and girls from gendered violence. So with every challenge, there is now an opportunity to continue to do so. The next task is to come up with creative, thoughtful ways in which we can institutionalize the idea of affirmative state duties, both at the local level and at the federal level, beyond what the Supreme Court has limited our ability to do.

For those who work in this field, it's hard work. There are attorneys who take domestic violence cases and the people who work in shelters, and the people who are on the front lines every day. It's difficult work. You don't get the recognition that is well-deserved. So now when people ask what kind of work I do, what does my scholarship involve, I've stopped saying I do women's rights or violence against women, and I just say, "I'm a human rights worker. I work in human rights in the United States." That connects each person who's working on issues of gendered violence to a much broader international community of people.

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25. Press Release, Office of the High Commissioner for Human Rights, Special Rapporteur on Violence against Women Finalizes Fact Finding Mission to the United States of America, U.N. Press Release (Feb. 8, 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10715>.



This community is connected much more deeply to the human rights movement than anything else.

We now have a significant number of international cases that reframe domestic violence as a human rights issue. This opens up tremendous opportunity for creative lawyering, for creative solutions. Go back to that initial goal that Senator Biden, now Vice President Biden announced at the passage of VAWA. He called on our sense of moral outrage. And that moral outrage ought to be directed at our own unwillingness to share responsibility, to vindicate. It should be our moral responsibility to vindicate.

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## Saint Thomas More: Equity and the Common Law Method\*

William D. Bader\*\*

Saint Thomas More was born in London on Milk Street on February 7, 1478.<sup>1</sup> Ironically, twenty yards down the street stood the birthplace of Saint Thomas Becket, and the new baby probably was named in his honor.<sup>2</sup> Saint Thomas Becket, also known as Saint Thomas of Canterbury, was an Archbishop of Canterbury who disagreed with King Henry II over the rights of the Church. Becket was murdered by the King's followers in Canterbury Cathedral in 1170. Thomas' father, John More, was a successful lawyer who was destined to cap his own career with appointments to the Court of Common Pleas in 1518 and the Court of King's Bench in 1520. He wanted Thomas to follow in his professional footsteps, and he was a significant influence on his son.<sup>3</sup>

Thomas spent two successful years at Oxford University from 1492 to 1494. He then entered New Inn in London to commence the study of English common law.<sup>4</sup> From there he entered Lincoln's Inn to train as a barrister at common law.<sup>5</sup> He distinguished himself at Lincoln's Inn and was admitted as a barrister in 1501.<sup>6</sup> According to Lord Campbell, More pursued religious studies during and after his legal education and seriously considered the priesthood, but he decided to remain a layman, marry, and pursue legal practice.<sup>7</sup>

Thomas More, according to Campbell, "rose very rapidly at the bar, and was particularly famous for his skill in international

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\* This essay is dedicated to Pearl.

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1. PETER ACKROYD, *THE LIFE OF THOMAS MORE* 6 (Nan A. Talese, Doubleday 1998).

2. *Id.* at 7.

3. J.A. GUY, *THE PUBLIC CAREER OF SIR THOMAS MORE* 3 (Yale University Press 1980).

4. *Id.*

5. 2 LORD CAMPBELL, *LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND* 6 (Frederick D. Linn & Co. 8th ed. 1880).

6. Brian M. Murray, *Chicken Soup for the Legal Soul: The Jurisprudence of Saint Thomas More*, 51 J. CATHOLIC LEGAL STUD. 145, 147-50 (2012).

7. CAMPBELL, *supra* note 5, at 6-8.

law.”<sup>8</sup> He was in great demand as court counsel among those who had major cases.<sup>9</sup> More’s high standing at the bar was certainly enhanced by his erudite common law lectures and administrative leadership at Lincoln’s Inn.<sup>10</sup>

More proceeded to serve in a series of lower judicial, political, and administrative positions at the behest of King Henry VIII. He reached his judicial apex in 1529 when the King appointed him to replace Cardinal Wolsey as Lord Chancellor of England.<sup>11</sup> Until King Henry VIII’s appointment of Lord Chancellor Thomas More, a lay Catholic and common lawyer, the Court of Chancery, the highest equity court in England, had always been run by a Lord Chancellor who was a clergyman. All these Lords Chancellor, with the exception of More’s predecessor, Cardinal Wolsey, had formal training in the civil or canon law.<sup>12</sup>

Thomas More’s chancellorship has come to be defined by his refusal to accept Henry VIII as head of the Catholic Church, his resulting martyrdom at the hands of the King in 1535, and his consequent canonization. Unfortunately, his significance as the first judge to actively encourage the broad use of equity principles in deciding common law cases has been eclipsed. Most of his opinions are no longer extant,<sup>13</sup> but the first biography of More by his son-in-law, lawyer William Roper, is considered authoritative, indeed “an exquisite biography, which remains today one of the choice monuments of English literature.”<sup>14</sup> It provides an invaluable view of More’s legal career. According to J.A. Guy, all subsequent accounts are derivative.<sup>15</sup>

More, a leader of the common law academy, the Inns of Court, introduced a common law perspective to the high court of equity.<sup>16</sup> This essay suggests that common lawyer More, through his two and one-half years of service as Lord Chancellor, planted a seed that was to flower much later into a “new” perspective on common

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8. *Id.* at 9.

9. EDWARD FOSS, A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND FROM THE CONQUEST TO THE PRESENT TIME: 1066-1870 457 (1870).

10. ACKROYD, *supra* note 1, at 125-26, 152-53.

11. Murray, *supra* note 6, at 150.

12. J. H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 80 (1986).

13. JOHN C. H. WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 200 (Sheed and Ward 1955).

14. SIR D. PLUNKET BARTON, THE STORY OF THE INNS OF COURT 296 (The Houghton Mifflin Co. 1987) (1928).

15. GUY, *supra* note 3, at 80.

16. BAKER, *supra* note 12, at 80.

law methodology in the common law courts themselves—a perspective that harks back to the original meaning of the early common law. Specifically, More construed equity to be inherent to the common law.

The concept of equity developed because the general character of a law may do an injustice when applied to certain specific, unusual cases. The king's conscience, informed by Judeo-Christian values and reason, served to loosen the legal precedents' interpretation to do justice in such cases.<sup>17</sup> During the early Middle Ages, when leading English jurist Henry de Bracton wrote of the role of the canon law of the Church and the inception of English common law, laws were relatively informal and their enforcement was more personally connected to the king. Thus equity—the king's conscience—could be exercised by the king's court at common law. As the Middle Ages progressed, however, the administration of justice became more bureaucratic and removed from the king personally, and the common law became more rigid to provide predictability and order in an increasingly large and complex society. At that time, justice in some individual and difficult cases was administered by a separate ecclesiastical chancellor through equity completely outside, and in mitigation of, the common law.<sup>18</sup>

By the time of Thomas More's ascendancy to the Chancellorship, a bitter rivalry had developed between the judges of the common law courts and the Lords Chancellor. Lord Chancellor More continued his predecessors' practice of issuing injunctions to block the harsh or inappropriate judgments of the common law judges.<sup>19</sup>

More handled many commercial suits as Lord Chancellor, actions which clearly illustrate the contrasting approaches of the contemporary common law and equity. The former demanded a strict construction of statutory and precedential text, while the latter permitted a loose and more abstract interpretation. For example, equity intervened with an injunction when a creditor took undue advantage of his legal position at common law to gain unjust enrichment.<sup>20</sup> J.A. Guy describes the typical situation eliciting the Lord Chancellor's equitable injunctive intervention:

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17. W.S. HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW 178-79* (Oxford University Press 1925).

18. *Id.*

19. WILLIAM ROPER, *THE LIFE OF SIR THOMAS MORE* 42 (S.W. Singer ed., C. Whittingham 1822) (1626).

20. GUY, *supra* note 3, at 70.

The most common circumstance was that in which a debtor by obligation paid his debt on his day, but failed to take either written acquittance or the return of the obligation which bound him. Notwithstanding his payment, the creditor then brought an action of debt on the obligation, and the debtor could have no remedy at common law. By [common] law, the debtor was required to pay the money again.<sup>21</sup>

The common law judges were made jealous by these incursions into their turf and were vocal about their dissatisfaction over common lawyer More's Chancery injunctions. This inspired More, who was directly confronted with these complaints, to invite the king's common law judges to a dinner in the council chamber at Westminster in order to discuss the controversy.<sup>22</sup>

Roper reveals that after dinner, More proceeded to explain his reasoning for every injunction he had ever issued against a common law judgment. He illustrated how each injunction was consistent with the just and reasonable intent of the law. Surprisingly, the common law judges confessed they would have acted in the same manner as More if they had been Lord Chancellor. Lord Chancellor More then told the assembled judges that, according to his understanding of the common law, they had the same discretion under the common law to mitigate the rigors of the legal text by discerning its equitable intent on a case-by-case basis. More challenged the common law judges to adopt this equitable perspective, which would make his injunctions unnecessary. The judges, however, declined More's offer.<sup>23</sup> Lord Chancellor More confided to Roper: "I perceive, son, why they like not so to do. For they see that they may, by the verdict of the jury, cast off all quarrels from themselves upon them; which they account their chief defence . . . ."<sup>24</sup>

Despite the fact that his view of equity at common law was not immediately accepted, Thomas More was a legal prophet. He realized that the common law method allowed, indeed mandated, an equitable calculus. A "loose construction," if you will, was necessary at times to discern the common law's just and reasonable intent in a particular case. At the same time, More harks back to the early and original common law of Bracton.

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21. *Id.*

22. ROPER, *supra* note 19, at 43.

23. *Id.*

24. *Id.* at 44.

The law has progressed along the methodological lines of Thomas More's prescriptions. J.H. Baker notes the steady progression of equitable thinking within the common law courts,<sup>25</sup> which was "devised by judicial discretion . . . to make the regular law function more effectively."<sup>26</sup> Nevertheless, today, "strict constructionists," specifically, the "legal textualists"<sup>27</sup> (not to mention their quasi-judicial analogues, the "zero tolerance"<sup>28</sup> adherents), reject this relatively flexible and authentic perspective. They threaten to make our legal culture unfair and brittle. The legal textualists take a highly formal and narrow approach to judicial interpretation, essentially using legal text as the only touchstone. Justice Scalia and Professor Garner explain:

The interpretive approach we endorse is that of the 'fair reading': determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued . . . the purpose [of the text] is to be gathered only from the text itself.<sup>29</sup>

The case of *Olmstead v. United States*<sup>30</sup> provides an excellent modern illustration of legal textualism as compared to the loose and equitable construction at law advocated by Thomas More. *Olmstead* was convicted of violating the National Prohibition Act.<sup>31</sup> Evidence seized through the use of what is now an illegal wiretap was crucial to his conviction and the main basis of his appeal.<sup>32</sup> Chief Justice Taft wrote a strictly construed, textualist opinion for the Court, maintaining that conversations are not protected by the Fourth Amendment because the amendment's text

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25. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 202-04 (4th ed. 2007).

26. *Id.* at 204.

27. See ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) for a brilliant defense of textualism.

28. "Zero tolerance" policies are disciplinary rules or codes, usually in schools, that are strictly construed to the letter or text regardless of a violator's intent or the broader context of a violation. For example, an eight year old student was banned from wearing a Denver Bronco's jersey with Peyton Manning's number eighteen; the school had prohibited attire containing gang associations and claimed the number eighteen (and other numbers) were used by local criminal gangs. See JOHN W. WHITEHEAD, A GOVERNMENT OF WOLVES: THE EMERGING AMERICAN POLICE STATE 188-89 (2013).

29. SCALIA & GARNER, *supra* note 27, at 33.

30. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

31. *Id.* at 456.

32. *Id.* at 456-57.

only specified protection of “papers and effects.”<sup>33</sup> Taft again pointed to the words of the Fourth Amendment as protecting “houses” and found no violation because the agents had not entered the defendant’s house.<sup>34</sup>

In dissent, Justice Brandeis took a looser, more abstract and equitable approach.<sup>35</sup> He would have ruled for Olmstead, finding a violation of his Fourth Amendment general right to privacy rather than limiting protection to material things.<sup>36</sup> Such textualism, Brandeis wrote, would miss the broader meaning of the Fourth Amendment and condone governmental law breaking.<sup>37</sup> In short time, Brandeis’s dissenting interpretation became the prevailing approach of the Supreme Court.<sup>38</sup> Likewise, much to the dismay of textualists, most modern judicial opinions reflect a flexible adherence to precedent broadly and justly construed.<sup>39</sup> In essence, Saint Thomas More’s active encouragement of the broad use of equity principles in deciding common law cases has carried the day.

The legal textualists are concerned primarily about the abuse of judicial discretion or so-called “legislation from the bench.” They envision an ideal judiciary as a passive branch of government that is essentially subservient to the democratic branches.<sup>40</sup> They are not mindful that respect for equitably construed precedent, the common law’s original cornerstone principle, acts as an inherent check on the reckless judicial activism they fear while permitting the law to evolve justly to meet social change.<sup>41</sup> They do not appreciate, as Saint Thomas More did, the importance of the strong and equitable common law judge in preventing tyranny and doing justice.

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33. *Id.* at 465.

34. *Id.* at 466.

35. *Id.* at 471-85 (Brandeis, J., dissenting).

36. *Id.* at 478-79.

37. *Id.* at 483.

38. For examples of how the approach has been used in the Fourth Amendment context, see *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States* 389 U.S. 347 (1967).

39. See William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 43, 49 n.83 (2011).

40. SCALIA & GARNER, *supra* note 27, at 3 & n.80.

41. See Bader & Cleveland, *supra* note 39, at 40-41.



# A Wolf in Sheep's Clothing: Pennsylvania's Oil and Gas Lease Act and the Constitutionality of Forced Pooling

*Russell Bopp*\*

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## I. INTRODUCTION

The Omnibus Amendments to Pennsylvania's Oil and Gas Lease Act<sup>1</sup> enjoyed an expedited path through the legislative process. The bill was passed by the Pennsylvania General Assembly on June 30, 2013,<sup>2</sup> signed by Governor Corbett on July 9, 2013,<sup>3</sup> and

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1. S.B. 259, 181st Leg., Reg. Sess. (Pa. 2013).

2. Senator Gene Yaw, *Senate Bill 259 Information History*, PENNSYLVANIA STATE SENATE, [http://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?syear=2013&sind=0&body=S&type=B&bn=259](http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2013&sind=0&body=S&type=B&bn=259) (last visited Feb. 27, 2014).

3. Signing Statement, OFFICE OF THE GOVERNOR: TOM CORBETT (July 9, 2013).

went into effect on September 7, 2013.<sup>4</sup> Generally speaking, the bill contains two pertinent provisions: royalty payments and forced pooling. The royalty payment provision guarantees landowners a one-eighth royalty payment, and the forced pooling provision adds a default provision that permits horizontal drilling in existing landowner-operator leases.<sup>5</sup> In response to the newly-passed Oil and Gas Lease Act—and a mere thirteen days after Governor Corbett signed it—EQT filed suit in the Court of Common Pleas of Allegheny County on July 22, 2013, asserting its right to engage in horizontal drilling where not expressly prohibited under existing leases.<sup>6</sup>

Part II of this article explains the historical background of oil and gas development in Pennsylvania and the General Assembly's attempt to regulate the industry through the Oil and Gas Lease Act. Part III evaluates the potential constitutional challenges to the forced pooling provision of the Oil and Gas Lease Act under the Pennsylvania and United States Constitutions. Briefly stated, the forced pooling provision implicates three constitutional provisions: (1) the Contracts Clause, (2) the Due Process Clause, and (3) the Takings Clause. Although each of these challenges requires an independent inquiry, the primary basis for a finding of unconstitutionality hinges upon whether the statute applies retroactively. The principal conclusion of this article is that the retroactive application of Pennsylvania's Oil and Gas Lease Act, which adds default provisions allowing horizontal drilling to existing leases, violates the Contracts Clauses, but not the Due Process Clauses or Takings Clauses, of the Pennsylvania and United States Constitutions. Part IV explores a recent case litigating these issues in the Allegheny County Court of Common Pleas.<sup>7</sup>

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4. S.B. 259, 181st Leg., Reg. Sess. (Pa. 2013).

5. 58 PA. CONS. STAT. ANN. §§ 33.3, 34.1 (West 2013).

6. Complaint at 12, *EQT v. Opatkiewicz*, No. GD-13-13489 (C.P. Allegheny Cnty. July 22, 2013). EQT Corporation is headquartered in Pittsburgh, Pennsylvania and is one of the nation's largest natural gas producers operating in the Appalachian basin. DAVID L. FORGES, UNITED STATES SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, NATURAL GAS ROUNDTABLE ON SHALE DEVELOPMENT: ENVIRONMENTAL PROTECTION AND BEST PRACTICES 1-5, 2 (May 23, 2013).

7. *EQT v. Opatkiewicz*, No. GD-13-13489 (C.P. Allegheny Cnty. July 22, 2013).

## II. HISTORICAL BASIS OF THE PENNSYLVANIA OIL AND GAS LEASE ACT

Pennsylvania has a decorated heritage in the oil and gas industry stretching back to the “Drake Well” drilled in Titusville in 1859.<sup>8</sup> As the first liquid oil well in the United States, the Drake Well sparked an energy revolution in Pennsylvania and throughout the country.<sup>9</sup> Within forty years of the Drake Well, Pennsylvania produced one-half of the world’s oil resources.<sup>10</sup> This level of production proved unsustainable, however, and Pennsylvania’s energy industry turned its focus toward the state’s other abundant natural resources: coal and natural gas.<sup>11</sup> Although coal established itself as the bedrock of energy production in Pennsylvania,<sup>12</sup> the natural gas industry began to develop in 1878 with the drilling of the “Haymaker Well,” the first natural gas well in Pennsylvania.<sup>13</sup> Over the past 135 years, the natural gas industry has grown consistently and provided significant infrastructure for economic growth in Pennsylvania.<sup>14</sup> Despite this growth, however, Pennsylvania was unable to regain its former status as the center of energy development in the United States.<sup>15</sup> The Marcellus Shale Formation’s unconventional natural gas resource provided the impetus for Pennsylvania to rediscover its oil and gas heritage and reestablish its status as an energy leader in the United States.

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8. John M. Smith, *The Prodigal Son Returns: Oil and Gas Drillers Return to Pennsylvania with A Vengeance Are Municipalities Prepared?*, 49 DUQ. L. REV. 1, 3 (2011) (The well, named after Edwin Drake, was originally referred to as “Drake’s Folly” based on the popular notion that it would fail).

9. Kevin L. Colosimo & Daniel P. Craig, *Compulsory Pooling and Unitization in the Marcellus Shale: Pennsylvania’s Challenges and Opportunities*, 83 PA. B.A. Q. 47, 48 (2012).

10. Smith, *supra* note 8.

11. Colosimo, *supra* note 9.

12. *Id.* (“Pennsylvania relies on coal to produce nearly one-half of its net electricity, making it one of the largest coal-consuming states in the country.”).

13. Ross H. Pifer, *What A Short, Strange Trip It’s Been: Moving Forward After Five Years of Marcellus Shale Development*, 72 U. PITT. L. REV. 615, 619 (2011). The “Haymaker Well” discovered natural gas unintentionally while drilling for oil; some other unintentional discoveries include: potato chips, penicillin, and corn flakes. Elaine Wong, *Inventions That Were Accidents*, FORBES, (Dec. 23, 2010, 4:30 PM), <http://www.forbes.com/2010/12/23/ten-accidental-inventions-leadership-cmo-network-common.html>.

14. Pifer, *supra* note 13.

15. Smith, *supra* note 8, at 3-4.

Marcellus Shale is a layer of sedimentary rock containing pores of natural gas, primarily methane and propane.<sup>16</sup> Similar to other fossil fuels, Marcellus Shale was formed from the concentration of organic materials under extreme heat and pressure over an extended period of time.<sup>17</sup> The Marcellus Shale Formation is located in the Appalachian Basin, a stretch of land west of the Appalachian Mountains running from New York to West Virginia.<sup>18</sup> The Marcellus Shale Formation is the largest repository of unconventional gas in the United States.<sup>19</sup> Marcellus Shale is considered an unconventional natural gas resource because the natural gas is tightly packed within the shale.<sup>20</sup> Conventional natural gas, on the other hand, is typically found in porous sandstone formations, which allows the gas to flow freely after drilling.<sup>21</sup> Although geologists have known about the Marcellus Shale Formation for over 150 years,<sup>22</sup> it was thought that the shale was an economically unviable source of energy due to the tightly packed nature of the shale.<sup>23</sup>

Two recent technological advances resulting from experimental developments in drilling technology in the Barnett Shale Formation in Fort Worth, Texas<sup>24</sup> removed this barrier: horizontal drilling and hydraulic fracturing.<sup>25</sup> In 2005, Range Resources utilized horizontal drilling and hydraulic fracturing to complete Pennsylvania's first Marcellus Shale unconventional natural gas well, the "Renz #1 Well," in Washington County.<sup>26</sup> The Renz #1 Well demonstrated that Marcellus Shale development was now

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16. Trisha A. Smrecak & PRI Marcellus Shale Team, *Introduction to the Marcellus Shale*, MARCELLUS SHALE: THE SCIENCE BENEATH THE SURFACE, May 2011, at 2-3, [http://www.museumoftheearth.org/files/marcellus/Marcellus\\_issue1.pdf](http://www.museumoftheearth.org/files/marcellus/Marcellus_issue1.pdf).

17. Trisha A. Smrecak & PRI Marcellus Shale Team, *Why the Geology Matters*, MARCELLUS SHALE: THE SCIENCE BENEATH THE SURFACE, May 2011, at 5, [http://www.museumoftheearth.org/files/marcellus/Marcellus\\_issue2.pdf](http://www.museumoftheearth.org/files/marcellus/Marcellus_issue2.pdf).

18. Michael Morris, *Buyer's Remorse over Your Pennsylvania Gas Lease? The Pennsylvania Supreme Court Upholds Meager Royalty Payments and Protects the Profitability of Marcellus Gas Drilling in Kilmer v. Elexco Land Services, Inc.*, 23 VILL. ENVTL. L.J. 25, 25 (2012).

19. Smrecak, *supra* note 16, at 3.

20. *Id.*

21. Pifer, *supra* note 13.

22. Smrecak, *supra* note 16.

23. Morris, *supra* note 18.

24. Pifer, *supra* note 13, at 620. In colloquial terms, hydraulic fracturing is referred to as "fracking." See, e.g., *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 914 (Pa. 2013).

25. Smrecak, *supra* note 16.

26. *Id.*

technologically and economically viable.<sup>27</sup> Since 2005, thousands of Marcellus Shale unconventional natural gas wells have been drilled in Pennsylvania.<sup>28</sup>

A. *Benefits and Dangers of Horizontal Drilling and Hydraulic Fracturing*

The Marcellus Shale energy revival in Pennsylvania has drawn local,<sup>29</sup> national,<sup>30</sup> and international<sup>31</sup> interest. The obvious reason for this interest is that Marcellus Shale natural gas development has a myriad of direct and collateral consequences: from international environmental issues to local watershed concerns,<sup>32</sup> from the socioeconomic impact on rural communities to the increase in the United States GDP,<sup>33</sup> and from municipal regulations to the restrictions imposed by the United States Constitution.<sup>34</sup> In order to fully appreciate these issues, it is necessary to better understand horizontal drilling and hydraulic fracturing—the two unique procedures used to extract natural gas from Marcellus Shale.

Horizontal drilling is a simple concept: an operator begins by drilling a vertical well and then gradually angles the drill—over the course of several hundred feet—until it is drilling horizontally

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27. *Id.*

28. DEPARTMENT OF ENVIRONMENTAL PROTECTION, OFFICE OF OIL AND GAS MANAGEMENT: WORKLOAD REPORT (2013), [http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/2014/WEBSITE\\_Weekly\\_Report\\_for\\_Last\\_Week.pdf](http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/2014/WEBSITE_Weekly_Report_for_Last_Week.pdf). As of February 27, 2014, there are 7,626 unconventional natural gas wells in Pennsylvania. *Id.*

29. Michael Krancer & Patrick Henderson, *Superstar of Natural Gas: With the Marcellus Shale, Pa. is Becoming a Responsible Energy Capital*, PITTSBURGH POST-GAZETTE, October 29, 2012, <http://www.post-gazette.com/opinion/Op-Ed/2012/10/29/Superstar-of-natural-gas-With-the-Marcellus-Shale-Pa-is-becoming-a-responsible-energy-capital/stories/201210290227>.

30. Clifford Krauss, *There's Gas in Those Hills*, N.Y. TIMES, April 8, 2008, <http://www.nytimes.com/2008/04/08/business/08gas.html>.

31. Pifer, *supra* note 13, at 624.

32. Trisha A. Smrecak & PRI Marcellus Shale Team, *Beyond Water*, MARCELLUS SHALE: THE SCIENCE BENEATH THE SURFACE, January 2012, at 6, [http://www.museumoftheearth.org/files/marcellus/Marcellus\\_issue9.pdf](http://www.museumoftheearth.org/files/marcellus/Marcellus_issue9.pdf).

33. Malia Spencer, Report: *Shale Energy Could Add 2% to 4% to GDP by 2020*, PITTSBURGH BUSINESS TIMES (July 18, 2013), <http://www.bizjournals.com/pittsburgh/blog/energy/2013/07/report-shale-energy-could-add-2-to.html>.

34. *See generally*, Smith, *supra* note 8. While Smith is primarily concerned with municipal issues, this article is concerned with potential conflicts with the United States Constitution.

through the layers of Marcellus Shale.<sup>35</sup> This greatly increases the range and productivity of an individual well.<sup>36</sup> When compared to vertical drilling, which only supports one well on each drilling pad, horizontal drilling is particularly effective because it enables an operator to drill multiple wells from a single well pad.<sup>37</sup> Horizontal drilling is not particularly controversial. In fact, it is generally accepted as both economically beneficial and environmentally friendly.<sup>38</sup> Horizontal drilling preserves the environment by reducing the surface footprint of Marcellus Shale operations.<sup>39</sup> The economic benefit derives from the operator's ability to drill multiple wells from a single well pad, which are multi-million dollar investments.<sup>40</sup>

Hydraulic fracturing, however, is one of the most controversial aspects of Marcellus Shale natural gas operations.<sup>41</sup> Hydraulic fracturing is the process of forcing highly pressurized water, chemicals, and proppants<sup>42</sup> into the Marcellus Shale layer in order to create micro-fractures in the shale, which allow the natural gas to escape and ultimately collect in the well bore.<sup>43</sup> A single horizontal well requires over 4.5 million gallons of water to complete the fracturing process.<sup>44</sup> Aside from the sheer amount of fresh water utilized, the primary controversies surrounding hydraulic fracturing concern the addition of chemicals and the wastewater

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35. Trisha A. Smrecak & PRI Marcellus Shale Team, *Understanding Drilling Technology*, MARCELLUS SHALE: THE SCIENCE BENEATH THE SURFACE, January 2012, at 6, [http://www.museumoftheearth.org/files/marcellus/Marcellus\\_issue6.pdf](http://www.museumoftheearth.org/files/marcellus/Marcellus_issue6.pdf).

36. *Id.*

37. Smith, *supra* note 8, at 5.

38. Joseph F. Speelman et al., *Environmental and Legal Issues Surrounding Development of the Marcellus Shale*, in ASPATORE SPECIAL REPORT, NAVIGATING LEGAL ISSUES AROUND THE MARCELLUS SHALE 5, 7 (Thompson Reuters, 2011) ("Horizontal drilling allows multiple wellbores to be drilled into shale regions from one site, well below water tables or underground water sources.")

39. *Id.*; INDEPENDENT OIL & GAS ASSOCIATION OF NEW YORK, THE FACTS ABOUT NATURAL GAS EXPLORATION OF THE MARCELLUS SHALE 4 (2011), *available at* <http://www.marcellusfacts.com/pdf/homegrownenergy.pdf>.

40. Smith, *supra* note 8, at 6.

41. John W. Carroll, *Environmental Issues Arising From Development of the Marcellus Shale*, in ASPATORE SPECIAL REPORT, NAVIGATING LEGAL ISSUES AROUND THE MARCELLUS SHALE 51, 54 (Thompson Reuters, 2011).

42. Proppants are extremely small sand grains that hold open the fractures created by the pressurized water in order to allow the natural gas to flow into the well bore. Smrecak, *supra* note 32, at 4.

43. *Id.*

44. Smith, *supra* note 8, at 5.

generated during the fracturing process.<sup>45</sup> The solution used in the hydraulic fracturing process is generally composed of one percent chemicals, nine percent proppants, and ninety percent fresh water.<sup>46</sup> Despite the fact that the chemicals are heavily diluted, they still have the potential to negatively affect the watershed.<sup>47</sup> Wastewater, by contrast, is the fluid that comes back out of a well after the hydraulic fracturing is complete.<sup>48</sup> Wastewater is comprised of the original solution and minerals, metals, salts, and even some radioactive materials.<sup>49</sup> As a highly concentrated solution, wastewater can be extremely harmful to the environment and, in order to address this concern, operators generally build multi-million gallon storage ponds to allow for recycling and reuse of the wastewater in the hydraulic fracturing process.<sup>50</sup> Even after the process of recycling, however, some wastewater remains and requires permanent disposal.<sup>51</sup> Many of the pertinent legal issues facing Marcellus Shale development in Pennsylvania emerged as the general public and Pennsylvania General Assembly became aware of these legitimate environmental concerns.

### B. *Forced Pooling*

The most recent legal controversy regarding Marcellus Shale development has revolved around forced pooling statutes in Pennsylvania. "Pooling" is the consolidation of rights to natural gas in a specific geographic area in order to facilitate the production of natural gas from a single well.<sup>52</sup> Typically, pooling occurs through voluntary agreements between landowners and gas companies seeking to develop natural gas operations; this is known as "voluntary pooling."<sup>53</sup> In fact, before the recent amendments to the Oil and Gas Lease Act,<sup>54</sup> oil and gas companies were *required* to bar-

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45. Trisha A. Smrecak & PRI Marcellus Shale Team, *Water: Into the Wells*, MARCELLUS SHALE: THE SCIENCE BENEATH THE SURFACE, November 2011, at 2-3, [http://www.museumoftheearth.org/files/marcellus/Marcellus\\_issue7.pdf](http://www.museumoftheearth.org/files/marcellus/Marcellus_issue7.pdf).

46. *Id.* at 8.

47. *Id.*

48. Trisha A. Smrecak & PRI Marcellus Shale Team, *Water: Out of the Wells*, MARCELLUS SHALE: THE SCIENCE BENEATH THE SURFACE, November 2011, at 1, [http://www.museumoftheearth.org/files/marcellus/Marcellus\\_issue8.pdf](http://www.museumoftheearth.org/files/marcellus/Marcellus_issue8.pdf).

49. *Id.* at 3-4.

50. *Id.* at 8.

51. *Id.* The main options for final disposal include state licensed treatment facilities and injection wells. *Id.*

52. Colosimo, *supra* note 9, at 51-2.

53. *Id.*

54. S.B. 259, 181st Leg., Reg. Sess. (Pa. 2013).

gain with landowners in order to achieve pooling.<sup>55</sup> The issue of forced pooling, however, arises when “holdout” landowners refuse to lease their land—refuse to voluntarily pool—for natural gas development.<sup>56</sup> Forced pooling involves the compulsory consolidation of natural gas interests in order to facilitate the production of natural gas.<sup>57</sup> Practically speaking, forced pooling disregards landowners’ property rights and requires unwilling landowners to allow natural gas development on their properties.<sup>58</sup> Per standard industry procedure, however, landowners are compensated for any operations on their land and any subsequent natural gas production.<sup>59</sup>

In addition to disregarding individual property rights, forced pooling is controversial because it involves hydraulic fracturing. In fact, in order to be implemented effectively, forced pooling relies heavily on horizontal drilling and hydraulic fracturing technology.<sup>60</sup> From the oil and gas producers’ perspective, forced pooling is both environmentally sound and economically efficient.<sup>61</sup> From the landowners’ perspective, however, forced pooling in order to enable Marcellus Shale development exposes their properties to the myriad of risks and concerns that accompany hydraulic fracturing.

Interestingly, there is an existing forced pooling statute in Pennsylvania, the 1961 Oil and Gas Conservation Law,<sup>62</sup> which does not apply to wells drilled within the Marcellus Shale Formation.<sup>63</sup> This statute applies to wells that are drilled within the Utica Formation, which is deeper than the Marcellus Shale Formation.<sup>64</sup> The forced pooling clause in the Oil and Gas Conserva-

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55. *Id.*

56. Michael L. Krancer & Margaret Anne Hill, *Shale Gas Leasing-Achieving Clarity, Transparency and Conservation: Recent Actions of the Pennsylvania Supreme Court and Legislature*, 84 PA. B.A. Q. 93, 100 (2013).

57. Lindsey Trachtenberg, *Reconsidering the Use of Forced Pooling for Shale Gas Development*, 19 BUFF. ENVTL. L.J. 179, 197 (2012).

58. *Id.*

59. *Id.*

60. Colosimo, *supra* note 9, at 59-60.

61. Trachtenberg, *supra* note 57, at 211 (“Forced pooling benefits the environment by preventing excessive drilling. Therefore, there are fewer well pads, which leads to less forest fragmentation and fewer sites disturbed at the surface by drilling activity.”).

62. 58 PA. CONS. STAT. ANN. § 408 (West 2013).

63. Trachtenberg, *supra* note 57, at 183.

64. Krancer, *supra* note 56 (“The Oil and Gas Conservation Law applies only to drilling in formations that penetrate the Onondaga formation or 3,800 feet below land surface where the Onondaga formation is shallower than 3,800 feet.”). The Utica Formation lies below the Onondaga formation. *Id.*



tion Law permits an operator to compel landowners to participate in Utica Shale operations in the absence of a lease.<sup>65</sup> The distinguishing characteristic of this forced pooling statute is that it was passed in 1961, well before the combined use of horizontal drilling and hydraulic fracturing were contemplated as viable extraction methods in the oil and gas industry.<sup>66</sup> This existing forced pooling statute is still valid law in Pennsylvania and has not been challenged on constitutional grounds.<sup>67</sup>

### C. *Oil and Gas Lease Act—Omnibus Amendments*

In response to a multitude of concerns regarding the transparency of natural gas production, payment receipts, and minimum guarantees of royalty payments, Senator Gene Yaw, who represents the 23rd Senate District,<sup>68</sup> introduced Senate Bill No. 259 in the Pennsylvania Senate on January 18, 2012.<sup>69</sup> According to Senator Yaw, the explicit purpose of this bill was to “provide openness and transparency for mineral rights owners.”<sup>70</sup> The bill was referred to the Environmental Resources and Energy Committee, where it was considered, amended, and reintroduced over the course of five months.<sup>71</sup> During this period of time, the bill’s primary goal was to establish new standards of transparency for royalty payments.<sup>72</sup> On June 25, 2013, the emphasis changed when a version of SB 259 was introduced that included a forced pooling clause.<sup>73</sup> In a mere two weeks, the Senate passed the bill, which had become the proverbial “wolf in sheep’s clothing”: the

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65. *Id.*

66. 58 PA. CONS. STAT. ANN. § 408 (West 2013).

67. *Id.* It is likely that this statute has not been challenged on Constitutional grounds because it did not implicate the inherent dangers of hydraulic fracturing.

68. Senator Gene Yaw, *Gene Yaw Biography*, PENNSYLVANIA STATE SENATE, [http://www.legis.state.pa.us/cfdocs/legis/home/member\\_information/Senate\\_bio.cfm?id=1186](http://www.legis.state.pa.us/cfdocs/legis/home/member_information/Senate_bio.cfm?id=1186) (last visited Feb. 27, 2014).

69. Senator Gene Yaw, *Senate Bill 259 Information History*, PENNSYLVANIA STATE SENATE, [http://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2013&ind=0&body=S&type=B&bn=259](http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2013&ind=0&body=S&type=B&bn=259) (last visited Feb. 27, 2014) [hereinafter Yaw, *Bill History*].

70. Senator Gene Yaw, *Senate Co-Sponsorship Memoranda*, PENNSYLVANIA STATE SENATE, (January 19, 2013), <http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20130&cosponId=11132> [hereinafter Yaw, *Senate Memoranda*].

71. Yaw, *Bill History*, *supra* note 69.

72. Yaw, *Senate Memoranda*, *supra* note 70.

73. Yaw, *Bill History*, *supra* note 69; S.B. 259, 181st Leg., Reg. Sess. (Pa. 2013).

royalty payment provisions provided the “wool” that hid the forced pooling clause.<sup>74</sup>

On June 30, 2013, the Pennsylvania General Assembly passed Senate Bill No. 259, titled “An act regulating the terms and conditions of certain leases regarding natural gas and oil.”<sup>75</sup> On July 9, 2013, Governor Corbett signed the bill into law.<sup>76</sup> In his signing statement, Governor Corbett addressed growing concerns surrounding the forced pooling clause: “By signing this legislation, it is my intention, and I believe that of the General Assembly . . . [not] to alter or affect the agreed-to terms of any existing lease.”<sup>77</sup> The law took effect on September 7, 2013.<sup>78</sup>

As previously mentioned, the Amended Oil and Gas Lease Act contains two significant modifications: royalty payments and forced pooling.<sup>79</sup> The royalty payment provisions guarantee landowners a one-eighth royalty payment for any oil or gas produced on their land.<sup>80</sup> Additionally, there are enumerated requirements relating to production cost and profit transparency on the part of the operators.<sup>81</sup> The Oil and Gas Lease Act states in relevant part:

A lease or other such agreement conveying the right to remove or recover oil, natural gas or gas of any other designation from the lessor to the lessee shall not be valid if the lease does not guarantee the lessor at least one-eighth royalty of all oil, natural gas or gas of other designations removed or recovered from the subject real property.<sup>82</sup>

These royalty and transparency provisions form the political façade of the Oil and Gas Lease Act, which acted as a shield for the forced pooling clause to hide behind.

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74. The origin of this phrase is the New Testament of the Bible, from a passage in the Gospel of Matthew in which Jesus says, “Beware of false prophets, which come to you in sheep’s clothing, but inwardly they are ravening wolves.” *Matthew 7:15* (New International Version).

75. Yaw, *Bill History*, *supra* note 69.

76. Signing Statement, OFFICE OF THE GOVERNOR: TOM CORBETT (July 9, 2013).

77. *Id.*

78. S.B. 259, 181st Leg., Reg. Sess. (Pa. 2013).

79. *Id.*

80. 58 PA. CONS. STAT. ANN. § 33.3 (West 2013).

81. *Id.* § 35.2 (requiring the following information on a check stub: identification, date, and volume of gas produced; price received for gas produced; taxes charged; value of sales from gas; landowner’s interest, landowner’s share of the sales; contact information).

82. *Id.* § 33.3.

The relevant language establishing forced pooling in the Oil and Gas Lease Act states, “[w]here an operator has the right to develop multiple contiguous leases separately, the operator may develop those leases jointly by horizontal drilling unless expressly prohibited by a lease.”<sup>83</sup> This clause acts as a default provision for oil and gas leases within Pennsylvania; where landowners have not expressly prohibited horizontal drilling in their leases, the operators are free to engage in horizontal drilling. Although the statute only addresses horizontal drilling, it also implicitly authorizes hydraulic fracturing as the technological means of harvesting natural gas.<sup>84</sup>

This provision differs from the forced pooling clause in the 1961 Oil and Gas Conservation Law in two ways: first, when that act was passed, horizontal drilling and hydraulic fracturing were not contemplated as viable extraction methods; and second, the forced pooling clause applies to the Utica Shale Formation, which is much deeper underground than the Marcellus Shale Formation.<sup>85</sup> The difference in depth between the shale formations might seem insignificant, but the shallower depth of the Marcellus Shale Formation raises significant watershed concerns that many landowners want to avoid because of the environmental hazards inherently involved in horizontal drilling and hydraulic fracturing.<sup>86</sup>

#### *D. The Problem: Constitutional Implications of Forced Pooling*

In a relatively short period of time, the recent technological developments in Marcellus Shale extraction, and the legislature’s attempts to manage them, have intersected with the United States and Pennsylvania Constitutions in significant ways. In fact, horizontal drilling and hydraulic fracturing have only been used in Pennsylvania since 2005.<sup>87</sup> Therefore, due to the recent developments in the oil and gas industry, the majority of landowners could not have contemplated horizontal drilling when they entered into their leases.<sup>88</sup> If applied retroactively to existing leases, the Amended Oil and Gas Lease Act would deprive those

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83. *Id.* § 34.1. It should be noted that this is not a traditional forced pooling clause because it applies to existing landowner-operator leases. Krancer, *supra* note 56.

84. See *supra* text accompanying note 66.

85. Smrecak, *supra* note 16, at Figure 4.

86. Carroll, *supra* note 41.

87. Pifer, *supra* note 13, at 620. See *supra* p. 4.

88. Krancer, *supra* note 56 at 99.

landowners of a substantial property right and impair the exercise of existing rights and obligations under their leases.

From the legal perspective, forced pooling statutes set the stage for a confrontation between individual property rights and the police power of the state. This confrontation calls into question the validity of these statutes under the Due Process, Takings, and Contracts Clauses of the Pennsylvania Constitution. Forced pooling also implicates the corresponding clauses of the United States Constitution. These types of confrontations between individual property rights and the powers of government are not new to the field of law and are generally resolved to the detriment of individual rights.<sup>89</sup>

### III. CONSTITUTIONAL CHALLENGES TO THE OIL AND GAS LEASE ACT

Although originally presented as a benefit to landowners by guaranteeing them royalties, the Pennsylvania Oil and Gas Lease Act actually injures landowners by adding a default provision to existing leases that alters the conditions of the contract and ultimately transfers a substantial property right to the operators.<sup>90</sup> The most plausible constitutional challenges to the Oil and Gas Lease Act are based on the Contract Clauses, Due Process Clauses, and Takings Clauses of the United States and Pennsylvania Constitutions. In order to fully explore the likelihood of success of these constitutional challenges, it is necessary to address the practical implications of the Oil and Gas Lease Act as it applies to land owners. Specifically, this requires discussion of how the Oil and Gas Lease Act will affect current landowners and existing leases.

#### A. *Retroactive Application*

A threshold consideration arising from the implementation of the Oil and Gas Lease Act, as applied to current landowners with existing leases, is whether the Act will be applied retroactively. This inquiry is significant because it determines whether existing leases will be affected by the changes in the law that add default provisions regarding Marcellus Shale pooling. Black's Law Dic-

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89. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005) (Where the mere potential for economic development by a private developer constituted sufficient public benefit to justify the taking of a private home).

90. S.B. 259, 181st Leg., Reg. Sess. (Pa. 2013).

tionary defines a retroactive law as “a legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect.”<sup>91</sup> The United States Supreme Court acknowledged, however, that a statute is not retroactive solely because it is applied to events or transactions completed before the statute was enacted.<sup>92</sup> Instead, the ultimate consideration is whether the statute “attaches new legal consequences to events completed before its enactment.”<sup>93</sup> In much the same way, Pennsylvania courts have held that a statute is classified as retroactive where it affects a pre-existing legal right or relationship.<sup>94</sup>

Established limitations govern when a statute can be applied retroactively. In Pennsylvania there is a statutory limitation on interpreting a statute to apply retroactively: “No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.”<sup>95</sup> This statutory limitation is a codification of established case law within Pennsylvania.<sup>96</sup> Simply stated, a statute is retroactive when it affects pre-existing legal relationships, but a statute cannot be applied retroactively unless unequivocally intended by the General Assembly. Therefore, any determination of whether the Oil and Gas Lease Act will be applied retroactively requires a court to delve into the morass of statutory construction and legislative intent.

Legislative intent can be found in any number of sources including committee notes, signing statements, and the text of the statute itself. Beginning with the text of the statute, the relevant language states that forced pooling is authorized “where an operator has the right to develop multiple contiguous leases separately.”<sup>97</sup> The necessary implication of this statutory language is that the operator has *already* entered into an existing lease with a landowner. Furthermore, the effect of the statute is to alter that existing lease by adding in the default forced pooling requirement. Thus, when evaluating the plain language of the statute and the inferences it yields, it is apparent that the statute was designed to apply retroactively.

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91. BLACK'S LAW DICTIONARY 1343 (9th ed. 2009).

92. Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994).

93. *Id.*

94. Warren v. Folk, 886 A.2d 305, 308 (Pa. Super. Ct. 2005).

95. 1 PA. CONS. STAT. ANN. § 1926 (West 2008).

96. Kepple v. Fairman Drilling Co., 615 A.2d 1298, 1304 (Pa. 1992) (“[I]t is well established in Pennsylvania that no statute shall be construed to be retroactive unless clearly and manifestly intended by the General Assembly.”).

97. 58 PA. CONS. STAT. ANN. § 33.3 (West 2013).

Although the text of the statute will ultimately be determinative of legislative intent, the signing statement of Pennsylvania Governor Tom Corbett had the potential to create some ambiguity. As mentioned before, the signing statement explicitly stated Corbett's intention and his belief as to the intention of the Pennsylvania General Assembly: "By signing this legislation, it is my intention, and I believe that of the General Assembly . . . [not] to alter or affect the agreed-to terms of any existing lease."<sup>98</sup> The only way in which the statute would not affect the agreed-to terms of an existing lease is by applying prospectively to future leases. Governor Corbett's signing statement—that the Act was not intended to apply to existing leases—created a contradiction with the express language of the Act. Regardless of Governor Corbett's opinion as to the Act's retroactivity, however, a court's starting point for determining the intent of the General Assembly is the text of the statute.<sup>99</sup> Therefore, because the text seems to assume that the statute applies to existing leases, it is extremely likely that a court would construe the statute to be retroactively applicable.

From a constitutional analysis standpoint, the retroactive application of the Oil and Gas Lease Act is significant because constitutional challenges under the Contracts Clause and the Due Process Clause are only viable if the Act is applied retroactively. Absent retroactive application, there is no impairment of contractual obligations because the law will only affect newly formed contracts. By contrast, the Due Process and Takings Clause challenges are not determined by the retroactive nature of the Oil and Gas Lease Act because Pennsylvania courts are unlikely to recognize that the means of extraction—horizontal drilling—is an independent property right under existing landowner-operator leases. Even if Pennsylvania courts were to construe the Oil and Gas Lease Act to apply retroactively, however, it is important to note that the "retroactive application of statutes is not per se prohibited" or unconstitutional.<sup>100</sup> Retroactive application of a statute *is* only prohibited, however, when it would violate the Due Process Clause or Contracts Clause of either the United States or the Pennsylvania Constitutions.<sup>101</sup> Therefore, the strongest basis for a constitutional

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98. Signing Statement, OFFICE OF THE GOVERNOR: TOM CORBETT (July 9, 2013).

99. 1 PA. CONS. STAT. ANN. § 1921 (West 2000).

100. *Tony Savatt, Inc. v. Latrobe Brewing Co.*, 583 A.2d 796, 802 (Pa Super. Ct. 1990).

101. *E.g. Krenzelak v. Krenzelak*, 469 A.2d 987, 991 (Pa. 1983) (holding that retroactive application of the statute violates the due process clause); *Parsonese v. Midland Nat'l Ins.*

challenge to the Pennsylvania Oil and Gas Lease Act is when the Act is applied retroactively to add a default forced pooling provision to existing landowner-operator leases.

### *B. Contracts Clause Challenge*

Contracts Clauses are found in both the United States Constitution and the Pennsylvania Constitution. Article I, Section 10 of the United States Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."<sup>102</sup> Similarly, Article I, Section 17 of the Pennsylvania Constitution states, "No . . . law impairing the obligation of contracts . . . shall be passed."<sup>103</sup> By explicitly prohibiting laws that would restrict private citizens' ability to contract, the Framers were guarding against potential abuses of governmental authority.<sup>104</sup> In fact, in Federalist Paper 44, James Madison wrote, "[L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation."<sup>105</sup> Thus, the constitutional prohibition on laws impairing the obligations of contracts is a fundamental constitutional protection of personal liberty and property.

Despite the express language protecting individual contractual rights in the United States Constitution and Pennsylvania Constitution, this protection has gradually eroded in the name of federalism and states' rights. Generally, this rationale is rooted in the police powers of the states, which were reserved to the states by the Tenth Amendment of the United States Constitution.<sup>106</sup> Specifically, the Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."<sup>107</sup> The police powers of the states traditionally include the power to provide for the general welfare of the people through the "promotion of public health, safety and morals."<sup>108</sup> For example,

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Co., 706 A.2d 814, 817-818 (Pa. 1998) (holding that retroactive application of the statute violates the contracts clause).

102. U.S. CONST. art. I, § 10, cl. 1.

103. PA. CONST. art. I, § 17.

104. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

105. THE FEDERALIST NO. 44 (James Madison).

106. U.S. CONST. amend. X.

107. *Id.*

108. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 791 (2007).

police powers include state regulation of crime, healthcare, education, and licensing.<sup>109</sup>

Ultimately, the United States Supreme Court recognized that each state has the authority to exercise its police powers to promote the general welfare of the people, a power which supersedes individual contractual rights.<sup>110</sup> In the same breath, however, the United States Supreme Court also acknowledged that “if the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits on the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.”<sup>111</sup> In order to identify and enumerate the limits that the Contracts Clause imposes on the police powers of the states, the United States Supreme Court originally developed a factor-based test.<sup>112</sup>

The United States Supreme Court’s factor-based test incorporates the following considerations: (1) substantial impairment of contract; (2) existence of emergency; (3) interest group protected; (4) tailored relief; (5) reasonable conditions; and (6) temporal limitation.<sup>113</sup> The Court further developed and refined this test to a three-part analysis.<sup>114</sup> The threshold inquiry is whether the state statute has substantially impaired a contractual relationship.<sup>115</sup> This factor is the most significant because the “severity of the impairment measures the height of the hurdle the state legislation must clear.”<sup>116</sup> In order to overcome a substantial contractual impairment, the second inquiry evaluates whether the state has a “significant and legitimate public purpose.”<sup>117</sup> It is important to note, however, that the mere finding of a legitimate public purpose does not validate an impairment of private contracts.<sup>118</sup> Thus, the third inquiry is whether the legislation at issue imposes reasona-

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109. *Id.* at 792-93.

110. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

111. *Id.* at 242 (emphasis added).

112. *See, e.g.*, *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (holding that a state’s exercise of its police powers violated the Contracts Clause of the United States Constitution where the statute retroactively altered a mortgagee’s contractual right to compensation and possession); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (holding that a state’s exercise of its police powers violated the Contracts Clause of the United States Constitution where the statute retroactively altered the compensation owed to an employee).

113. *Blaisdell*, 290 U.S. at 444-49; *Spannaus*, 438 U.S. at 244-45.

114. *E.g.*, *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 504-5 (1987).

115. *Spannaus*, 438 U.S. at 242.

116. *Id.* at 244.

117. *DeBenedictis*, 480 U.S. at 505.

118. *Id.*



ble conditions and is appropriate to justify the legitimate public purpose.<sup>119</sup> Although not expressly acknowledged by the United States Supreme Court, it appears that the Court is engaging in a form of heightened scrutiny for contract clause challenges.

The original factor-based test has since been adopted and applied by the Pennsylvania Supreme Court.<sup>120</sup> Specifically, in *Parsonese v. Midland National Insurance Co.*, the Pennsylvania Supreme Court applied the same test in the context of a retroactive statute.<sup>121</sup> Pennsylvania courts have also applied the adapted three-part analysis when evaluating challenges under the Contracts Clause of the United States and Pennsylvania Constitutions.<sup>122</sup> Therefore, in order to survive the Contracts Clause challenge, the forced pooling clause of the Oil and Gas Lease Act must pass through the three-part analysis, which incorporates the original factors.

When evaluating whether the Oil and Gas Lease Act violates the Contracts Clause, the first and most significant factor is whether the Act substantially impairs a contractual relationship.<sup>123</sup> Although the Oil and Gas Lease Act allows a landowner to expressly prohibit hydraulic fracturing through an explicit provision in his or her lease, many of these leases were entered into before hydraulic fracturing and horizontal drilling were contemplated by the landowner.<sup>124</sup> If applied retroactively, the Oil and Gas Lease Act would add a default pooling provision into existing leases between landowners and operators that would permit hydraulic fracturing and horizontal drilling.<sup>125</sup> Therefore, allowing the Oil and Gas Lease Act to add a default pooling provision would alter the conditions of that contract. In fact, the main purpose of a lease is to allow the landowner to transfer property rights to a third party. Inherent in this statement is the presupposition that any property right *not* transferred to a third party is reserved to the landowner.<sup>126</sup>

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119. *Id.*; *E.g.*, *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977).

120. *Parsonese v. Midland Nat'l Ins. Co.*, 706 A.2d 814, 817-18 (Pa. 1998).

121. *Id.* (finding that the retroactive nature of the statute violated the contracts clause where the statute eliminated an insured's selection of a beneficiary).

122. *E.g.*, *S. Union Twp. v. Commonwealth*, 839 A.2d 1179, 1188 (Pa. Commw. Ct. 2003) *aff'd*, 854 A.2d 476 (2004).

123. *Spannaus*, 438 U.S. at 242.

124. Krancer, *supra* note 56.

125. 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).

126. Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 239 n. 2 (1994) ("In contemporary legal discourse the most common conception of property is the bundle of legally protected interests, held

This principle is illustrated by the effect of the Oil and Gas Lease Act's forced pooling clause. Pennsylvania's Statutory Construction Act of 1972 states that a statute shall be construed to give effect to each of its provisions.<sup>127</sup> The forced pooling clause expressly grants an operator the right to engage in horizontal drilling when certain conditions are met.<sup>128</sup> It follows that, without this new provision, an operator does not have the ability to engage in horizontal drilling. Otherwise, the forced pooling provision of the Oil and Gas Lease Act would be rendered superfluous. Therefore, it is evident that, before the forced pooling clause, landowners inherently reserved the right to prevent an operator from engaging in horizontal drilling. When applied retroactively, the Oil and Gas Lease Act would operate to deprive landowners' substantial property rights that were reserved under the lease.

Unlike many standardized contracts, gas lease contracts are customized and specifically bargained for by the landowner and operator because of the wide variety of unique characteristics involved.<sup>129</sup> Due to the recent rise in concern regarding the environmental impacts of horizontal drilling and fracturing, many landowners have specifically removed or avoided provisions allowing such drilling techniques.<sup>130</sup> In effect, the retroactive application of the Oil and Gas Lease Act would add default provisions in leases requiring forced pooling, horizontal drilling, and, by implication, hydraulic fracturing. Simply stated, many landowners would not have allowed such provisions in their lease if they had contemplated these aspects at the time of signing the lease. Based on these considerations, it is evident that the Oil and Gas Lease Act substantially impairs the contractual relationship between landowners and operators.

A substantial contractual impairment, however, is only the beginning of the Contracts Clause analysis. The second inquiry, which incorporates the remaining original factors, is whether the state has a legitimate public purpose for the statute which impairs

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together by competing and conflicting policy goals. The removal of one or more sticks from the bundle should have no particular implications for the legally protected interests that remain.")

127. 1 PA. CONS. STAT. ANN. § 1921 (West 2000).

128. 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).

129. George A. Bibikos, *Interpreting Oil and Gas Leases in Pa.'s Shale Gas Era*, THE LEGAL INTELLIGENCER, July 31, 2012, at 1.

130. Examples of these leases can be found in the complaint filed in *EQT v. Opatkiewicz*. Complaint, *supra* note 4 at 19-103.

private contractual obligations.<sup>131</sup> The only identifiable public purpose of the forced pooling clause of the Oil and Gas Lease Act is to economically benefit natural gas companies and the Commonwealth by implication. It is undisputable that the Oil and Gas Lease Act was not passed in response to the existence of an emergency or in response to environmental concerns. Thus, the only potential legitimate public purpose is the ephemeral economic public benefit from the development of natural resources.

Even if a court were to accept economic public benefit as a legitimate public purpose, the final inquiry for a Contracts Clause analysis is whether the legislation at issue imposes reasonable conditions and is appropriate to justify the legitimate public purpose.<sup>132</sup> Essentially, this is an evaluation of how well the legislation is tailored to achieve its purpose. Here, the forced pooling provision of the Oil and Gas Lease Act was not limited in scope or time. In fact, the main constitutional problem is that the Act will be applied retroactively to existing leases. Furthermore, the forced pooling provision doesn't impose reasonable conditions to achieve its purpose because landowners have relied on the existing obligations and rights under their leases. Ultimately, analogous to *Blaisdell*, *Allied Structural Steel Co.*, and *Parsonese*, the fact that the Oil and Gas Lease Act will be applied retroactively to existing leases will be determinative.<sup>133</sup> Therefore, the forced pooling clause of the Oil and Gas Lease Act would not survive a constitutional challenge under the Contracts Clause of either the United States or Pennsylvania Constitutions.

### C. Due Process Clause Challenge

The Due Process Clause is found in the Fourteenth Amendment to the United States Constitution: "No state shall . . . deprive any person of life, liberty, or property without due process of law."<sup>134</sup> The Fourteenth Amendment has been subject to much discussion regarding substantive due process, procedural due process, and the incorporation doctrine regarding the Bill of Rights.<sup>135</sup> It is im-

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131. *DeBenedictis*, 480 U.S. at 505.

132. *Id.*

133. *Parsonese*, 706 A.2d at 819 ("It is critical to our analysis that application of the statute in this case would be retroactive application.")

134. U.S. CONST. amend. XIV, § 1.

135. For an in-depth discussion of substantive and procedural due process see, for example, Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 860 (2003).

portant to note, however, that the Fourteenth Amendment's due process requirement expressly applies to the legislative actions of a state.<sup>136</sup> Although economic substantive due process has been effectively abandoned by the Court,<sup>137</sup> it is well established that the Due Process Clause restricts a state's ability to alter or extinguish individual rights.<sup>138</sup> The Pennsylvania Supreme Court held that Article I, Section 1 of the Pennsylvania Constitution contains an equivalent "Due Process Clause,"<sup>139</sup> which is not distinguishable from the Due Process Clause of the 14th Amendment of the United States Constitution.<sup>140</sup> Therefore, the Oil and Gas Lease Act can be challenged under the Due Process Clauses of the United States and Pennsylvania Constitutions on the basis of the deprivation of a "vested right."

The Pennsylvania Supreme Court has acknowledged that the retroactive application of newly enacted statutes violates the Due Process Clause only when the application would be unreasonable.<sup>141</sup> In a rather perplexing manner, the Pennsylvania Supreme Court elucidates the unreasonable standard by describing what constitutes a reasonable application. Specifically, the retroactive application of a statute is considered to be reasonable when it will "impair no contract and disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, and . . . not vary existing obligations contrary to their situation when entered into and when prosecuted."<sup>142</sup> Thus, the touchstone of a due process challenge in this situation is whether a vested right has been disturbed. Pennsylvania courts have defined vested rights in a myriad of ways, but each contains similar elements.<sup>143</sup> The com-

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136. U.S. CONST. amend. XIV, § 1.

137. Robert Ashbrook, *Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1285 (2002) ("[The] economic substantive due process doctrine was and continues to be wrong.")

138. *Hosp. & Healthsystem Ass'n of Pa. v. Com.*, 77 A.3d 587, 603 (Pa. 2013) ("The retrospective character of [the statute] implicates this Court's recognition that due process norms limit the government's ability to extinguish vested rights . . . through retroactive legislation.")

139. PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.")

140. *Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995).

141. *Krenzela v. Krenzela*, 469 A.2d 987, 991 (Pa. 1983).

142. *Id.*

143. *E.g.*, *In re R.T.*, 778 A.2d 670, 679 (Pa. Super. Ct. 2001) ("[A vested right is a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent."); *Croll v. Harrisburg Sch. Dist.*, 2012 WL 8668130 (Pa.

mon vein running through these definitions leads to one conclusion: ultimately, a vested right is a right that is considered to be legally enforceable. Therefore, in order to survive the constitutional challenge under the Due Process Clause of the Fourteenth Amendment as it applies to Pennsylvania, the Oil and Gas Lease Act must not disturb the vested rights of landowners.

In the case of the Oil and Gas Lease Act, it is unclear whether the retroactive application would disturb a vested right. The analysis to determine whether a vested right is disturbed is similar to the threshold analysis under the Contracts Clause challenge.<sup>144</sup> However, instead of identifying a contractual right or obligation, the focus is to identify an existing and independent property right. The property right at issue here is the right of an operator to jointly develop properties by engaging in horizontal drilling. Property rights are traditionally referred to as a bundle of sticks, all of which are vested rights that are legally enforceable when given away or retained in a contract.<sup>145</sup> The absence of the forced pooling provision in a lease could be construed as reserving that “stick” with the landowner. Under the Oil and Gas Lease Act, however, an operator must first own the right to the minerals before engaging in forced pooling.<sup>146</sup> Therefore, this analogy likely draws too thin of a distinction between the right to the minerals themselves and the *means of extracting the minerals*—horizontal drilling.<sup>147</sup> Therefore, in order for the Oil and Gas Lease Act to violate the Due Process Clause of the United States Constitution, the means of extraction must be construed to be an independent right of the property owner. Because this is likely too far of a stretch for Pennsylvania courts, it is probable that the Oil and Gas Lease Act would survive the challenge under the Due Process Clause of the United States and Pennsylvania Constitutions.

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Commw. Ct. Dec. 13, 2012) (“[A vested right] must be something more than a mere expectation, based upon an anticipated continuance of existing law. It must have become title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another.”).

144. See *supra* pp. 18-20.

145. E.g., Anna di Robilant, *Property: A Bundle of Sticks or A Tree?*, 66 VAND. L. REV. 869, 877 (2013).

146. Krancer, *supra* note 56.

147. *Id.*

*D. Takings Clause Challenge*

The final plausible constitutional challenge to the Oil and Gas Lease Act is a violation of the Takings Clauses of both the United States and Pennsylvania Constitutions.<sup>148</sup> The federal constitution's Takings Clause is found in the Fifth Amendment: "[N]or shall private property be taken for public use, without just compensation."<sup>149</sup> Beginning in the late nineteenth century, the United States Supreme Court applied the Takings Clause of the Fifth Amendment to the states through the Fourteenth Amendment.<sup>150</sup> The Pennsylvania Constitution also has a Takings Clause: "Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken."<sup>151</sup> Inherent in the Takings Clauses of both the United States and Pennsylvania Constitutions is the requirement that the property be taken only for public use.<sup>152</sup> Thus, the touchstone for the takings clause analysis is whether the effect of the state statute falls within the label of "public use." Historically, public use has been interpreted broadly, giving great deference to state legislatures as long as there is some public purpose present.<sup>153</sup>

In response to the broad interpretation of public use under the Takings Clause, however, the Pennsylvania General Assembly passed the Property Rights Protection Act.<sup>154</sup> The statute states, in relevant part, that "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited."<sup>155</sup> Thus, there are two barriers to the practical implementation of the Oil and Gas Lease Act: first, the Takings Clauses of the United States and Pennsylvania Constitutions require the property to be taken for public use,<sup>156</sup> and second, the Property Rights Protection Act, passed in response to the U.S. Supreme Court's broad interpretation of what

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148. U.S. CONST. amend. V; PA. CONST. art. X, § 4.

149. U.S. CONST. amend. V.

150. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

151. PA. CONST. art. X, § 4.

152. U.S. CONST. amend. V; PA. CONST. art. X, § 4.

153. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 483 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.")

154. 26 PA. CONS. STAT. ANN. § 204 (West 2006).

155. *Id.*

156. U.S. CONST. amend. V.

constitutes a public purpose, expressly prohibits any government takings for private use.<sup>157</sup> Ultimately, both barriers require that property is only taken by the government for a public use.

A traditional forced pooling statute would clearly violate Pennsylvania's Property Rights Protection Act and could potentially violate the Takings Clause of the United States and Pennsylvania Constitutions because traditional forced pooling statutes *require* "holdout" landowners to lease their mineral rights to an operator. In effect, a traditional forced pooling statute allows an operator to take a landowner's mineral rights. Here, however, it is undisputed that the Oil and Gas Lease Act is not a conventional forced pooling statute because the Act applies to existing landowner-operator leases.<sup>158</sup> Despite this significant distinction, a plausible argument can be made, similar to the due process analysis, that the means of extraction—horizontal drilling—comprise an independent property right that is reserved to the property owner, even after the rights to the minerals have been leased. For the same reasons that the due process challenge might prove to be problematic, however, it is unlikely that the Pennsylvania courts would construe the means of extraction as an independent right of the property owner.

#### *E. Constitutional Challenge Summary*

Despite the strict limitations on the retroactive application of statutes, based on inferences drawn from the statutory language, the Pennsylvania Oil and Gas Lease Act will likely be construed to apply retroactively as adding default provisions to existing leases between landowners and operators.<sup>159</sup> Although the retroactive application of a statute is not *per se* unconstitutional or prohibited, it does create three plausible constitutional challenges to the Act based on the Contracts, Due Process, and Takings Clauses of the United States and Pennsylvania Constitutions. The strongest challenge is likely to be found under the Contracts Clauses because the statute effectively adds default provisions to leases that have been specifically bargained for, and those default provisions incorporate recent developments in the oil and gas industry that could not have been contemplated by the property owner when they entered into their lease. The Due Process and Takings

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157. PA. CONST. art. X, § 4.

158. Krancer, *supra* note 56.

159. 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).

Clause challenges, however, are weaker arguments because they ultimately turn on the courts' determination that the means of extraction, horizontal drilling and hydraulic fracturing, is a vested and independent property right—a step that the courts are unlikely to be willing to take.

#### IV. CONCLUSION

Although this article was academic in evaluating the constitutional challenges to Pennsylvania's Oil and Gas Lease Act, the real battle is already being waged in the Pennsylvania judicial system.<sup>160</sup> As mentioned throughout this article, a recent case litigating these constitutional issues is *EQT v. Opatkiewicz* before the Court of Common Pleas of Allegheny County, Pennsylvania.<sup>161</sup> On April 8, 2014, the Court entered an order granting EQT's Motion for Partial Judgment on the Pleadings, holding that the forced pooling clause is constitutional.<sup>162</sup> The accompanying Memoranda explained the Court's rationale: (1) EQT always had the right, under existing leases, to jointly develop through horizontal drilling; (2) the forced pooling clause is a mere clarification of existing rights; and (3) because the landowners reserved no rights under existing leases, there is no basis for a constitutional challenge.<sup>163</sup> As such, the Court cleverly dodges fully addressing the substantial constitutional challenges. Although, there is no indication of whether this order will be appealed by the landowners, an appeal likely due to the important interests involved.

The basis of the Court's decision, that under existing leases EQT always the right to jointly develop properties through horizontal drilling, is misguided for three reasons. First, as mentioned in this article, it is a fundamental concept that property rights not expressly given away are retained by the landowner.<sup>164</sup> Second, the forced pooling clause of the Oil and Gas Lease Act is not a clarification of existing rights because it expressly grants an operator the right to engage in horizontal drilling in limited circumstances.<sup>165</sup> Third, and perhaps most significantly, prior to this

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160. *EQT v. Opatkiewicz*, No. GD-13-13489 (C.P. Allegheny Cnty. July 22, 2013).

161. *Id.*

162. Order of Court, *EQT v. Opatkiewicz*, No. GD-13-13489 (C.P. Allegheny Cnty. July 22, 2013).

163. Memoranda at 6, *EQT v. Opatkiewicz*, No. GD-13-13489 (C.P. Allegheny Cnty. July 22, 2013).

164. *See supra* text accompanying note 126.

165. 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).



decision it was a well-established practice in the oil and gas industry to bargain for and compensate landowners for these joint development provisions.<sup>166</sup> Obviously, if EQT always had the right to jointly develop properties, they would not specifically bargain for and compensate landowners for an express joint development provision in the lease.

If the contracts clauses of the Pennsylvania and United States Constitutions are to retain any practical meaning or effect in modern constitutional law jurisprudence, then the retroactive application of this statute is a clear violation. To hold otherwise would render meaningless an important constitutional protection of individual rights. Therefore, based on the analysis in this article, the forced pooling clause in the Oil and Gas Lease Act is unconstitutional as a violation of the Contracts Clause of the United States and Pennsylvania Constitutions.

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166. *E.g.*, Complaint at 81, EQT v. Opatkiewicz, No. GD-13-13489 (C.P. Allegheny Cnty. July 22, 2013). The pooling provision in paragraph two of the Smith lease, which EQT attempted to bargain for, is explicitly crossed out.

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*Arkansas Game & Fish Comm’n v. United States:*  
 When a Taking by Any Other Name is Still a  
 Taking: Why Intentional Government-Induced  
 Temporal Floods Should be Governed by Takings  
 Analysis

*William C. Wallander\**

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## I. INTRODUCTION

Imagine owning thousands of acres of pristine property inhabited by wildlife and valuable timber. It's the quintessential American dream; the property is yours, privately-owned, and the timberland is income producing. You labor many hours to attract wildlife for hunting as well as nurture the timber for future harvest. For decades you have managed this property and the hard work has paid off. Migratory birds swarm your carefully-maintained property, and in return have attracted skillful hunters. Over the decades, the timber has healthily matured and is ready for harvest. Your land has flourished.

Unfortunately, beginning in 1993, the Army Corps of Engineers ("Army Corps") begins deviating from its flood control procedures, at a local dam located upriver from your property, to extend the harvest season for local farmers.<sup>1</sup> Since 1950, the Army Corps had followed its Water Release Manual ("Manual") closely,<sup>2</sup> and since the Manual strategically manages water flow, your property has flourished. However, the Army Corps' deviations from the Manual have resulted in more water inundating your property for longer periods of time each year.<sup>3</sup> Although you object to the Army Corps' deviations, they continue this plan.<sup>4</sup> Only in 2001, when you allege that these deviations have damaged your valuable timber, does the Army Corps take your requests seriously and end the

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1. *Ark. Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594, 603 (2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd and remanded*, 133 S. Ct. 511 (2012), *aff'd*, 736 F.3d 1364 (Fed. Cir. 2013).

2. *Ark. Game & Fish Comm'n*, 87 Fed. Cl. at 603.

3. *Id.* at 606.

4. *Id.* at 603.

deviations.<sup>5</sup> For eight years the Army Corps' deviations benefitted local farmers at the expense of your trees. Due to congressionally enacted statutes such as the Flood Control Act of 1928 and The Federal Torts Claim Act, your only chance of recovery against the government may be bringing a Fifth Amendment Takings Claim under the Tucker Act, which grants the Court of Federal Claims jurisdiction to hear constitutional cases, but not cases arising in tort.<sup>6</sup> Now, stop imagining because this scenario occurs often in intentional government-induced temporal flood cases. The most recent example, as described above, involves the hunting and timberlands of the Arkansas Game and Fish Commission.

*Arkansas Game & Fish Commission v. United States* demonstrates the quagmire that the tort versus taking distinction has become in intentional government-induced temporal flood cases. Simply stated, in an intentional government-induced temporal flood case, the tort versus taking distinction is critical because a landowner is precluded from recovering in tort against the government, but the landowner may recover under a Takings Claim pursuant to the Tucker Act. Yet, court decisions "offer[] no guidance in resolving the difference between takings and torts."<sup>7</sup> Hence, attempts by courts to tackle the tort versus taking distinction have resulted in perplexing, inconsistent judicial opinions.

This note proposes that the tort versus taking distinction is improper in the context of intentional government-induced temporal floods. Instead, Takings Clause analysis, not tort analysis, is the proper context when dealing with intentional government-induced temporal floods. More specifically, this note suggests that all intentional government-induced temporal floods are a taking and that the proper inquiry for the courts in such cases is to determine damages. Part II of this note discusses precedential Fifth Amendment cases as well as important intentional government-induced temporal flood cases in order to show the complexities of the tort versus taking distinction in the context of intentional government-induced temporal flood cases. Additionally, Part II of this note presents the facts and rulings of the Supreme Court's recent decision in *Arkansas Game and Fish Commission v. United States*.

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5. *Id.* at 606.

6. See *infra* notes 127-29 and accompanying text.

7. Nancie G. Marzulla, *The Supreme Court Tackles Temporary Takings: Arkansas Game & Fish Commission v. United States*, 44 TRENDS 2 (Sept. 2012), available at [http://www.americanbar.org/publications/trends/2012\\_13/september\\_october/the\\_supreme\\_court\\_tackles\\_temporary\\_takings\\_arkansas\\_game\\_fish\\_commission\\_v\\_united\\_states.html](http://www.americanbar.org/publications/trends/2012_13/september_october/the_supreme_court_tackles_temporary_takings_arkansas_game_fish_commission_v_united_states.html).

Part III of this note discusses the flaws with the tort versus taking analysis currently used by the courts to decide intentional government-induced temporal flood cases. Because the application of the tort versus taking analysis in intentional government-induced temporal flood cases has become overly convoluted, this note suggests that the focus in such cases ought to be on determining damages rather than determining whether a cause of action exists based on the arbitrary distinction of tort versus taking. Finally, this note discusses the possibility of adopting the inverse ratio rule, used in intellectual property law, when litigating damages in intentional government-induced temporal flood cases.

## II. *ARKANSAS GAME & FISH COMMISSION V. UNITED STATES*

### A. *Jurisprudential Framework*

The Takings Clause of the Fifth Amendment states “Nor shall private property be taken for public use without just compensation.”<sup>8</sup> Although the Takings Clause seems simple, its application has required extensive judicial interpretation in intentional government-induced temporal flood cases because the court must determine that a taking has occurred rather than a mere tort for a cause of action to survive, an elusive distinction.<sup>9</sup> Courts struggle to apply the Takings Clause to intentional government-induced temporal flooding cases because the floods only “take” the landowner’s property temporarily before receding.<sup>10</sup> However, courts have overlooked the obvious fact that these temporal floods still take private property, even if the taking is not permanent.<sup>11</sup> Most recently, the Supreme Court missed an opportunity to remedy the law in *Arkansas Game & Fish Commission v. United States*. Ideally, in *Arkansas Game*, the Supreme Court should have ruled that all intentional government-induced temporal floods are tak-

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8. U.S. CONST. amend. V.

9. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012) (“[N]o magic formula enables a court to judge in every case whether a given government interference with property is a taking.”).

10. See Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 482, 496 (2010) (establishing that prospectively temporary floods are meant to be temporary from the outset; whereas retrospectively temporary floods are intended to be permanent at the outset but turn out to be temporary).

11. See Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589, 592 (2013) (describing the court’s flooding cases as an “incongruent distinction between permanent and temporary takings”).

ings and that the proper inquiry for the court is to determine the amount of damages.<sup>12</sup> Unfortunately, due to the Supreme Court's narrower ruling, courts will continue to struggle in intentional government-induced temporal flood cases with the "incongruent distinction between permanent and temporary takings."<sup>13</sup> As a result, when addressing intentional government-induced temporal flood cases, courts will be forced to continue to rely on the four precedential Supreme Court cases that set the general framework for applying Takings Clause jurisprudence.<sup>14</sup>

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court addressed whether the New York state government's requirement that a landlord permit the installation of cable television equipment on the roof of her apartment building constituted a compensable taking under the Takings Clause.<sup>15</sup> The Court's holding in *Loretto* established one of the black-letter rules of Takings Clause jurisprudence: a permanent physical occupation of property, no matter how minor, is a taking when authorized by the government.<sup>16</sup> Importantly, the permanent physical occupation need not be exclusive so long as it impedes any one of the owner's property rights.<sup>17</sup> However, the Court carefully clarified that the *Loretto* per se rule does not apply to government regulations unless the landowner must forfeit property to a third party.<sup>18</sup>

In *Lucas v. South Carolina Coastal Council*, the Supreme Court addressed whether the South Carolina state government's regulation forbidding construction on Lucas' beachfront parcels consti-

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12. Unfortunately, the Supreme Court made a much narrower ruling: "[R]ecurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability." *Ark. Game & Fish Comm'n*, 133 S. Ct. at 515 (emphasis added).

13. See Epstein, *supra* note 11, at 592.

14. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518. See generally *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002) (temporary regulatory takings); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (permanent regulatory takings eliminating all economically viable use); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (permanent physical takings); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978) (permanent regulatory takings eliminating some economically viable use).

15. *Loretto*, 458 U.S. at 421-22 (establishing that the cables installed on the roof were a minor encroachment, measuring only one-half inch in diameter and measuring thirty feet in length).

16. *Id.* at 426.

17. See *id.* at 435 ("[T]he government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand.").

18. *Id.* at 440 (explaining that states may still "require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building [s]o long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party").

tuted a compensable taking.<sup>19</sup> The Court's holding in *Lucas* established another black-letter rule of Takings Clause jurisprudence: government regulations that result in the loss of all economically viable use of one's property require just compensation.<sup>20</sup> There is an exception to the *Lucas* rule: government regulations that prevent public nuisances are outside Takings Clause jurisprudence.<sup>21</sup>

In *Penn Central Transportation Co. v. City of New York*, the Court addressed whether New York's Landmarks Preservation Law which denied Penn Central the ability to build in the airspace above its Grand Central Terminal amounted to a compensable taking.<sup>22</sup> The Court's decision in *Penn Central* recognized that courts interpret Takings Clause jurisprudence by looking at the parcel as a whole.<sup>23</sup> Therefore, the Court established a balancing test, which in turn requires courts to consider the following factors when dealing with government regulations that impair some, but not all, of the economically viable use of property: (1) "the economic impact of the regulation" on the property owner, (2) "the extent to which the regulation has interfered with distinct investment-backed expectations" of the property owner, and (3) the "character of the government action."<sup>24</sup> Applying this balancing approach, the Court concluded that Penn Central had not suffered a taking because the Landmark Preservation Law "permit[s] reasonable beneficial use of the [Grand Central Terminal]."<sup>25</sup>

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court addressed whether a thirty-two

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19. *Lucas*, 505 U.S. at 1007.

20. *Id.* at 1019 ("[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.")

21. *Id.* at 1022-23. See generally *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 590 (1962) (town ordinance forbidding pit excavation within its limits); *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (state law permitting cutting down cedar trees to prevent spread of blight to apple orchard); *Hadacheck v. Sebastian*, 239 U.S. 394, 404 (1915) (municipal ordinance prohibiting brick manufacturing in residential community); *Reinman v. City of Little Rock*, 237 U.S. 171, 172 (1915) (city law prohibiting livery stables within city limits); *Mugler v. Kansas*, 123 U.S. 623, 623 (1887) (state law declaring all breweries as public nuisances).

22. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978).

23. *Id.* at 130-31 ("Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . [T]his Court focuses . . . on the character . . . nature and extent of the interference with rights in the parcel as a whole.")

24. *Id.* at 124 (explaining that physical invasions are more likely to result in takings "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good")

25. *Id.* at 138.



month moratorium which forbade development while a land-use plan for the region was formulated constituted a compensable taking.<sup>26</sup> The Court reasoned that “the property will recover value as soon as the prohibition is lifted.”<sup>27</sup> However, the Court seemed genuinely concerned that long moratorium may result in a taking.<sup>28</sup> Therefore, the Court decided that temporary regulatory taking claims, such as moratorium, should be evaluated using the *Penn Central* test.<sup>29</sup>

### B. *Prior Flooding Cases*

Flooding cases often present the courts with complex Takings Clause problems that require courts to consider both general Takings Clause jurisprudence,<sup>30</sup> as well as the Takings Clause jurisprudence of historic flooding cases.<sup>31</sup> Indeed, when the government permanently invades one’s land with flood-induced water, the courts will always find a taking.<sup>32</sup> On the other hand, for cases involving intentional government-induced temporal flooding, courts exert considerable effort attempting to balance the landowner’s property rights with the government’s interference with those rights.<sup>33</sup> In intentional government-induced temporal flooding cases, courts struggle to define a taking because, on the one hand, the government interferes with the landowner’s right to exclude others from his property, but, on the other hand, the landowner’s dispossession is only temporary.<sup>34</sup> Moreover, there is no bright line between a permanent occupation versus a temporary invasion.<sup>35</sup> The effect of this lack of total dispossession of the landowner’s property rights coupled with a questionable boundary between permanent occupation and temporary invasion becomes

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26. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 306 (2002).

27. *Id.* at 332.

28. *Id.* at 341 (“[M]oratorium that last more than one year should be viewed with special skepticism.”).

29. *Id.* at 342. *See supra* note 24 and accompanying text.

30. *See supra* notes 14-29 and accompanying text.

31. *See infra* notes 36-53 and accompanying text.

32. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982) (collecting cases); *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 181 (1871) (“Where real estate is actually invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness, it is a taking.”).

33. *See infra* notes 94–121 and accompanying text.

34. *Loretto*, 458 U.S. at 435 n.12 (“[I]ntermittent flooding . . . [does] not absolutely dispossess the owner of his right to use, and exclude others from, his property.”).

35. *See id.* at 447-48.

evident when reading the inconsistent, and sometimes untenable, judicial decisions in intentional government-induced temporal flooding cases.

In *United States v. Cress*, the government's construction of a dam resulted in frequent overflows of water onto the landowner's property.<sup>36</sup> The Court determined that the frequent overflows attributable to the dam constituted a permanent condition for which the landowner was entitled to just compensation.<sup>37</sup> Seven years later, in *Sanguinetti v. United States*, the government's construction of a canal again resulted in recurrent flooding of a landowner's property.<sup>38</sup> Although the land had experienced flooding prior to the construction of the canal, the Court recognized that the flooding after the canal's completion may have caused greater damage to the land due to increased flooding.<sup>39</sup> The Court stated that for the government to be held liable for a taking a plaintiff must show that the government's project directly resulted in a permanent invasion of the plaintiff's land resulting in an appropriation.<sup>40</sup> Because the landowner could still use his property, the Court found no taking occurred in *Sanguinetti*.<sup>41</sup>

In *United States v. Dickinson*, a government dam resulted in the permanent flooding of some of the landowner's property as well as intermittent flooding of other portions of his property.<sup>42</sup> Ultimately, the landowner reclaimed much of his land that had been taken by flooding by using rock fill.<sup>43</sup> Nonetheless, the Court held that Dickinson's land had been taken and that subsequent actions by Dickinson did not affect the takings analysis.<sup>44</sup> In *Barnes v. Unit-*

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36. 243 U.S. 316, 318 (1917).

37. *Id.* at 328 ("There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other.")

38. 264 U.S. 146, 147 (1924).

39. *Id.* at 149, 150 (calling the increased damage conjectural as the appellant provided little evidence other than claiming increased damage).

40. *Id.* at 149 ("[T]o create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of land amounting to an appropriation of and not merely an injury to the property.")

41. *Id.* ("Appellant was not ousted, nor was his customary use of the land prevented.")

42. 331 U.S. 745, 746-47 (1947).

43. *United States v. Dickinson*, 152 F.2d 865, 871 (4th Cir. 1946), *aff'd*, 331 U.S. 745 (1947).

44. *Dickinson*, 331 U.S. at 751 ("[N]o use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose.")

*ed States*, government releases of water from a dam resulted in the flooding of the landowner's property from 1969 to 1973.<sup>45</sup> However, the court determined that the government only took the landowner's property in 1973.<sup>46</sup> Essentially, the *Barnes* decision established that the government gets several "free" flood years before a landowner can claim that intermittent flooding is foreseeable.<sup>47</sup>

In summary, *Loretto* and *Pumpelly* illustrate that courts will construe permanent flooding invasions of a landowner's property as a taking.<sup>48</sup> Moreover, *Lucas* suggests that any government flooding regulation that extinguishes all economically viable uses of property will be a taking.<sup>49</sup> Furthermore, *Cress* supports the proposition that intermittent inevitably recurring floods also constitute a taking.<sup>50</sup> Unfortunately, flooding cases that fall outside the bright line rules associated with permanently flooded property, inevitably recurring flooding, and flooding that destroys all economically viable use of property are subject to uncertain judicial discretion.

*Sanguinetti*, *Dickinson*, and *Barnes* show that if a flood is not permanent, inevitably recurring, or does not destroy all economically viable uses of property then it is difficult to predict how courts will rule.<sup>51</sup> *Penn Central* and *Tahoe-Sierra* demonstrate that balancing tests inevitably favor the government; however, this provides little certainty or guidance to landowners considering a takings claim and governments dealing with flooding decisions.<sup>52</sup> It is indisputable that more certainty is needed for intentional government-induced temporal flooding cases, and the recent Supreme Court decision of *Arkansas Game & Fish Commission v. United States* evidences this need.<sup>53</sup> As described immediately below, *Arkansas Game* questions "whether a taking may occur, within the meaning of the Takings Clause, when government-induced flooding invasions, although repetitive, are temporary."<sup>54</sup>

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45. 538 F.2d 865, 872-73 (Ct. Cl. 1976).

46. *Id.* at 873-74.

47. *Id.* at 873 ("[T]he date the [g]overnment complete[s] taking its flowage easement cannot be prior to when . . . the permanent character of intermittent flooding could fairly be perceived.").

48. *See supra* notes 15-17 and 32 and accompanying text.

49. *See supra* notes 19-21 and accompanying text.

50. *See supra* notes 36-37 and accompanying text.

51. *See supra* notes 38-47 and accompanying text.

52. *See supra* notes 22-29 and accompanying text.

53. 133 S. Ct. 511 (2012).

54. *Id.* at 515. *See infra* notes 56-93 and accompanying text.

### C. *Facts of the Case*

The Arkansas Game and Fish Commission<sup>55</sup> (“Commission”) owns and operates the Dave Donaldson Black River Wildlife Management Area (“Management Area”).<sup>56</sup> The Management Area consists of 23,000 acres of land, adjacent to the Black River, which the Commission maintains for hunting and wildlife.<sup>57</sup> Within the Management Area, hardwood bottomland timber provides a natural habitat for the wildlife and serves as a valuable source of income to the Commission, and therefore, the Commission takes great efforts to preserve the timber for regular harvests.<sup>58</sup>

In 1948, the U.S. Army Corps of Engineers<sup>59</sup> (“Army Corps”) completed construction of the Clearwater Dam (“Dam”) 115 miles

55. The Arkansas Game and Fish Commission consists of seven Arkansans appointed for seven-year terms by the governor, as well as the Chair of the University of Arkansas at Fayetteville’s Department of Biology, who serves as a non-voting member. *About AGFC - The Commission*, ARK. GAME & FISH COMM’N, <http://www.agfc.com/aboutagfc/Pages/AboutCommission.aspx> (last visited Feb. 7, 2014). “The Arkansas Game and Fish Commission’s mission is to conserve and enhance Arkansas’s fish and wildlife and their habitats while promoting sustainable use, public understanding and support.” *About AGFC - Our Mission*, ARK. GAME & FISH COMM’N, <http://www.agfc.com/aboutagfc/Pages/AboutMission.aspx> (last visited Feb. 7, 2014).

56. *Ark. Game & Fish Comm’n*, 133 S. Ct. at 515.

57. *Id.* The Management Area provides top-quality waterfowl hunting as well as turkey, deer, quail, rabbit, squirrel, and crow hunting. *Wildlife Management Area Details*, ARK. GAME & FISH COMM’N, <http://www.agfc.com/hunting/Pages/wmaDetails.aspx?show=170> (last visited Feb. 7, 2014).

58. *Ark. Game & Fish Comm’n*, 133 S. Ct. at 515-16. The dominant species of hardwood timber are nuttall oak, overcup oak, pin oak, and water oak. *Wildlife Management Area Details*, ARK. GAME & FISH COMM’N, <http://www.agfc.com/hunting/Pages/wmaDetails.aspx?show=170> (last visited Feb. 7, 2014). The Commission strategically floods the hardwood timber to provide waterfowl habitat, and the Commission also selectively thins trees to “stimulate the growth of new timber, to provide a diverse habitat type and to remove unhealthy or unproductive trees from the forest.” *Id.*

59. In 1824, after its decision in *Gibbons v. Ogden*, 22 U.S. 1, Congress used its Commerce power to give the U.S. Army Corps of Engineers authority to improve the navigation of the Ohio and Mississippi Rivers, and Congress later amended the act to include other U.S. rivers. *The U.S. Army Corps of Engineers: A Brief History – Improving Transportation*, U.S. ARMY CORPS ENGINEERS, <http://www.usace.army.mil/About/History/BriefHistoryoftheCorps/ImprovingTransportation.aspx> (last visited Feb. 7, 2014). Furthermore, via the 1928 Flood Control Act and the 1936 Flood Control Act, Congress authorized the Army Corps to undertake flood control measures by building reservoirs. *The U.S. Army Corps of Engineers: A Brief History – Multipurpose Waterway Development*, U.S. ARMY CORPS ENGINEERS, <http://www.usace.army.mil/About/History/BriefHistoryoftheCorps/MultipurposeWaterwayDevelopment.aspx> (last visited Feb. 7, 2014). Finally, by passing The Flood Control Act of 1938, Congress authorized the Army Corps to undertake flood control projects in the area of the country containing the Management Area, and the Army Corps began construction of the Clearwater dam in 1940. *See Ark. Game & Fish Comm’n v. United States*, 87 Fed. Cl.

upstream from the Management Area.<sup>60</sup> As a flood control project, responsibility for maintenance and operation of the Dam belongs to the Army Corps.<sup>61</sup> In 1950, the Army Corps implemented a water control plan, and in 1953, published *The Clearwater Lake Water Control Manual* (“Manual”).<sup>62</sup> Initially, when implementing its plan and determining water release rates, the Army Corps considered the agricultural growing season which roughly coincided with the hardwood timber growing season, and the Army Corps attempted to release water in a controlled manner in order to avoid interfering with growing season.<sup>63</sup> The Army Corps routinely followed the Manual’s water release rates until 1993 when it began deviating from the Manual’s water release rates at the request of farmers.<sup>64</sup>

The Commission observed that after the Army Corps implemented the deviations, the Management Area began experiencing flooding above historical norms.<sup>65</sup> Most concerning, these floods occurred during the hardwood timber’s growing season.<sup>66</sup> The Commission voiced concerns that the deviations from the water release rates in the Manual, which the Army Corps had followed for decades, may negatively impact the hardwood bottomland timber.<sup>67</sup> The Commission pleaded for the Army Corps to cease the

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594, 602 (2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd and remanded*, 133 S. Ct. 511 (2012), *aff'd*, 736 F.3d 1364 (Fed. Cir. 2013).

60. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 516.

61. *Ark. Game & Fish Comm'n*, 87 Fed. Cl. at 602.

62. *Id.* at 603 (the Manual states the Dam’s primary purpose as “provid[ing] flood protection below the dam and to maintain a permanent conservation pool for recreation, fish and wildlife, and other incidental uses”).

63. *Id.* at 602 (the growing season for hardwood timber occurs roughly between April and November).

64. *Id.* The planned deviations were implemented to provide farmers, located downriver, with a longer harvest period. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 516. To achieve these longer harvest periods, the Army Corps released water from the Dam at a slower rate than called for by the Manual. *Id.* As a result, water levels in the Dam rose and the Army Corps released the water for longer periods of time. *Id.*

65. *Id.*

66. *Ark. Game & Fish Comm'n*, 87 Fed. Cl. at 603.

67. *Id.* at 603-04 (various other groups voiced concerns as well, including: the Commission, the United States Fish and Wildlife Service, the Missouri Conservation Department, dock owners and campsite owners, and the drainage district). The Commission’s main concern was that “a much longer duration of stagnant water being held on the biologically and economically valuable hard mast bearing species of trees,” may have negative consequences. *Id.* at 604.

deviations and reestablish the water release rates called for by the Manual; however, the deviations continued into the late 1990s.<sup>68</sup>

In 1999, the Army Corps considered revising the Manual to make the deviations permanent.<sup>69</sup> Again, the Commission expressed its disapproval and concerns that the deviations negatively impair its hardwood timber.<sup>70</sup> Unfortunately for the Commission, the Army Corps contended that the effects from any deviations from the Manual ceased in Missouri, long before reaching the Management Area.<sup>71</sup> In fact, after conducting an environmental research assessment, the Army Corps concluded that making the water release deviations permanent would be of little or no consequence.<sup>72</sup> Once more, the Commission disputed the Army Corps' findings that the deviations resulted in little consequence.<sup>73</sup>

By July 1999, the Commission noticed a dramatic increase in hardwood timber mortality in the Management Area.<sup>74</sup> The Commission contended that the Army Corps deviations from the Manual caused this increased timber mortality.<sup>75</sup> The Army Corps reiterated its view that deviations from the Manual did not cause the increased timber mortality in the Management Area because the effects from the deviations ceased at the Missouri/Arkansas border.<sup>76</sup> Despite its disbelief, the Army Corps conducted water-stage testing and found that the deviations did, in fact, result in water from the Dam reaching the Management Area.<sup>77</sup> Further-

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68. *Id.* The flooding that occurred in the Management Area when the Army Corps followed the release rates dictated by the Manual resulted in "short-term waves of flooding which . . . receded quickly." *Ark. Game & Fish Comm'n*, 133 S. Ct. at 516.

69. *Ark. Game & Fish Comm'n*, 87 Fed. Cl. at 604.

70. *Id.*

71. *Id.* ("[T]he effect of Clearwater Dam diminishes at approximately the Missouri/Arkansas state line . . . due to the increased size of the watershed").

72. *Id.* (a draft environment assessment prepared by the Army Corps described the effects of making the deviations permanent as a "Finding of No Significant Impact").

73. *Id.* at 604-05 (the Commission had a "significant problem" with the new plan to make the deviations permanent). Additionally, the U.S Fish and Wildlife Service claimed that the Army Corps provided insufficient evidence to conclude that the effects of the planned deviations end at the Missouri/Arkansas border. *Id.*

74. *Id.* at 601, 605 (Martin Blaney, the Statewide Habitat Coordinator for the Commission, testified that in 1999 "a massive die-off of oak timber" occurred that was "a stark contrast from the healthy forest that [he had] seen before").

75. *Id.* at 600, 605 (Robert Zachary, Wildlife Supervisor for the Commission, contributed this damage to "stress caused by . . . stagnant water being in the [Management] [A]rea during the growing season for consecutive years . . . that led to a . . . gradual decline, and then finally a drastic change due to conditions in 1999").

76. *Id.* at 606 (Mike Hendricks, local Chief of Reservoir Control for the Army Corps opined that the Commission's claim was "unfounded").

77. *Id.* (the Army Corps found that permanent deviations would "inundate[ ] the roots of the hardwood trees in the wildlife management area").

more, the Army Corps finally acknowledged that the deviations may impact the hardwood timber in the Management Area.<sup>78</sup> As a result, in April 2001, the Army Corps ceased all deviations from the Manual and abandoned plans to make the deviations permanent.<sup>79</sup>

In 2005, the Commission sued the Army Corps claiming that the deviations from the Manual resulted in a compensable taking under the Fifth Amendment.<sup>80</sup> The Commission relied on Dr. Mickey Heitmeyer, a wetland ecologist, to establish that the deviations resulted in water inundating the Management Area for greater lengths of time compared to the time period prior to the deviations.<sup>81</sup> Dr. Heitmeyer's report established that the deviations resulted in over fifty percent of the nuttall oaks being inundated by water for, on average, forty-seven percent longer per year than prior to the commencement of the deviations.<sup>82</sup> Furthermore, Dr. Heitmeyer noted that in 1997, part of the Management Area was flooded for 166 days, ninety-five days longer than it had flooded on average prior to the deviations.<sup>83</sup> The Army Corps used a computerized model to analyze the impact of the Dam on the Management Area, both with and without the deviations.<sup>84</sup> Even without the deviations, the Army Corps' expert concluded that the Management Area would have experienced greater than average flooding during the time period in question.<sup>85</sup> In fact, the Army Corps contended that, even without deviations, the Management Area would have remained flooded for the majority of the hardwood timber growing season during the years in question.<sup>86</sup>

Moreover, both the Commission and the Army Corps relied on timber consultants for expert reports.<sup>87</sup> The Commission's timber experts analyzed the hardwood timber from regions of the Man-

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78. *Id.* (the district engineer for the Army Corps acknowledged that the deviations "unacceptably extend[ed] the duration of water inundation on bottomland hardwoods").

79. *Id.* (the Army Corps acknowledged that it ceased the deviations due to concerns about the effects the deviations had on bottomland timber in the Management Area).

80. Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 516 (2012).

81. Ark. Game & Fish Comm'n, 87 Fed. Cl. at 600, 608.

82. *Id.* at 608 (Heitmeyer used available water-gauge data collected by the Commission to determine that prior to the deviations, from 1949 to 1992, fifty percent of the nuttall oaks flooded on average 62.16 days/year; whereas, after the deviations commenced, from 1993-1999, fifty percent of the nuttall oaks flooded on average 91.14 days/year).

83. *Id.*

84. *Id.* at 608-09.

85. *Id.* at 609.

86. *Id.* ("[T]he modeling predicted that there would have been flooding in the Management Area for 72.8% of the days during the growing seasons from 1994 to 1999.").

87. *Id.* at 609-12.

agement Area which had experienced increased flooding (“Low Regions”) as well as control regions located at higher elevations that had not experienced flooding (“High Regions”) resulting from the Army Corp’s deviations.<sup>88</sup> Due to the healthy nature of the hardwood timber in the High Regions,<sup>89</sup> the Commission’s timber consultants believed that flooding caused the demise of the hardwood timber in the Low Regions.<sup>90</sup> Thus, the Commission’s timber experts concluded that the deviations caused the increased mortality of the hardwood timber.<sup>91</sup> The Army Corps’ timber expert analyzed the trees in both High and Low Regions and rejected the Commission’s timber expert’s finding mainly because he could not identify any sign of flood stress in the tree rings extracted from the hardwood timber cores.<sup>92</sup> The Court of Federal Claims faced a difficult factual and legal analysis to determine whether the Commission had established a compensable Fifth Amendment Claim due to the temporal nature of the intentional government-induced flooding.<sup>93</sup>

#### D. *The Court of Federal Claims Decision*

The Court of Federal Claims (“COFC”) held that the Commission was entitled to just compensation from the government for the taking of its interest in the bottomland hardwood timber.<sup>94</sup> The COFC found that the Army Corps’ deviations resulted in regular flooding of the Management Area from 1993 to 1998.<sup>95</sup> Moreover, the COFC determined that, with a reasonable investigation,

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88. *Id.* at 609.

89. *See id.* at 610 (“[O]f the ten thousand red oaks analyzed in the two [High Regions], no trees were dead and only 150 trees were in a declining state.”).

90. *Id.* at 609-10 (the hardwood timber mortality rate in the Low Regions ranged between nine percent to fifty-nine percent per year and thirty to forty percent of these trees exhibited a declining state of health).

91. *Id.* at 610 (“The prolonged growing season flooding (June-August) that occurred in 1994-1998 undoubtedly resulted in saturated soils, inadequate oxygen levels in the water and the soil, increased root respiration, and significant root mortality and die-back in many of the less water tolerant trees.”). As further evidence of saturated soils, the timber experts noted the invasion of wetland species, which thrive in saturated soil, into the Low Regions of the Management Area. *Id.* at 613.

92. *Id.* at 611-12.

93. 28 U.S.C. § 2503(c) (2012) (the Court of Federal Claims does not offer the right to a jury: “The judges of the Court of Federal Claims shall fix times for trials, administer oaths or affirmations, examine witnesses, receive evidence, and enter dispositive judgments”).

94. *Ark. Game & Fish Comm’n*, 87 Fed. Cl. at 640 (awarding damages of \$5,602,329.56). “The temporary taking of a flowage easement resulted in a permanent taking of timber.” *Id.* at 624-25.

95. *Id.* at 618-19.



the Army Corps would have been capable of predicting the impact of the deviations on the Management Area.<sup>96</sup> Additionally, the COFC rejected the Army Corps' claim that the summer droughts of 1999 and 2000 were intervening causes in the destruction of the Commission's timber.<sup>97</sup> Furthermore, the COFC concluded that the Commission's expert testimony sufficiently linked the deviations to the flooding of the Management Area which, in turn, caused the timber mortality.<sup>98</sup> In summary, the COFC found that the Commission met its burden of establishing that the Army Corps' deviations from the Manual resulted in the destruction of the Commission's timber, a compensable taking under the Fifth Amendment.<sup>99</sup>

#### *E. The Federal Circuit's Reversal*

The Federal Circuit held that no taking had occurred and reversed the COFC's decision.<sup>100</sup> In reaching its holding, the Federal Circuit did not address whether the flooding of the Management Area was predictable and sufficiently substantial to arise to a taking.<sup>101</sup> Consequently, the Federal Circuit decided that, as a matter of law, temporary floods do not constitute a taking unless the flooding is permanent or inevitably recurring.<sup>102</sup> Because the Army Corps never implemented permanent deviations from the Manual, and because the deviations only lasted between 1993 and 2000, the deviations were "inherently temporary."<sup>103</sup> Relying on

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96. *Id.* at 623 ("Indeed, the Corps had available to it a computerized modeling system that could have been used to evaluate potential hydrological effects of its deviations from the water control plan. . . . In short, the effect of deviations in the Management Area was predictable, using readily available resources and hydrological skills.").

97. *Id.* at 623-24 ("[T]he fact that there was some later incident that may have 'tilted the scale' . . . does not break the chain of foreseeable results of the government's authorized action.").

98. *Id.* at 629-32 (expert reports demonstrating "the increased frequency and uniquely sustained pattern of flooding in the Management Area during [the deviations]," as well as the once "very healthy condition" of the timber were crucial to the COFC's finding).

99. *Id.* at 634 ("The government's temporary taking of a flowage easement over the Management Area resulted in a permanent taking of timber from that property.").

100. *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1378-79 (Fed. Cir. 2011), *rev'd and remanded*, 133 S. Ct. 511 (2012).

101. *Ark. Game & Fish Comm'n*, 637 F.3d at 1376 ("[W]e need not decide whether the flooding on the Management Area was 'sufficiently substantial to justify a takings remedy' or 'the predictable result of the government's action.'" (quoting *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003))).

102. *Id.* at 1378 ("[The Commission has] not met [its] burden to prove that the increased flooding would be 'inevitably recurring' because the deviations were explicitly temporary.").

103. *Id.* at 1378-79.

prior case law, The Federal Circuit concluded “flooding must be a permanent or inevitably recurring condition, rather than an inherently temporary situation, to constitute the taking of a flowage easement.”<sup>104</sup>

Circuit Judge Pauline Newman, the lone dissenter, would have affirmed the COFC’s finding of a taking.<sup>105</sup> Judge Newman reasoned that permanent or inevitably recurring flooding is not required for one to claim just compensation under the Fifth Amendment.<sup>106</sup> Moreover, Judge Newman recognized that “flood-induced destruction of timber is permanent injury, and is compensable within the meaning of the Fifth Amendment.”<sup>107</sup> Judge Newman believed that the majority erred by focusing on whether the Army Corps’ deviation policy was permanent or temporary.<sup>108</sup> Judge Newman contended that the proper takings analysis focuses on whether the flooding caused substantial damage before the Army Corps ended the deviations.<sup>109</sup>

#### *F. The United States Supreme Court’s Reversal*

The United States Supreme Court unanimously<sup>110</sup> reversed the Federal Circuit’s holding that a flood must be permanent or inevitably recurring to constitute a taking and remanded the case for further proceedings.<sup>111</sup> Delivering the opinion of the Court, Justice Ginsburg framed the issue to be decided as “whether a taking may occur, within the meaning of the Takings Clause, when gov-

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104. *Id.* at 1378.

105. *Id.* at 1383 (Newman, J., dissenting).

106. *Id.* at 1381 (Newman, J., dissenting) (“Precedent does not require constant or permanent flooding, and eventual abatement of the flooding does not defeat entitlement to just compensation. . .”).

107. *Id.* at 1382 (Newman, J., dissenting) (relying on *Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987)).

108. *Id.* (Newman, J., dissenting) (“My colleagues err . . . incorrectly holding that the issue is solely whether the injurious flooding was eventually ended. My colleagues err in ruling that: ‘we do not focus on a structure and its consequence. Rather we must focus on whether the government flood control policy was a permanent or temporary policy.’”).

109. *Id.* at 1383 (Newman, J., dissenting) (“The question is . . . whether the increased flooding caused significant injury before the flooding was abated, such that, on balance, the Fifth Amendment requires just compensation.”).

110. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 515 (2012) (Justice Kagan recused herself from the case).

111. *Id.* at 522 (“We rule today, simply and only, that government-induced flooding temporary in duration *gains no automatic exemption* from Takings Clause inspection.”) (emphasis added). The Supreme Court’s ruling only eliminates the *absolute* bar to Takings Clause analysis in temporal flood cases; it is important to note that the tort versus taking analysis survives in temporal flood cases. *See infra* notes 165-69 and accompanying text.

ernment-induced flood invasions, although repetitive, are temporary.”<sup>112</sup> The Court recognized that most takings cases require fact-intensive inquiries.<sup>113</sup> Furthermore, the Court specified that its precedent would not require that the Army Corps’ deviations be permanent in order to qualify as a taking.<sup>114</sup> The Court expressed its view that to evaluate a temporary physical invasion of private property by the government, a court should consider factors including: (1) duration, (2) the intent or foreseeability of the government action, (3) the “reasonable investment-backed expectations” of the land’s use, and (4) the severity of the interference.<sup>115</sup> After concluding that “recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability,” the Court remanded the case so that the Federal Circuit could consider whether the predictability and severity of the flooding preclude takings liability.<sup>116</sup>

### G. Decision on Remand

On remand, the Federal Circuit decided that (1) a physical taking occurred despite the fact that the government-induced floods were only temporary,<sup>117</sup> (2) sufficient evidence established that the Army Corps’ deviations from the Manual damaged trees,<sup>118</sup> (3) sufficient evidence established that it was foreseeable that deviation from the Manual would damage trees,<sup>119</sup> and (4) the intrusion was severe enough to constitute a taking.<sup>120</sup> As such, the decision of the COFC was affirmed.<sup>121</sup>

## III. FLAWS IN THE CURRENT TORT VERSUS TAKING DISTINCTION

In *Arkansas Game and Fish Commission v. United States*, the Supreme Court reached the proper conclusion that temporary

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112. *Id.* at 515.

113. *Id.* at 518 (there are some bright line rules, but “most takings claims turn on situation-specific factual inquiries”).

114. *Id.* at 519 (“[W]e have rejected the argument that government action must be permanent to qualify as a taking.”).

115. *Id.* at 522 (internal citations omitted).

116. *Id.* at 515, 523 (“Because the Federal Circuit rested its decision entirely on the temporary duration of the flooding, it did not address [the causation, foreseeability, substantiality, and amount of damages].”).

117. *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1369 (Fed. Cir. 2013).

118. *Id.* at 1372.

119. *Id.* at 1374.

120. *Id.* at 1375.

121. *Id.* at 1367.

flooding is not automatically barred from the Takings Clause protection guaranteed by the Fifth Amendment to the United States Constitution.<sup>122</sup> However, the Supreme Court ruled too narrowly and missed an opportunity to remedy the law in the unique realm of intentional government-induced temporal flood cases.<sup>123</sup> Lawyers, landowners, government agencies, and planning commissions will continue to struggle with temporary flooding decisions.<sup>124</sup> This analysis section first addresses the flaws with the tort versus taking analysis currently used by courts to decide intentional government-induced temporal flood cases. Then, this analysis section suggests that because the application of the tort versus taking analysis has become elusive in intentional government-induced temporal flood cases, courts deciding such cases ought to focus on litigating damages rather than determining whether a cause of action exists based on the arbitrary and elusive distinction between torts and takings. Finally, this analysis section discusses the possibility of adopting the inverse ratio rule, used in intellectual property law, when litigating damages in intentional government-induced temporal flooding cases.

A. *The Arbitrary Tort Versus Taking Distinction Unfairly Determines Whether a Landowner Has a Cause of Action When His or Her Property is Taken by an Intentional Government-Induced Temporal Flood*<sup>125</sup>

The practical importance of the tort versus taking distinction is that it determines (1) whether the plaintiff has a cause of action against the government for the intentional government-induced

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122. Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 515 (2012).

123. Temporary flooding cases are unique because a flood can affect property both when the flood waters are present and long after such flood waters have receded. The flood not only limits the landowner's use of his or her land for a set period of time (a temporal component), but floods often have lasting effects that survive after the flood waters have receded (a lasting component). For instance, in *Arkansas Game & Fish Commission v. United States*, the Commission's use of the Management Area was limited by flood waters caused by the Dam (the temporal component). See 87 Fed. Cl. 594, 603 (2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd and remanded*, 133 S. Ct. 511 (2012), *aff'd*, 736 F.3d 1364 (Fed. Cir. 2013). But even after they receded, the flood waters' lasting effects in the Management Area continued to impact the hardwood timberland mortality (the lasting component). See *id.* at 610.

124. See generally Daniel L. Siegel, *The Impact of Tahoe-Sierra on Temporary Regulatory Takings Law*, 23 UCLA J. ENVTL. L. & POL'Y 273, 274 (2005) ("Planners operate under the fear that a court may find that their decision constitute[s] a taking.").

125. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury."); see also Epstein, *supra* note 11, at 592.

temporal flood, (2) which court has jurisdiction over the cause of action, and (3) what is the relevant statute of limitations to initiate the cause of action. First, the importance of the tort versus taking distinction in deciding whether the plaintiff has a cause of action against the government in intentional government-induced temporal flooding cases can be traced back to the 1920s, when the federal government authorized the Army Corps to undertake flood control projects.<sup>126</sup> Congress passed the Flood Control Act of 1928, which immunized the government from tort liability resulting from government flood control projects.<sup>127</sup> Therefore, a landowner whose property attains damage from a government flood control project may not sue the government in tort.<sup>128</sup> As a result, the landowner's only remedy is to sue the government under the Takings Clause.<sup>129</sup>

Next, the tort versus taking distinction determines in which court the plaintiff may bring his or her cause of action against the government. The Court of Federal Claims has jurisdiction over takings claims,<sup>130</sup> but not tort claims<sup>131</sup> filed against the government. Furthermore, the United States District Courts cannot hear takings claims of more than \$10,000.<sup>132</sup> Finally, as for the relevant statute of limitations, tort claims must be brought before

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126. See *supra* note 59 and accompanying text.

127. The Flood Control Act of 1928, 33 U.S.C. § 702(c) (2006) (“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.”).

128. See *id.*

129. Although 33 U.S.C. § 702(c) states that governments shall face “no liability,” the courts have interpreted the “no liability” language liberally; otherwise the statute may be found unconstitutional for violating the Fifth Amendment. *Turner v. United States*, 17 Cl. Ct. 832, 834-35 (1989), *rev'd on other grounds by* 901 F.2d 1093 (Fed. Cir. 1990) (holding that 33 U.S.C. § 702(c) is subject to the limitations imposed by the Fifth Amendment); see also Transcript of Oral Argument at 39, *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) (No. 11-597) (Edwin Kneedler, attorney for the United States, stated “the Flood Control Act of 1928 . . . says that the Government shall not be liable for any damage to any property at any place resulting from floods or flood waters.” Justice Scalia answered, “[o]f course, that can't overrule the Takings Clause, can it? I mean, that's nice that Congress doesn't want to be liable.”).

130. 28 U.S.C. § 1491(a)(1) (2012) (“The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution. . .”).

131. *Id.* § 1346(b)(1) (2012) (giving U.S. District Courts exclusive jurisdiction over loss of property claims against the United States caused by the negligent act of any employee of the government).

132. *Id.* § 1346(a)(2) (2012).

the United States District Courts within two years,<sup>133</sup> whereas takings claims can be filed with the United States Court of Federal Claims for up to six years after the cause of action accrues.<sup>134</sup>

Hence, the practical implications of the tort versus taking distinction are profound. If the court determines that the intentional government-induced temporal flood damages occurred in tort, then the landowner has no cause of action against the government, and the questions of which court has jurisdiction and what is the relevant statute of limitations become moot.<sup>135</sup> Thus, the tort versus taking distinction is unfair and improper in intentional government-induced temporal flooding cases because an arbitrary line determines whether a cause of action exists. Courts ought to focus on litigating damages rather than determining whether a cause of action exists based on the arbitrary and elusive distinction between torts and takings.

*B. Protecting the Government from Justly Compensating Landowners When its Actions Take the Landowner's Property Creates a Dangerous Moral Hazard*

Congress passed the 1928 Flood Control Act to protect the government from liability arising from government flood control projects.<sup>136</sup> Among Congress' chief purposes in passing the 1928 Flood Control Act was to enable the Army Corps to manage flood control projects without the fear of facing litigation. A recurring anxiety of the government in temporal flooding cases is that awarding damages for takings against the government risks disruption of flood control projects.<sup>137</sup> The government fears that "[e]very passing flood attributable to the government's operation of a flood-control project, no matter how brief," may qualify as a compensable taking.<sup>138</sup> The Supreme Court observed in *Arkansas Game* that the government's fear was unfounded.<sup>139</sup>

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133. *Id.* § 2401(b) (2012) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . .").

134. *Id.* § 2501 (2012) ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition is filed within six years after such claim first accrues.")

135. *See supra* notes 127-29 and accompanying text.

136. *See supra* note 127 and accompanying text.

137. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 521 (2012).

138. *Id.*

139. *Id.* ("To reject a categorical bar to temporary-flooding takings claims, however, is scarcely to credit all or even many such claims.")

Moreover, even if there is some merit to the government's fear that allowing a cause of action against the government may impede flood control projects, it does not follow that takings claims should be barred against the government merely because the claims arise in tort.<sup>140</sup> Barring takings actions merely because the cause of action arises in tort greatly increases the government's power and control over people's property, and history is ripe with doctrines meant to limit the government's power.<sup>141</sup> In fact, The Fifth Amendment's Takings Clause is meant to protect a landowner from the government's overreaching power to take his or her property.<sup>142</sup>

In *Romeo & Juliet*, Shakespeare quipped "What's in a name? That which we call a rose by any other name would smell as sweet."<sup>143</sup> Similarly, whether called a tort or a taking, intentional government-induced temporal floods may cause damage to a landowner's property for which the landowner is entitled to a remedy. The unfair consequence of the tort versus taking distinction is to bar the landowner's remedy should the flood be called a tort. Moreover, it has been suggested that "torts against property are takings under the Fifth Amendment."<sup>144</sup> Hence, if a tort against property is a taking, then there is no need to distinguish torts and takings in the realm of intentional government-induced temporal floods in the first place.

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140. *Id.* (flooding cases should not be assessed "by resorting to blanket exclusionary rules"); See Marzulla, *supra* note 7, at 5 ("Temporary takings are now part of established jurisprudence. There is no logical reason to exclude flooding cases from general takings law."); Daniel T. Smith, Note, *Draining the Backwater: The Normalization of Temporary Floodwater Takings Law in Arkansas Game and Fish Commission v. United States*, 101 GEO L. J. ONLINE 57, 69 (2013), available at <http://georgetownlawjournal.org/ipsa-loquitur-issue/101> (the *Ark. Game & Fish Comm'n* decision diminishes arguments both for and against bright-line rules in Takings cases).

141. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed . . ."). See generally MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 405 (4th ed. 2011) ("The principle that law should protect the rights of individuals against the abuses of governments can at least be dated back to John Locke's *Two Treatises of Government* published in 1690. Locke believed that human rights, not governments, came first in the natural order of things.")

142. See U.S. CONST. amend. V.

143. WILLIAM SHAKESPEARE, *ROMEO & JULIET* 22 (London, Macmillan 1839).

144. See Arpan A. Sura, Comment, *An End-run Around the Takings Clause? The Law of Economics of Bivens Actions for Property Rights Violations*, 50 WM & MARY L. REV. 1739, 1753 (2009) (citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35-38 (1985)).

Indeed, to avoid a moral hazard, a government must be held responsible for the negative consequences of its actions.<sup>145</sup> In the temporary takings realm, history demonstrates that the government acts differently when it must face the detrimental consequences of its actions. For example, after the Supreme Court found a taking in *Lucas v. South Carolina Coastal Council*,<sup>146</sup> South Carolina promptly settled the case, lifted the regulation forbidding development, and sold the property to developers who built homes on the very lots that Lucas had been forbidden from developing.<sup>147</sup> Similarly, in *Arkansas Game*, only the looming threat of litigation resulted in the Army Corps ending the deviations from the Manual that were causing the hardwood timber damage in the Management Area.<sup>148</sup>

The corollary to holding the government responsible for the negative consequences of its actions is that the government will fear that its actions may result in liability, hence hindering government efficiency.<sup>149</sup> However, fear is necessary to motivate the government to take precautions to try to avoid liability in the first place. Without fear and the threat of takings liability, the government has little motivation to consider the landowner's best interest. More importantly, landowners have little remedy when the government temporarily takes, or even destroys, their property, thus resulting in "an unstable system of recovery for individuals whose property is destroyed by the government."<sup>150</sup>

A proponent for the tort versus taking distinction may argue that while the government may not be legally obligated to compensate landowners if the flooding is found to be a tort, the gov-

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145. See Tyler J. Sniff, Comment, *The Waters of Takings Law Should Be Muddy: Why Prospectively Temporary Government-Induced Flooding Could Be a Per Se Taking and the Role for Penn Central Balancing*, 22 FED. CIR. B. J. 53, 76 (2012) ("[T]reatment under takings law and takings liability should also depend on the actual impact of a government action on a plaintiff's property interest, rather than simply the government's intent.").

146. 505 U.S. 1003 (1992).

147. Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches – A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837, 867 n.116 (1998) ("The state regulators' environmental zeal thus lasted only as long as they thought they could stick Lucas with the cost of the proverbial free lunch. But when faced with the tab themselves, preservation of Lucas' lots suddenly ceased being environmentally important.").

148. See *supra* notes 77-79 and accompanying text.

149. See Siegel, *supra* note 124, at 274.

150. Stephen R. Catanzaro, Comment, *The Home Taken Into the Takings Clause: An Exploration of the Takings Clause and the Moral Obligation of the Government to Provide Just Compensation*. Student Scholarship Paper 195, 28 (2013), [http://erepository.law.shu.edu/student\\_scholarship/195](http://erepository.law.shu.edu/student_scholarship/195).



ernment still has a moral obligation to compensate.<sup>151</sup> Although this doctrine of public necessity may be true, its application to the government may be limited by government immunity, and landowners waiting on the government to act based upon a moral obligation will often be disappointed.<sup>152</sup> In any event, regardless of whether there is a moral obligation for the government to pay for damages resulting from its attempts to improve flooding conditions, the better method is to hold the government to its constitutional duty to justly compensate for a taking.<sup>153</sup>

*C. The Current Tort Versus Taking Test is Unclear and Denies Justice in Intentional Government-Induced Flooding Cases*

*1. The Tort Versus Taking Framework used in Intentional Government-Induced Temporal Flooding Cases Fails the Armstrong Principle*

The quintessential problem with the current tort versus taking framework used in intentional government-induced temporal flooding cases is that it too often fails to protect individual landowners from the government's flooding choices.<sup>154</sup> By amending the United States Constitution to add the Fifth Amendment's Takings Clause, Congress intended to protect landowners from the omnipotent government by providing landowners with just compensation should the government take the landowner's private property (the "Armstrong principle").<sup>155</sup> However, the current state of intentional government-induced temporal flooding jurisprudence fails to protect landowners from the government.<sup>156</sup>

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151. See generally RESTATEMENT (SECOND) OF TORTS § 196 (1965).

152. See *id.* at cmt. h (1965); *cf.* Catanzaro, *supra* note 150, at 31 (explaining that Congress acted to compensate oyster farmers despite a finding by the Federal Circuit that no taking had occurred) (citing *Avenal v. United States*, 100 F.3d 933 (Fed. Cir. 1996)).

153. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

154. See, e.g., *Sanguinetti v. United States*, 264 U.S. 146, 148-50 (1924) (no taking); *Big Oak Farms, Inc. v. United States*, 105 Fed. Cl. 48, 59 (2012) (no taking); *Barnes v. United States*, 538 F.2d 865, 873 (Ct. Cl. 1976) (no taking for several floods); *Hartwig v. United States*, 485 F.2d 615, 617 (Ct. Cl. 1973) (no taking); *Fromme v. United States*, 412 F.2d 1192, 1194-1195 (Ct. Cl. 1969) (no taking).

155. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

156. See Magdalene Carter, Note, *Flooding the Possibility of Recovery Under a Temporary Takings Analysis: The Drowning Effects of Arkansas Game & Fish Commission v.*

Even after the Supreme Court's holding in *Arkansas Game*, courts continue to give the federal government too much deference in intentional government-induced temporal flooding cases, essentially allowing the government to temporarily take private property without providing the landowner with just compensation.

Most recently, the United States Court of Federal Claims ("COFC") gave the federal government great deference by dismissing an intentional government-induced temporal flood takings claim in *Big Oak Farms, Inc. v. United States*.<sup>157</sup> In *Big Oak Farms*, many landowners alleged that the Army Corps violated the Takings Clause by taking their property without providing just compensation.<sup>158</sup> The Army Corps exploded the levee that protected the landowners' property, releasing flood waters that damaged the landowners' property, crops, equipment, and infrastructure.<sup>159</sup> In addition, the flood left sand and gravel deposits strewn across the landowners' property.<sup>160</sup> The COFC relied on the Federal Circuit's opinion in *Arkansas Game* and held that no taking had occurred because "[r]eleases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring."<sup>161</sup>

Following the Supreme Court's reversal<sup>162</sup> of the Federal Circuit in *Arkansas Game*, the COFC instructed both parties to address the effects of the reversal on the COFC's earlier decision<sup>163</sup> denying a takings claim.<sup>164</sup> The COFC declined to reconsider its earlier decision.<sup>165</sup> The COFC reasoned that reconsideration was unnecessary because "*Arkansas Game* addressed simply and only whether 'repeated' government-induced flooding, if temporary in nature, was exempt from the Takings Clause. The Supreme Court

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*United States*, 23 VILL. ENVTL. L. J. 211, 245 (2012) (recognizing that in temporal flooding cases, courts give "the government unprecedented power to occupy private property without just compensation," and further recognizing that the courts permit the federal government to "disregard . . . the environmental destruction caused by such a taking").

157. 105 Fed. Cl. at 59.

158. *Id.* at 50.

159. *Id.*

160. *Id.*

161. *Id.* at 55-56 (quoting *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1377 (Fed. Cir. 2011), *rev'd and remanded*, 133 S. Ct. 511 (2012)).

162. The Supreme Court reversed the Federal Circuit's decision on December 4, 2012. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 523 (2012).

163. The COFC ruled on May 4, 2012 that no taking had occurred in *Big Oak Farms*, 7 months prior to the Supreme Court's December 4, 2012 holding in *Arkansas Game*. *Big Oak Farms, Inc.*, 105 Fed. Cl. at 48.

164. Order Following *Arkansas Game* at 2, *Big Oak Farms, Inc. v. United States*, No. 11-275L (Fed. Cl. 2012), ECF No. 54.

165. *See id.* at 3.

did not address whether a single flood can give rise to a claim for a taking as opposed to a tort.<sup>166</sup> Essentially, the COFC continues to hold that a single flood can never rise to the level of a taking, and, therefore, in all cases, the government is entitled to freely flood one's property at least one time.<sup>167</sup> Thus, the most recent intentional government-induced temporal flooding case indicates that the COFC continues to struggle interpreting the tort versus taking distinction and improperly takes the easy road by categorically exempting a landowner's one-time flood claim from ever succeeding with a Takings Clause cause of action.<sup>168</sup> Because the government exploded the levee in *Big Oak Farms* to protect some landowners in Cairo, Illinois,<sup>169</sup> it clearly follows that the court failed to satisfy the *Armstrong* principle when it forced other landowners to suffer the brunt of the resultant intentional government-induced temporal flooding damage while also withholding just compensation.<sup>170</sup> Therefore, in intentional government-induced temporal flood cases, courts ought to focus on litigating damages rather than determining whether a cause of action exists based on the arbitrary and elusive distinction between torts and takings. By following such a procedure, the *Armstrong* principle is more easily satisfied.

## 2. *It is Unclear How Many Intentional Government-Induced Temporal Floods Turn a Mere Tort into a Taking*

The frequency of flooding required to rise to the level of a taking has created a judicial quagmire resulting in decisions inconsistent with general takings jurisprudence. For example, the courts consistently hold that one flood does not rise to the level of a taking.<sup>171</sup> However, holding that one flood does not rise to the level of a taking is inconsistent with earlier general takings cases where the

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166. *See id.*

167. In reality, the government flooded the landowner's property twice; however, the COFC says that the two floods are too remote to be considered recurring floods. *Big Oak Farms, Inc.*, 105 Fed. Cl. at 56.

168. Smith, *supra* note 140, at 68-69 ("In spite of the Supreme Court's doctrinal move away from per se rules that invalidate takings claims, the *Big Oak Farms* court's decision not to reconsider the case suggests lower courts may continue to treat factors such as substantiality and frequency as dispositive, limiting the practical effects of the *Arkansas* decision.")

169. 105 Fed. Cl. at 50.

170. *See supra* note 155 and accompanying text.

171. *See, e.g., Big Oak Farms*, 105 Fed. Cl. at 56; *Hartwig v. United States*, 485 F.2d 615, 620 (Ct. Cl. 1973); *Fromme v. United States*, 412 F.2d 1192, 1196 (Ct. Cl. 1969).

courts decided that the government must pay just compensation for a single physical temporary taking.<sup>172</sup> Furthermore, an absolute bar on one flood constituting a taking is inconsistent with the Supreme Court's recent decisions which aim to avoid per se rules invalidating takings claims.<sup>173</sup>

Besides, if one flood cannot constitute a taking then how many floods must a landowner suffer before his claim rises to the level of a taking rather than a mere consequential tort? Unfortunately, the court has not clearly answered this question.<sup>174</sup> Rather, one is left to decipher unclear rules. For example, "[g]overnment-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort."<sup>175</sup> Although at first glance this rule seems adequate, no clear guidelines mark the boundary between inevitably recurring floods which face liability for government takings and occasional floods which evade any government liability, making the rule difficult to apply.<sup>176</sup>

Additionally, the durational uncertainty required to find a taking, as opposed to a mere tort, is exacerbated by the Federal Circuit's inconsistent decisions in cases with nearly identical facts. For example, in *Arkansas Game*,<sup>177</sup> the Federal Circuit's majority opinion failed to discuss *Cooper v. United States*,<sup>178</sup> a case directly on point; however, in her dissenting opinion, Justice Newman addressed the case.<sup>179</sup> In *Cooper*, the Army Corps project blocked a river which caused Cooper's farm to flood for five consecutive years.<sup>180</sup> Consequently, the standing water stressed Cooper's timber during the growing season and Cooper's trees began to die.<sup>181</sup> The Federal Circuit found that a taking of Cooper's timber had

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172. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 374-75 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

173. Smith, *supra* note 140, at 68.

174. Three floods may not be a taking. See *supra* notes 45-47 and accompanying text. Two floods may not constitute a taking. See *supra* note 167 and accompanying text.

175. *Barnes v. United States*, 538 F.2d 865, 870 (Ct. Cl. 1976).

176. *Nat'l By-Products, Inc. v. United States*, 405 F.2d 1256, 1273 (Ct. Cl. 1969) ("The distinction between 'permanent liability to intermittent but inevitably recurring overflows', and occasional floods induced by governmental projects, which we have held not to be takings, is, of course, not a clear and definite guideline.")

177. *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd and remanded*, 133 S. Ct. 511 (2012).

178. 827 F.2d 762 (Fed. Cir. 1987).

179. *Ark. Game & Fish Comm'n*, 637 F.3d at 1382 (Newman, J., dissenting).

180. *Cooper*, 827 F.2d at 762.

181. *Id.*

occurred.<sup>182</sup> Considering the court's holding in *Cooper*, it is unclear how the Federal Circuit could conclude, in *Arkansas Game*, that flooding from 1993 through 2001 that destroyed the Commission's timber did not also amount to a taking.<sup>183</sup> Therefore, in intentional government-induced temporal flood cases, courts ought to focus on litigating damages rather than trying to decipher the arbitrary line transforming the flood from a mere tort to a taking.

3. *It is Unclear What Level of Intent / Foreseeability Turns a Mere Tort into a Taking*

Clearly, for a court to award damages in a tort or takings action against the government, the plaintiff must show the government caused the damages. Although this principle seems simple, the tort versus taking distinction makes it quite confusing for the courts.

In *Ridge Line, Inc. v. United States*, the court described the two-part test to distinguish physical takings from torts.<sup>184</sup> First, a taking requires that the government "intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity . . . .'"<sup>185</sup> Second, the court must consider whether the government's interference with property rights was "substantial and frequent enough to rise to the level of a taking."<sup>186</sup> Essentially, the first prong requires the court to determine if the harm "[was] the predictable result of the government's action, and whether the government's actions were sufficiently substantial to justify a takings remedy."<sup>187</sup>

The courts have experienced great difficulty determining whether harm is predictable and what is the relevant standard of predictability. In *Moden v. United States*, addressing the causation prong of the *Ridge Line* test, the Federal Circuit stated that a "plaintiff must prove that the government *should* have predicted or foreseen the resulting injury."<sup>188</sup> Four days earlier, in *Hansen*

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182. *Id.* at 763-64.

183. *Ark. Game & Fish Comm'n*, 637 F.3d at 1382 (Newman, J., dissenting) ("The floods in *Cooper* and the government activity that caused them were no less 'inherently temporary,' the words by which the majority characterizes the flooding, than the recurring releases here.").

184. 346 F.3d 1346, 1355 (Fed. Cir. 2003).

185. *Id.* (internal citation omitted).

186. *Id.* at 1357.

187. *Id.* at 1355.

188. 404 F.3d 1335, 1343 (Fed. Cir. 2005) (emphasis added).

*v. United States*, addressing the causation prong of the *Ridge Line* test, the COFC stated that the proper inquiry was if “the harm *could* have been foreseen. . . .”<sup>189</sup>

Although the difference between “could have been foreseen” and “should have been foreseen” seems minor, this determination can be dispositive of the tort versus taking distinction. For example, in *Moden*, the plaintiffs needed to prove that it should have been foreseen that chemical solvents, used by the Air Force base, would be released into the groundwater.<sup>190</sup> Although an Air Force engineer testified “underground leaks in drainage systems are possible,” the court found that, at most, this merely indicated the cause-in-fact of the claimed injury.<sup>191</sup> Despite the fact that the engineer’s testimony showed that the Air Force “could have foreseen” the chemical solvent entering the groundwater, the Federal Circuit determined that this did not mean that the injury should have been foreseen.<sup>192</sup> Therefore, the *Modens* failed to satisfy the first prong of the *Ridge Line* test required to find a taking. *Moden* demonstrates the importance of having a causation standard that is understood and applied uniformly by the courts, especially when that determination is dispositive of the tort versus taking distinction. By focusing on damages, rather than the tort versus taking distinction, the court could eliminate the possibility of barring recovery based on an unclear factor.

#### D. A Better Method for Resolving Temporal Flooding Cases

As demonstrated above, what constitutes a taking, as opposed to a tort, is not a question to which there is likely to be agreement across temporal flooding cases.<sup>193</sup> Under the current law, intentional government-induced temporal flooding cases turn on whether the plaintiff’s claim rises to a taking because 33 U.S.C. § 702(c) precludes liability against the government in tort.<sup>194</sup> Therefore, in an intentional government-induced temporal flooding case, the plaintiff’s taking claim must satisfy a set of unclear balancing factors before the plaintiff can establish any liability. Basing takings liability on the tort versus taking distinction is fundamental-

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189. 65 Fed. Cl. 76, 97 (2005) (emphasis added).

190. 404 F.3d at 1344.

191. *Id.* at 1345.

192. *See id.*

193. *See Epstein, supra* note 11, at 604.

194. *See supra* notes 127-29 and accompanying text.

ly flawed because “torts against property are takings under the Fifth Amendment.”<sup>195</sup> Hence, a more practical approach in temporal flooding cases would focus on litigating damages rather than litigating whether an intentional government-induced temporal flood crosses the arbitrary, imaginary line that delineates a tort from a taking.<sup>196</sup>

Of course, by focusing on damages in an intentional government-induced temporal flooding case, the question shifts to causation. If the landowner can prove that the government flood control project caused the damages to the landowner’s property, a tort has occurred; because a tort against property is a taking,<sup>197</sup> by logical deduction a taking has occurred. Once a taking is found there are many possible options for calculating damages.<sup>198</sup>

Applying a takings analysis in intentional government-induced temporal flood cases resolves many issues currently plaguing the intentional government-induced temporal flooding jurisprudence. First, if the landowner can establish that a tort to his property resulted from the intentional government-induced temporal flood, then the landowner will experience the fairness and justice called for by the *Armstrong* principle because his cause of action no longer depends on the arbitrary line delineating torts from takings.<sup>199</sup> When applying a tort versus taking distinction in an intentional government-induced temporal flood case, a landowner whose claim sounded in tort forfeited his chance at collecting damages because he failed to have a cause of action against the government.<sup>200</sup> However, by applying a takings analysis in intentional government-induced flood cases, if the landowner can establish that the government flooded his property, he gets his day in court to litigate damages. As such, by simply applying a takings analysis the landowner may litigate damages and will not be forced to “bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>201</sup>

Furthermore, applying a takings analysis in intentional government-induced temporal flood cases is a logical extension of the

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195. See Sura, *supra* note 144, at 1753.

196. See Epstein, *supra* note 11, at 600 (calling for “liability by rule, damages by degree”).

197. See Sura, *supra* note 144, at 1753.

198. See Siegel & Meltz, *supra* note 10, at 513-23.

199. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

200. See *supra* notes 127-29 and accompanying text.

201. See *Armstrong*, 364 U.S. at 49.

Supreme Court's "doctrinal move away from per se rules that invalidate takings claims . . . ." <sup>202</sup> Under current law, because the case of an individual flood sounds in tort, it can never amount to a taking. <sup>203</sup> Although recurrent flooding was at issue in *Arkansas Game* rather than a single flood, the Supreme Court's holding that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability," <sup>204</sup> illustrates a desire to avoid rules that categorically bar takings actions. Moreover, the Court addressed that "most takings claims turn on situation-specific factual inquiries." <sup>205</sup> By utilizing a takings analysis in a single flood case, courts could simply apply the situation specific factual inquiry to litigating damages rather than barring the action entirely. Holding that a single flood can never amount to a taking clearly fails the *Armstrong* principle as well. Thus, the move to avoid categorical exemptions from Takings Clause liability supports the idea of applying a takings analysis in intentional government-induced temporal flooding cases.

Moreover, applying a takings analysis in intentional government-induced temporal flood cases avoids the difficulties associated with the *Ridge Line* test. <sup>206</sup> Instead of trying to apply the abstract *Ridge Line* test to determine if a cause of action exists, the court is left to litigate what level of damages the flooding warrants. As such, the landowner's burden shifts to proving what level of just compensation the government owes for its temporary use of the landowner's private property. Although a landowner's and court's opinion of what constitutes just compensation may differ, receiving less just compensation is more just and fair than barring a cause of action based on the arbitrary tort versus taking distinction.

Also, applying a takings analysis in intentional government-induced temporal flood cases will not result in the government owing substantial just compensation in all cases. In some cases the government may owe nominal or small amounts of just compensation. Because in temporal flooding cases, "torts against

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202. Smith, *supra* note 140, at 68.

203. See, e.g., *Big Oak Farms, Inc. v. United States*, 105 Fed. Cl. 48, 56 (2012); *Hartwig v. United States*, 485 F.2d 615, 620 (Ct. Cl. 1973); *Fromme v. United States*, 412 F.2d 1192, 1196 (Ct. Cl. 1969).

204. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012).

205. *Id.* at 518 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

206. See *supra* notes 184-92 and accompanying text.



property are takings under the Fifth Amendment,<sup>207</sup> the government may limit the just compensation due by proving that the intentional government-induced temporal flood did not proximately cause the landowner's damage or that a concurrent cause existed. For example, if the Army Corps could prove that a landowner's trees suffered from blight before the temporal flooding began, then the Army Corps could limit the just compensation due. More importantly, the Army Corps may only owe nominal damages if the landowner's property produced no income and the flooding caused no property damage. For example, if the Army Corps merely flooded an empty field or a forest, where the landowner does not harvest timber, then the landowner would fail to prove anything more than nominal damages. Hence, applying a takings analysis in intentional government-induced temporal flood cases will not result in the government owing substantial just compensation in all cases. Furthermore, judicial activism is a possibility, and it is plausible that judges may find ways to mitigate or award nominal damages in close cases. The government may still receive some deference in intentional government-induced temporal flood cases, and if such is the case, only landowners with very strong claims will succeed.

#### *E. An Inverse Ratio Rule*

A difficult conundrum in intentional government-induced temporal flooding cases is that the government could be held liable for remote flood damages. To limit damages in scenarios involving very remote flooding, courts could adopt the inverse ratio rule from intellectual property law.<sup>208</sup> In the context of damages in a government-induced temporal flooding case, the inverse ratio rule would require a lesser showing of intent or knowledge that the plaintiff's land would flood if there is a strong showing that a good faith effort at computer modeling would have predicted the flooding of the plaintiff's land.<sup>209</sup> Stated differently, landowners adjacent to or in close proximity to the dam should almost always be

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207. Sura, *supra* note 144, at 1753.

208. *See, e.g.,* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000) (establishing that in copyright infringement cases where there is weak proof of access to the copyrighted material and only circumstantial evidence establishes substantial similarity the court applies an inverse ratio test, which requires a lesser showing of substantial similarity if there is a strong showing of access).

209. Computer modeling is already used in the context of intentional government-induced temporal floods. *See supra* note 96 and accompanying text.

justly compensated with their full amount of proven damages. If a more remote landowner, whose property is located further from the dam, can show that good faith computer modeling would have predicted that his or her property would flood, then this landowner should also be justly compensated his or her full amount of proven damages.<sup>210</sup> If a remote landowner, whose property is located further from the dam, cannot show that good faith computer modeling would have predicted the flooding of his or her property, then the court is left to determine what compensation is owed to the landowner. Using an inverse ratio test would result in the government owing just compensation for government-induced temporal floods, but in remote flood cases the court may exercise more judicial discretion in determining the amount of just compensation due to the landowner.

#### IV. CONCLUSION

Intentional government-induced temporal floods are a taking and the proper inquiry for the court is to determine the amount of damages. When a lay person is asked whether the government ought to be held liable for intentional government-induced temporal flooding of one's property, the common sense answer dictates that the government ought to be held liable. Yet, the unclear nature of the Takings Clause's application to intentional government-induced temporal flooding cases often results in no liability due to statutes such as the Flood Control Act of 1928 as well as arbitrary court decisions premised on the tort versus taking distinction. The Arkansas Game and Fish Commission spent nine years as a party in the court system to be justly compensated for government-induced floods that destroyed its timber. The Arkansas Game and Fish Commission's ordeal illustrates the need for a simpler application of takings claims in the intentional government-induced temporal flooding context. Accordingly, because torts against property are takings, intentional government-induced temporal flooding cases should focus on damages to determine liability instead of attempting to apply an unclear and arbitrary tort versus taking analysis.

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210. Even located 115 miles from the dam, a good faith effort at computer modeling would have predicted the flooding of the Management Area. See *supra* notes 60 and 96 and accompanying text.