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Contract as Evil

PETER LINZER*

Contract is, of course, often good. It permits parties to negotiate terms that are specific to their needs, something statutes can't do. But contract is often evil and used for evil ends, particularly because much of contract theory and doctrine is unconcerned with the distribution of power; information and shrewdness between the parties and is based, in part, on a romantic view of contract, emphasizing its basis in free will and liberty. This almost deification of Contract blinds those who follow it to the very absence of free will and liberty when the ability to deal in contract is unbalanced. The current dialogue about contracts of adhesion and the question whether they should even be considered contracts requires us to take a new look at contract. The use of contract to limit constitutional and other rights based on a notion of voluntary waiver raises serious issues about whether we should be skeptical about the assumed good of contract. We need contracts, but we need also to rethink what we mean by contract and whether the formalistic conservative libertarian approach to it needs to be reined in.

This Article looks at Margaret Jane Radin's argument that adhesion contracts are not really contracts and should be treated more through tort law, and looks briefly at the progression of product liability from contract to tort to strict liability. The Article also consider whether the model of agency regulation should be applied when traditional contract reasoning is overwhelmed by the actual facts of a supposed bargain. The Article then examines judicial approval through contract reasoning of unfair or even dishonest conduct in a number of quite different contexts. Sometimes the good guys win, but too often they don't because contract is said to beat them.

* Professor of Law, University of Houston Law Center. A.B., Cornell, 1960; J.D., Columbia, 1963. During this Symposium, I stated how much I admire Professor Charles L. Knapp and how important Chuck's work has been for contract writ large. His contemporary contributions to the debate over pre-dispute arbitration "agreements" are particularly relevant to several points I try to make in this Article. See, e.g., Charles L. Knapp, *Opting In or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 *LOU. L.A. L. REV.* 95 (2006). While I, and others, frequently speak of "consumer contracts," I mean what Chuck has aptly described as "individual contracts." In the cited article, Chuck wrote:

By this I mean not a contract between individuals, but a contract between a flesh-and-blood individual, on the one hand, and a commercial enterprise on the other. . . . [F]or our purposes here the contract of an individual worker (as contrasted with a collectively bargained labor contract) has enough in common with the ordinary consumer contract to treat them together.

Id. at 120.

My excellent editors have been concerned with my use of "contract," "contracts," and "Contract." I use the singular to mean the concept of contract, rather than specific contracts or specific doctrine in the law of contracts, as in "jus" rather than "lex" for law in Latin, or "droit" rather than "loi" in French. E.g., GRANT GILLMORE, *THE DEATH OF CONTRACT* (1974). I capitalize Contract mostly to indicate how it becomes personified, like some sort of god.

Contract often aids evil. Government regulation—thoughtful but serious regulation by Congress, legislatures, administrative agencies and courts—is not antithetical to freedom of contract. It is needed to protect those who lack power and skill and consequently, the very free will and liberty that are supposedly the basis of contract.

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Of course, contract is often good. It can do things that statutes usually can’t. A statute usually acts prospectively and broadly; it can’t anticipate all scenarios and who will play what role in them. Negotiated contracts can be drafted and fine-tuned by the people who know the most about them, and can be renegotiated or modified if something new comes up. And they can be worded precisely to the parties’ needs, unlike mandatory clauses prepared by the government or some NGO. Thus, it is reasonable to argue that outsiders—whether courts, administrative agencies, legislatures, or even well-meaning third parties—should usually keep their hands off contracts and leave the parties to do what they know how to do.

And there are aspects of contractarianism that are romantic—it is based on free will and “liberty,” and to those who buy in, it means that unless you agree by contracting for more duties, the government shouldn’t be able to make you do more than the minimal duties of a citizen: pay taxes, defend against enemies, and obey the criminal laws.

Contract is often described as private lawmaking; this notion has an important philosophical cousin, “freedom of contract.” Freedom of contract blurs two related concepts: first, that the government should normally not interfere with private contracts and second, that the government has very

limited power without actual consent, whether by individuals or businesses.¹ The latter public law concept is undergoing something of a rebirth.² Roscoe Pound and Samuel Williston challenged it as a mechanical and simplistic idea a century ago,³ and the Supreme Court still solidly rejects it.⁴ With respect to the overlap between private and public freedom of contract, in the last month of the Hoover Administration, Morris Cohen argued that contracts are intrinsically part of public law.⁵ Jean Braucher, whose very recent death is mourned by everyone in the contracts community, built on Cohen's thesis two generations later to make a strong claim that contract law needed to be regulatory, not the automatic handmaiden of private power.⁶ The issue has been made central to contract scholarship

1. From the famous high Victorian words of Sir George Jessel, M.R.:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.

Printing & Numerical Registering Co. v. Sampson, (1875) 19 L.R.Eq. 462, 465 (Eng.). While Jessel's words are often still quoted, Friedrich Kessler made the important point that "'freely and voluntarily' should not be underemphasized." FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS 8 n.30 (3rd ed. 1986).

2. See generally Bernard H. Siegan, ECONOMIC LIBERTIES AND THE CONSTITUTION (2d ed. 2006). Additionally, almost any post on The Volokh Conspiracy, any publication by the Cato Institute, or any article by Randy Barnett would illustrate this point nicely.

3. See generally Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) (arguing that the concept of equal rights between employee and employer is a fallacy, but courts persist in it because of mechanical jurisprudence and their concept that law overrides the facts of actual conditions); see also Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 379 (1921) ("The extent to which freedom of contract should be limited inevitably becomes a question of degree to which not even an attempt at an answer can be made without reference to time, place, and circumstance; and there is nothing in our Constitutions which should prevent reasonable experiment to aid in the decision. It is no longer possible for those who would like to decide such questions by a mere appeal to liberty and freedom of contract to avert what Huxley called "'the tragedy of a fact killing a theory," by putting a Constitutional sanction behind a cherished dogma." (citations omitted)).

4. See *Nebbia v. New York*, 291 U.S. 502, 523 (1934) ("[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest." (internal citations omitted)); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) ("Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." (citation omitted)). To many observers, including myself, freedom of contract, though dressed in Commerce Clause drag, was the basis of "the Broccoli Horrible" in "the Obamacare Case." See *Nat'l Fed. of Indep. Bus. v. Sibelius*, 132 S. Ct. 2566, 2591 (2012). "The Broccoli Horrible" was the argument that the Commerce Clause barred the federal government from reaching anyone who had not previously engaged in commerce, the "horrible" being that if eating vegetables was good for the nation as a whole (like widespread medical insurance), the government could make us all buy broccoli. *Id.* Chief Justice Roberts relied upon this heavily in his opinion announcing the judgment, but not the Opinion of the Court, *id.* at 2608, as did the Scalia-Kennedy-Thomas-Alito dissent, *id.* at 2650 (Scalia, Kennedy, Thomas, & Alito JJ., dissenting). Justice Ruth Bader Ginsburg scathingly satirized this argument in her opinion. *Id.* at 2619 (Ginsburg, J., concurring in part and dissenting in part).

5. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933).

6. Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 699 (1990); PETER LINZER, A CONTRACTS ANTHOLOGY 54, 106 (2d ed. 1995).

because of the recent explosion of writing on contracts of adhesion⁷—the take-it-or-leave-it contracts put forth by suppliers, usually sellers of goods or services but also by employers, franchisors, bankers, mortgagees, and Internet advertisers.

There are aspects of contract that justify its role as a “private lawmaker” and times when judicial interference is ill-advised, just as there are times when people who do not consent to public responsibilities should not be held to them in spite of majority rule.⁸

A lot of what I’ve just written represents contract as good, but much of contract is its evil twin: contract as power. Contracts are something we worship simply because they are individual manifestations of Contract, that concept that summons up notions of liberty and free will. But too often Contract permits the strong and the adept to win over the weak and the trusting. It rewards those who know how to use the rules better than those who don’t. Contract views the world as evenly matched even when those on one side are less educated, less familiar with the rules, less knowledgeable about the factual background of the deal, and less well advised. It is not the concern of Contract that some do not protect themselves as well as others—those who use a contract to their advantage.

There are also times when interference with nominally private transactions or the imposition of public duties upon those who do not want to do them⁹ are not merely acceptable, but imperative. In public law matters, this interference may be intended to prevent freeloaders or because a controversial statute has been passed after those dissenting have put forth their ideas and used their full power. In private transactions, government intervention is particularly important because contracts are often used for evil ends and by evil means. Frequently, this evil comes from the exercise of disproportionate power or disproportionate access to necessary information by one side. Our Anglo-American contract system has traditionally paid little attention to these imbalances, but it is time to realize that this treatment of contract—as between two equals on an equal playing field—has little to do with reality. It is not necessary to sacrifice capitalism to allow intervention to redress at least some greater amount of imbalances. These imbalances cause most of the evil. But our exalting of Contract is their handmaiden.

7. See *infra* notes 10–14.

8. Obvious examples arise under the First Amendment. See U.S. CONST. amend. I.

9. Compliance with antitrust laws, federal labor laws, and zoning regulations are three illustrations.

I. HOW ADHESION CONTRACTS ARE FORCING US TO FIGURE OUT WHAT WE REALLY MEAN BY A CONTRACT

The idyllic description of contract works sometimes, but only sometimes. Surely, a very high percentage of what we consider contracts are either contracts of adhesion or involve parties of unequal bargaining power. In fact, the question of whether consumer transactions are even contracts has become prominent, largely because of an enormous recent academic outpouring, including Margaret Jane Radin's much discussed *Boilerplate*;¹⁰ Oren Bar-Gill's *Seduction by Contract*;¹¹ Nancy Kim's *Wrap Contracts*;¹² an important Festschrift inspired by, and including, the writings of Stewart Macaulay,¹³ and two symposia about adhesion contracts.¹⁴ And then there is the American Law Institute's new Restatement Third of Consumer Contracts,¹⁵ which many think is misnamed and should rather speak of "Consumer Transactions."¹⁶

A. "BUT IT ISN'T CONTRACT"

When he observed the Charge of the Light Brigade during the Crimean War—673 British light cavalrymen charging the cannons of a Russian redoubt, which killed or wounded 278 of them—Pierre Bosquet, Marshall of France, said "*C'est magnifique, mais ce n'est pas la guerre. . .*

10. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19–32 (2013).

11. See generally OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012).

12. See generally NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (2013).

13. See Stewart Macaulay, *Non-Contractual Relations in Business—A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), reprinted in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL I* (Jean Braucher et al. eds., 2013) [hereinafter Macaulay, *Non-Contractual Relations*]; Stewart Macaulay, *Private Legislation and the Duty to Read—Businesses Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966), as reprinted in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY*, supra, at 20 [hereinafter Macaulay, *Private Legislation*]; Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity, and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003), as reprinted in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY*, supra, at 35 [hereinafter Macaulay, *Real and Paper*].

14. See generally Symposium, "*Boilerplate*": *Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006); Symposium, *Contracting Out of the Uniform Commercial Code*, 40 LOY. L.A. L. REV. 1 (2006); see also 6 PETER LINZER, *CORBIN ON CONTRACTS* § 26.5 (Joseph M. Perillo ed., 2010) (discussing adhesion contracts).

15. Oren Bar-Gill of Harvard, and Omri Ben-Shahar, of the University of Chicago, are the reporters for this Restatement, along with Florencia Moratta-Wengler of New York University as Deputy Reporter. AM. LAW INST., *ANNUAL REPORT 2013–2014*, at 14 (2014).

16. My statement is based on conversations I've had with law teachers in the contracts and consumer law fields, but support for this view can be found in the books and articles, supra notes 5, 6, 10, 12. In my reading, Orin Bar-Gill's excellent book, *SEDUCTION BY CONTRACT LAW*, supra note 11, makes a very strong argument for treating consumer transactions as different from contracts, but Professor Bar-Gill has told me that he does not agree with me that the name of the Restatement should be changed.

C'est de la folie.” “It’s magnificent, but it isn’t war. It’s madness.”¹⁷ Perhaps the rationale of adhesion contracts as somehow involving volition and consent is not as absurd as the 673 men charging the Russian guns and being mowed down as they rode into the Valley of Death,¹⁸ but the more I read and think about consumer transactions, the more I wonder whether it isn’t madness to regulate them through contract, treating long-distance, impersonal take-it-or-leave-it transactions as if they were negotiated with actual bargaining and actual consent by the consumer, franchisee, employee, or small business person. Maybe we can reform contract law sufficiently to do something about the way that dominant parties use contracts of adhesion to eliminate class actions, jury trials, warranties, consequential damages, local courts, or, for that matter, courts entirely. Perhaps it is better to segregate consumer transactions into a separate area of contracts, as we have done with insurance.¹⁹ Maybe, though, it is better to rethink the entire enterprise, as recent books and articles have suggested, either expressly or by exposing underlying issues that are inconsistent with the kind of contract law we think of as the norm.²⁰ Maybe it is time to create a new law to govern these transactions without giving the dominant sellers, employers, franchisors, and the like, unlimited authority to decree the governing law, and without giving the other party any alternative but doing without.

Even more, perhaps it is time explicitly to recognize that a contract is not just a matter of private dealing, but also a matter of public law that affects our entire society. This is not a new idea. The Sherman Act has forbidden “contracts in restraint of trade” since 1890,²¹ and the century-

17. Martin Hollis, *The Presidential Address: Reasons of Honour*, in 87 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY I, 2 (1986); ROBERT DEBS HEINL, DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 24 (1966).

18. In Alfred Tennyson’s words:

Half a league, half a league,
Half a league onward,
All in the valley of Death
Rode the six hundred.
“Forward the Light Brigade!
Charge for the guns!” he said.
Into the valley of Death
Rode the six hundred.

Alfred Tennyson, *The Charge of the Light Brigade*, THE EXAMINER, Dec. 9, 1854, at 780.

19. Insurance law frequently uses a stronger duty of good faith, construes contracts against insurance carriers more stringently than general contract law, and regulates adhesion contracts more rigorously. See E. ALLAN FARNSWORTH, CONTRACTS 527, 677–78, 761–64 (4th ed. 2004); see also 6 LINZER, *supra* note 14, § 26.12.

20. See *supra* notes 4–8.

21. “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1 (2015).

long battle over “freedom of contract” and economic substantive due process is a staple of the constitutional law course. But it is time to think hard about the role of our *polis*, in what is ostensibly a private deal between two parties.

Take, for example, Radin’s *Boilerplate*, in which she pointed to the lack of consent and negotiation,²² the intrusion by contracts of adhesion on the rule of law,²³ and the argument by law and economics scholars that contract terms should be deemed part of a product rather than an independent legal overlay.²⁴ Radin built on this to ask why we should not use the law of torts, or perhaps that of strict products liability, to deal with a “product” whose contract of adhesion has left its user with defective rights.²⁵ Radin’s idea is that if we treat defective products as a strict liability without requiring proof of fault, why can’t we treat adhesion contracts as “defective” because they take away the weaker party’s rights as strict liabilities of the dominant party, and then give remedies based on the impact on the nondominant party’s rights?²⁶ The difference between this approach and the law of contracts is that in the latter, one’s rights flow from the contract itself or from the breach of a duty in the contract. Radin’s approach has the nondominant party’s rights coming from a social system—the law itself²⁷—without fraud or other tort-like behavior attributed to the dominant party. Under Radin’s approach, the mere act of using power to deprive the other party of rights through contract would trigger remedies, just as liability flows from using commerce to sell a defective product.²⁸

Then consider how contract law assumes that contracts consist of rational parties contracting with one another.²⁹ But in Bar-Gill’s *Seduction by Contract*, he said:

22. See RADIN, *supra* note 10, at 19–32.

23. See *id.* at 33–51.

24. In a subchapter entitled “The Contract-as-Product Theory (the Law-and-Economics View of Boilerplate),” Radin points particularly to Judge Frank Easterbrook’s opinion in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), and cites Arthur A. Leff’s *Contract as Thing*, 19 AM. U. L. REV. 131 (1970), and Lewis A. Kornhauser’s *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151 (1976), as the wellsprings of the idea. RADIN, *supra* note 10, at 99–101. Leff was not a law and economics type but a brilliant and provocative thinker who probably would not have supported the use of his article as a justification for market dominance.

25. This is the burden of the last quarter of Radin’s book, “Escaping Contract: Other Remedial Possibilities” and “Afterword: What’s Next for Boilerplate?”. See generally RADIN, *supra* note 10, at 187–248.

26. She speaks of a possible tort of “Intentional Deprivation of Basic Legal Rights.” *Id.* at 211–12.

27. See *id.*; see also *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053–54 (N.Y. 1916).

28. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1997); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

29. See, e.g., *Printing & Numerical Registering Co. v. Sampson* (1875) 19 L.R.Eq. 462, 465 (Eng.); see also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206–07 (2003).

We consumers are imperfectly rational, our decisions and choices influenced by bias and misperception. Moreover, the mistakes we make are systematic and predictable. Sellers respond to those mistakes. They design products, contracts, and pricing schemes to maximize not the *true* (net) benefit from their product, but the (net) benefit *as perceived by the imperfectly rational consumer*. Consumers are lured, by contract design, to purchase products and services that appear more attractive than they really are. This *Seduction by Contract* results in a behavioral market failure.³⁰

Bar-Gill is a behavioral economist and a co-Reporter of the American Law Institute's new Restatement Third of Consumer Contracts. He does not appear to reject the use of contract law in consumer matters. Nonetheless, his very thesis illustrates the difficulty of applying contract analysis to a shadow show that the dominant party manipulates, even if in open view of its audience.³¹

Still another challenge to our traditional detached approach to power in contract comes from a new book honoring the fiftieth anniversary of Stewart Macaulay's seminal article, *Non-Contractual Relations in Business: A Preliminary Study*.³² While Macaulay focused on the failure of businesspersons to follow contract precedent in their commercial dealings, his famous article is an important landmark in questioning how contract law affects and should affect supposedly contractual dealings. The new book, a Festschrift (though Macaulay would probably find the term pretentious) called *Revisiting the Contracts Scholarship of Stewart Macaulay*, is a collection of essays by and about Macaulay's work.³³ In addition to Macaulay's 1963 article, the book includes excerpts from two of his later articles. In Macaulay's 1966 article, he spoke of organizations that "attempt to use contract ideology to legislate privately; sometimes successfully, sometimes not."³⁴ Though Macaulay has been pointing out for more than fifty years what we all should have seen long ago, his more recent writings are equally if not more persuasive. For example, in 2003, he concluded an article on form contracts, writing: "At the very least, if our courts allow those who draft written contracts to impose terms

30. BAR-GILL, *supra* note 11, at 2.

31. See Korobkin, *supra* note 29, at 1216–44; see also Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 92–93 (2013). Korobkin is also a behavioral economist and he may not agree with my reading of these two valuable works. The latter article is discussed at some length in Part II B.2 below.

32. See generally Macaulay, *Non-Contractual Relations*, *supra* note 13. Though it was not published in a law review, Macaulay's article was said to be "the most widely cited paper on contracts of the last 50 years." Robert E. Scott, *The Promise and Peril of Relational Contract Theory*, in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY*, *supra* note 13, at 105, 105 (citing Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 tbl.1 (1996)).

33. See generally *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY*, *supra* note 13. The book's perfect subtitle, "On the Empirical and the Lyrical," describes two of the many sides of Macaulay, a prince of scholars and human beings.

34. Macaulay, *Private Legislation*, *supra* note 13, at 1051.

inconsistent with expectations and the implicit dimensions of contract, we can expect reformers to demand that the law police those bits of private legislation that masquerade as contracts so that they are fair.”³⁵ Several of the articles in the Macaulay Festschrift raise similar issues, as do other recent articles.

It is troubling that each of these quite different discussions exposes a type of transaction in which traditional contract and restitution (and perhaps property law) doesn’t work right, generally because our traditional approach leaves some parties exposed, whether because of the wording of a contract of adhesion,³⁶ manipulation of advertising and incentives,³⁷ or because one side had never even thought the other side was going to make money from their activities and thus never thought to protect themselves.³⁸ This begs a major question: Should we rethink contract as we know it?

B. THAT WAS NO CONTRACT, THAT WAS MY LUNCH

Radin’s book, *Boilerplate*,³⁹ has got lots of people talking and blogging, particularly about her argument that consumer adhesion contracts are not contracts at all, and shouldn’t be overseen by contract law, but by a new regime unconstrained by traditional contract doctrine. She leads one to doubt that we should call any legal document a contract when it involves no real agreement, no negotiation or bargaining, little understanding of terms by the nondominant party, and no opportunity to change terms, except by walking away. Radin was expanding on the theme put forward by the apologists for adhesion, who argue that the form contract is simply part of the product—if you pay less, we analyze the transaction very differently. If, for instance, you like saving money by buying a used or dented washer, why should we not treat the new washer with a disclaimer of merchantability the same way? Defenders of the “adhesion contract as

35. Macaulay, *Real and Paper*, *supra* note 13, at 79.

36. See RADIN, *supra* note 10, at 19–32.

37. See BAR-GILL, *supra* note 11, at 2.

38. See *infra* note 70 and accompanying text; Korobkin, *supra* note 29, at 1206–07.

39. See RADIN, *supra* note 10. Despite my great respect for both of them, I wish Radin and Ben-Shahar had not used the term “boilerplate,” rather than “adhesion” or “form contracts” in their books, though I’ll concede that “boilerplate” has punch rhetorically. Most lawyers that I know use “boilerplate” to mean standard provisions, regardless of whether they are the subject of negotiation. In an arms-length, well-negotiated contract between parties of equal strength, the parties may agree that they need standard and sometimes uncontroversial provisions such as a choice-of-law or choice-of-forum clause, a merger clause, a clause dealing with the role of captions or of where notices should be sent, and all of these needs are frequently dealt with through standardized terms, either from form books or old contracts in someone’s files, sometimes well-written, sometimes not. These terms are usually called “boilerplate,” meaning standardized. They may raise questions of style and draftsmanship, but in a non-adhesion contract they often do not involve an imbalance of power. For a 675-page group of essays on how to draft standard provisions in negotiated contracts, see TINA L. STARK, *NEGOTIATING AND DRAFTING: CONTRACT BOILERPLATE* (2003).

thing”⁴⁰ usually argue that the benevolent sellers (they would say “licensors”) will share their savings with you by reducing the price, an apology that Radin does a good job of undermining. The bigger objection to her argument is that there is something nihilistic or even apocalyptic about the removal of form contracts from the contracts kingdom. Yet, as Radin points out, that has been the process throughout the history of products liability.⁴¹

The usual starting point of products liability is *Winterbottom v. Wright*, an 1842 decision of the Court of Exchequer in which Winterbottom, a coachman for the Royal Mail who had been injured by a defective mail coach, attempted to recover from Wright, who had contracted with the Postmaster-General (who was immune from suit) to supply the coach and keep it in good repair.⁴² Lord Abinger, the Chief Baron, took considerable care to support his conclusion that no duties were owed unless they had been created by contract, the only exceptions being “public duties,” such as innkeepers’ duties to guests, and violations of the law of nuisance.⁴³ Since Winterbottom was not in privity of contract with Wright, the court held that Winterbottom had no claim against him for his injuries, though they were caused by Wright’s failure properly to perform his contractual duties, which ran only to the Postmaster-General.⁴⁴

For nearly seventy-five years after *Winterbottom*, the courts chipped away at the notion that a manufacturer (or, as in *Winterbottom*’s case, a maintenance contractor) had no duty to the ultimate user, until Judge Benjamin Cardozo, destroyed the doctrine in *Macpherson v. Buick Motor Company*, with a careful delineation of the case law, but really in three sentences:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.⁴⁵

This worked well when negligence could be shown, but it didn’t help Bertha Chysky, a waitress who had been furnished, as part of her lunch, with a piece of cake containing a nail that punctured her gum and cost her three teeth.⁴⁶ She could not prove negligence against the wholesale baker so she sued for breach of warranty.⁴⁷ The New York Court of Appeals, only seven years after *Macpherson* and with Cardozo joining

40. The concept is usually traced to Leff’s *Contract as Thing*, but one wonders how enthusiastic Leff would have been about where his idea has been taken. See Leff, *supra* note 24, at 136.

41. RADIN, *supra* note 10.

42. (1842) 152 Eng. Rep. 402 (Exch.).

43. *Id.* at 405.

44. *Id.* at 405–06.

45. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

46. *Chysky v. Drake Bros. Co.*, 139 N.E. 576, 577 (N.Y. 1922).

47. *Id.* at 578.

the majority, reversed a verdict in her favor because “privity of contract does not exist between the seller and such third persons [like Bertha], and unless there be privity of contract there can be no implied warranty.”⁴⁸ Yet in the same era in other states, courts were focusing on the nature of food to expand liability, until it became widespread law that implied warranties were not limited to contractual privity and until Justice Roger Traynor, in 1944, could use the fact that an exploding Coke bottle contained “foodstuffs” to buttress his opinion in *Escola v. Coca-Cola Bottling Company*, an exploding Coke bottle case and the wellspring of strict products liability.⁴⁹

C. “WHO IS AFFECTED BY THIS CONTRACT?”

By focusing on the subject matter of the transaction rather than the formalities of contract or the assumption that tort is based on fault and wrong, Cardozo, Traynor, and many other judges and writers were able to transform the issue to a question of who should bear the cost when a product injures a consumer, regardless of contract or fault. In *Escola*, Traynor made the point that if even the most carefully constructed bottle had a defect that caused injury, it made more sense for the manufacturer to include the cost of compensation in the price of the product, spreading the loss to all consumers rather than putting all of the loss on the loser in the injury lottery.⁵⁰ All consumers bore the risk of injury equally, so compensation should be a matter involving all consumers. Traynor, and eventually section 402A of the Restatement (Second) of Torts, thought beyond the narrow terms of negligence, *res ipsa loquitur*, or contract, to fairness within the society as a whole.⁵¹ Similarly, today’s courts, administrative agencies, Congress, and state legislatures should focus not on the mechanics of contract, but on the many factors relied upon by Radin in considering whether to restrain the power of sellers to deprive consumers of rights that the social system has granted them and that form contracts attempt to take away.

48. *Id.*

49. *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring). Since then, Article 2 of the Uniform Commercial Code (“U.C.C.”) eliminated the privity requirement. See U.C.C. §§ 2-1 to 2-7 (6th ed. 2010).

50. *Escola*, 150 P.2d at 441-43.

51. See RESTATEMENT THIRD OF TORTS: PRODUCTS LIABILITY § I (1977); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

D. WHAT IS PRIVATE? WHAT IS PUBLIC?

Others have not necessarily bought into the amputation of adhesion contracts from “contracts,” but they have recognized how one-way form contracts do not fit in with traditional views of contract. *Revisiting the Contracts Scholarship of Stewart Macaulay* looks in that direction.⁵² Macaulay’s 1963 American Sociology Review article refers to non-contractual relations *in business*,⁵³ and many of the essays in the Festschrift are about business contracts, but not all. Only three years after his 1963 article, Macaulay wrote *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*.⁵⁴ The reference to IBM machines may sound quaint but, like Kurt Vonnegut’s stories (*Epicac*) and novels (*Player Piano*) from the fifties and sixties that saw today’s problems of technology and people in an era of room-sized computers with thousands of vacuum tubes, Macaulay’s article still rings true. In a footnote, Macaulay cited Lawrence Friedman’s discussion of how a discrete area such as labor law and occupational licensing has been spun off from general contract jurisprudence, and he made reference to his own discussion of automobile franchising.⁵⁵ In a fairly short discussion of consumers, Macaulay considered both case-by-case policing and legislation of standard terms, as in fire insurance contracts, but did not go much beyond that.⁵⁶ But in his article *Bambi Meets Godzilla*, Macaulay did look at consumer and deceptive trade practices laws and argued that they should be an integral part of the contracts course, even though they had frequently been distorted into windfalls for well-informed consumers (often lawyers) rather than as weapons of defense for less sophisticated consumers.⁵⁷

Others in *Revisiting the Contracts Scholarship of Stewart Macaulay* have built on Macaulay’s work to suggest that consumer transactions should be treated as a separate area within contract law. For instance, Dean Robert E. Scott has co-written several articles arguing for judicial restraint when sophisticated businesses are dealing with each other.⁵⁸ He

52. See generally REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY, *supra* note 13.

53. See generally Macaulay, *Non-Contractual Relations*, *supra* note 13.

54. See generally Macaulay, *Private Legislation*, *supra* note 13.

55. *Id.* at 1056 n.18.

56. *Id.* at 1062.

57. Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 582–89 (1989).

58. See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1383 (2010) (discussing interfirm collaboration through a combination of “formal and informal methods of enforcement through a process [they] term ‘braiding’”); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 934 (2010) (“Our theory applies to contracts between sophisticated firms.”); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003) (delineating four categories of bargaining: (1) firm to firm, (2) individual to individual, (3) firm sells to individual, and (4) individual sells to firm; stating that their theory applies only to contracts between firms).

builds on this point of view to argue that such a hands-off policy makes no sense with consumer transactions because the factors that pervade “Big Contracts” between big companies are absent.⁵⁹ Bob Gordon described the Scott approach this way:

Robert Scott generously and sympathetically notes the basic kinship between law-and-economics and law-and-society scholars’ treatment of relational contracting. He proposes a sort of Peace of Augsburg, in which the theories and methods of each school would predominate in the study of different domains of contracting: law-and-economics . . . over contracts between firms, where the main task for law and lawyers is helping the parties realize their joint goals; law-and-society . . . over contracts between firms and unequal partners like consumers and employees, where the law has to worry about abuses of superior power and knowledge.⁶⁰

This makes a great deal of sense to me. So does Gordon’s essay, which focuses on contract’s ambiguous position on the cusp of both public and private law.⁶¹

Much of the recent discussion has focused on adhesion contracts. While many fine writers have proposed general solutions like Todd Rakoff’s presumption of unconscionability,⁶² any general rule that requires a consumer or employee to litigate whether a clause violated a standard will favor the dominant party—a repeat performer with lawyers on retainer.⁶³ I have argued that legislation or judicial rulemaking forbidding specific terms in individual adhesion transactions is the best approach.⁶⁴ Examples include choice of a distant forum, mandatory arbitration, limits on consequential damages, and waivers of warranties and jury trials. It is an appropriate area for state legislative and consumer agency work, and, more importantly, for federal congressional or Consumer Financial Protection Bureau (“CFPB”) intervention, particularly because this issue has almost nothing to do with freedom of contract. By far the most important and controversial issue currently is predispute consumer arbitration. The CFPB, which is now taking a close look at mandatory predispute arbitration, looks like a promising candidate, particularly since Congress expressly punted the issue to it in the Dodd-Frank Act:

59. See generally *id.*

60. Robert W. Gordon, *Is the World of Contracting Relations One of Spontaneous Order or Pervasive State Action? Stewart Macaulay Scrambles the Public-Private Distinction*, in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY*, *supra* note 13, at 49, 66–67.

61. See generally *id.*

62. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1190, 1195, 1206 (1983).

63. 6 LINZER, *supra* note 14, § 26.5[B]; Peter Linzer, “Implied,” “Inferred,” and “Imposed”: Default Rules and Adhesion Contracts—The Need for Radical Surgery, 28 PACE L. REV. 195, 208–17 (2008); see Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing Standard Form Contracts*, 7 SMALL & EMERGING BUS. L. 393, 416 & nn.127–31 (2003).

64. See 6 LINZER, *supra* note 14, § 26.5[C]; Linzer, *supra* note 63, at 208–17.

The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).⁶⁵

The CFPB was the brainchild of Senator Elizabeth Warren, who used to teach contracts. If the agency uses the power Congress has given it,⁶⁶ states and other federal agencies may be able to resolve by regulation many of the problems of adhesion contracts, and by doing so, cure many of the evils they help to impose. After all, the holder in due course doctrine had been around for hundreds of years. It provided that a maker of a negotiable instrument could not raise most defenses against a holder presenting it for payment. This made sense when the transactions were relatively individual and when commercial paper was widely used as money, and it makes sense for some commercial transactions today. But for generations sellers of consumer products that sold on credit made use of the doctrine by selling the consumer's promissory note to a "different" company (which theoretically was not affiliated with the seller), making the second company a holder in due course. Thus, Bob's Appliance Company would sell its consumer paper to Steve's Finance Company. If the product was defective and the consumer protested by not paying, Steve's (now the holder in due course) would sue her and the consumer (the maker of the note) was barred from raising the defense that the product didn't work. So the consumer had to pay the finance company, despite the product being defective. Finally, the Federal Trade Commission ended all this, simply by banning the holder in due course doctrine in consumer transactions. That happened nearly forty years ago. There is plenty of agency power, federal and state, that can be used against adhesion contracts and the like, and we should actively seek its use.

II. THE EVIL SIDE OF CONTRACT

A. THE ROMANCE OF CONTRACT

Adhesion contracts are not, however, the only evil of contract. The romantic view of contract, to which I alluded at the beginning of this Article, is a major part of contract's bad side. Not only did this view lead

65. See Dodd-Frank Act, Pub. L. No. 111-203, § 1028(b), 124 Stat. 1376, 2003-04 (2010) (codified at 12 U.S.C. § 5518(b) (2015)).

66. The CFPB's preliminary study, published in 2013, seems strangely tentative given the widespread criticism of mandatory predispute arbitration clauses in consumer transactions. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 7 (2013).

to the half century of “freedom of contract” undermining social legislation,⁶⁷ but it has also been used simultaneously, for instance by Randy Barnett, one of the leading conservative constitutional libertarians and a well-known writer on contract law, to justify enforcing, as contracts, adhesions with only the faintest consent.⁶⁸ At the same time, it has been used to limit “presumed consent” to economic and social laws that impose duties on unwilling individuals to laws that do not violate what Barnett views as the people’s “retained fundamental rights.”⁶⁹ Why the person who is found to be bound by an adhesive arbitration clause does not have a “retained fundamental right” to a jury trial is not clear to me. But there are many other aspects of the ascendancy of contract reasoning that seem wrong to me. I offer a few examples in Part II.B.

B. SOME EXAMPLES

1. *Euchred by Contract (1) : Virtual Work, Gamers, and Bloggers*

In a most striking look at a “new” form of employment, Miriam Cherry of St. Louis University has coined the term “virtual work” and has written extensively on it and related topics.⁷⁰ By “virtual work,” she means work done by many workers whose product is often a very small piece of data assembled by more highly skilled professionals into a sophisticated product.⁷¹ The work usually involves computers and often is carried out in a nontraditional workplace—that is, in a home or coffee shop or on a cell phone while sitting on a park bench, for example. Many of these workers get paid on a piecework basis and earn much less than the minimum wage but are designated as “independent contractors” in an end user license agreement (“EULA”) or a form contract, which permits their “non-employer” to claim that they are not covered by the Fair Labor Standards Act (“FLSA”).⁷² The FLSA covers “employees” and expressly exempts

67. This trend lasted from at least *Allgeyer v. Louisiana*, 165 U.S. 5782 (1897), to *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). It actually can be traced back to Chief Justice Roger Taney’s notorious opinion in *Dred Scott v. Sandford*, 60 U.S. 393, 438 (1856). There, rejecting the claim that the slave, Dred Scott, had been freed without his master’s consent when the master took him into a free territory, Taney wrote: “[A]n Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory . . . could hardly be viewed with the name of due process of law.” *Id.* at 450. Note that the “liberty” was the right to own slaves and the “property” was Dred Scott.

68. See Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 635 (2002).

69. See Randy E. Barnett, *We the People: Each and Every One*, 123 *YALE L.J.* 2576, 2601–02 (2014).

70. See generally Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 *GA. L. REV.* 951 (2011) [hereinafter Cherry, *Taxonomy of Virtual Work*]; Miriam A. Cherry, *The Gamification of Work*, 40 *HOFSTRA L. REV.* 851 (2012) [hereinafter Cherry, *Gamification*]; Miriam A. Cherry, *Virtual Whistleblowing*, 54 *S. TEX. L. REV.* 9 (2012); Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 *ALA. L. REV.* 1077 (2009).

71. Cherry, *Taxonomy of Virtual Work*, *supra* note 70, at 953–56.

72. See 29 U.S.C. § 203 (2015).

independent contractors from the definition of an employee.⁷³ Many factors go into the determination of who is an employee, and the FLSA has been interpreted to cover more workers as employees than common agency law tests.⁷⁴ The EULA and similar contracts that are obviously contracts of adhesion militate against the worker being defined as an employee, a definition that would ensure receipt of at least the minimum wage. Defining these “virtual workers” as contractors is appealing to employers for reasons beyond the FLSA. For example, the Supreme Court applies narrower common law agency tests in cases falling under the Employee Retirement Income Security Act (“ERISA”),⁷⁵ and the agency that administers the Occupational Safety and Health Act (“OSHA”) has said that it will follow the Supreme Court’s ERISA decisions in OSHA cases.⁷⁶ Thus, it is likely that the EULA and other contracts of adhesion will be upheld in other non-FLSA areas, such as eligibility for unemployment payments or workers compensation.⁷⁷ For many of these “virtual workers” doing piecework data gathering on their computers and cell phones, it seems unlikely that they actually agreed that they were not entitled to these benefits. Even if they were aware that they were agreeing that they were “independent contractors,” they almost certainly did not know what that designation was costing them in terms of legal entitlements.

Another form of “virtual work” that Cherry discusses and criticizes involves people being encouraged to take part in games or game-like environments, either for fun or as a matter of public service.⁷⁸ Video gamers are invited to “play” in ways that enable researchers to use the players’ work to make money—not for the players, but for the promoters.⁷⁹ Though what the gamers do ends up making money for someone else, the “beneficiary” disclaims any contractual or restitutionary liability⁸⁰ and disputes any property interest belonging to the virtual worker. While these pseudo-games do not involve third-party beneficiary contracts, the scenario turns the concept of the incidental third-party beneficiary on its head. In standard contract doctrine, if A makes a promise to B that benefits a non-party, C, C does not gain rights unless B intends to benefit her. In the gaming scenario, there are only two parties and there may not even

73. *Id.*

74. Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257–58 (2006).

75. Since the Supreme Court uses a narrower definition in ERISA cases, and since the FLSA is limited to employees and not contractors, use in other contexts of the narrower common law agency definition of “employee” means that fewer people are covered for minimum wages and similar benefits.

76. Stone, *supra* note 74, at 261–62.

77. While Stone does not specifically discuss unfair designation of workers as contractors, this conclusion appears to follow from her discussion of non-FLSA forms of atypical work. *See id.* at 262–70.

78. *See* Cherry, *Gamification*, *supra* note 70, at 852–54.

79. *See id.* at 855.

80. *See id.* at 856.

be any contract. A invites B to play or to do research that is entertaining and perhaps competitive and takes the benefit of it but says that she has no duty to compensate B for B's efforts nor any obligation to share the resulting benefit. After all, B had fun, and there was no agreement.

This, in turn, leads to a similar though not identical issue, with the same empty result for the Bs of the world. Cherry looked at the unsuccessful lawsuit by Huffington Post ("HuffPo") bloggers who were outraged, to say the least, when their blogging turned into a \$315 million deal for Arianna Huffington and her backers, but nothing for them.⁸¹ The HuffPo bloggers lost for three reasons: (1) because the courts held that they had been given notice that HuffPo was a for-profit corporation (the profits coming from advertising rather than selling the blogs), (2) because the bloggers understood that they would not be paid for their work, and (3) because they did not submit their writings with intent to be paid. We can even assume that the HuffPo promoters had no idea, at least at first, that their new idea would be fabulously successful and would enable them to sell it for hundreds of millions in only a few years. We can further assume that the bloggers did not submit their writings to make money from HuffPo. The circumstances had changed, however, in an unanticipated way, and the bloggers surely were not submitting their writings as a gift to enable the promoters to make a fortune. There was no express contract between HuffPo and the bloggers. Under these circumstances, an expansive view of restitution would have supported the bloggers' argument, whether for the \$115 million they said their contribution was worth or for considerably less, but for still a significant proportion of the capital gain achieved by the HuffPo promoters. In the actual case, both the district court and the Second Circuit focused only on the lack of agreement and HuffPo's true (but incomplete) disclosures of their financing to the bloggers when they submitted their writings.⁸² This focus on the lack of agreement is a common, though not universal approach to restitution—essentially straitjacketing it in contract-based formalism.⁸³

81. Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381, 381–84, 441–43 (2013) (discussing *Tasini v. AOL, Inc.* (*Tasini I*), 851 F. Supp. 2d 734 (S.D.N.Y. 2012), *aff'd*, 505 F. App'x 45 (2d Cir. 2012)).

82. See generally *Tasini v. AOL, Inc.*, 505 F. App'x 45 (2d Cir. 2012); *Tasini I*, 851 F. Supp. 2d 734.

83. For an expansion on these views, see Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 696–98, 759–75.

2. *Euchred By Contract (2): The Parol Evidence Rule and Russell Korobkin's "Borat Problem"*

Russell Korobkin is a thoughtful writer and a highly regarded behavioral economist. More than ten years ago, he put forth views on the "bounded rationality"⁸⁴ of consumers rather similar to those in Bar-Gill's recent *Seduction by Contract*.⁸⁵ Korobkin's thesis, in summary is as follows:

[N]on-drafting parties (usually buyers) are boundedly rational decisionmakers who will normally price only a limited number of product attributes as part of their purchase decision. When contract terms are not among these attributes, drafting parties will have a market incentive to include terms in their standard forms that favor themselves, whether or not such terms are efficient. Thus, there is no a priori reason to assume form contract terms will be efficient [T]he proper policy response to this conclusion is greater use of mandatory contract terms and judicial modification of the unconscionability doctrine to better respond to the primary cause of contractual inefficiency.⁸⁶

On its face, this sounds sensible, but Korobkin puts more emphasis on what he views as efficiency than I do, since I think that what many economists term "efficiency" discounts as externalities many costs to the "little guy."

In my view, the parol evidence rule ("PER") fits that description, which makes it one of the evil aspects of contract.⁸⁷ I have read many cases where I had little or no doubt that the extrinsic proof probably told the true story, but it was excluded because the court considered the written word a bar to further evidence. This emphasis on the written word is particularly devastating when a party's apparently true claim of fraud is barred by the words of the contract she signed. Korobkin teaches contracts, yet his discussion of the PER in his recent article on the litigation resulting from the smash hit movie *Borat* shows lack of attention to the critics of the PER, generally, and seems naïve about the motives of contract drafters and their ability to use the PER to cover their own fraud or quasi-fraud.

As Korobkin described it:

In the 2006 movie *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*, English comedian Sacha Baron Cohen plays the role of an outrageously inappropriate Kazakhstani television reporter, Borat Sagdiyev, who journeys across the United States to film a

84. From what I can gather, Korobkin uses "bounded" simply to mean "limited."

85. See generally Korobkin, *supra* note 29; BAR-GILL, *supra* note 11.

86. Korobkin, *supra* note 29, at 1203.

87. The PER basically states that when parties to a contract have made an agreement—almost always a writing reflecting the final word and complete statement of the agreement, which supersedes all previous agreements on the subject matter—they will not be allowed to present evidence of earlier agreements or of extrinsic evidence contradicting the writing. There are so many variations and exceptions to the PER that many writers deny that the PER is a rule at all. Arthur L. Corbin, who wrote half a volume on the PER, disliked it intensely and almost always either put it in quotation marks or referred to it as "the so-called parol evidence rule." See, e.g., 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 573 (1960).

documentary about American culture. In the course of his travels, the title character uses his bizarre persona to elicit offensive statements and behavior from, as well as to humiliate, a number of ordinary Americans who are not in on the joke. The movie was a critical and box office success: *Borat* received an Academy Award nomination for Best Adapted Screenplay, Baron Cohen won a Golden Globe Award for Best Actor in a Comedy or Drama, and the movie earned nearly one-third of a billion dollars in ticket and DVD sales.⁸⁸

Borat has also produced so many lawsuits that punching in “*Borat* lawsuits” on Google produces at least thirty-five pages of entries. Many of the lawsuits were brought by the unwitting stooges. For example, Michael Psenicska, a driving instructor with thirty-two years of experience, is

hired to give Borat a driving lesson, finds himself trapped in the passenger seat of a car as the volatile faux Kazakhstani careens erratically down local streets while endorsing rape, shouting obscenities at other drivers, and asking Psenicska to be his boyfriend. Clearly discombobulated by this unexpected behavior, an anxious Psenicska alternately ignores, deflects, objects to, or nervously chuckles at Borat’s political incorrectness while trying to prevent an accident.⁸⁹

Two etiquette coaches were similarly made to look like fools, and three fraternity boys were encouraged to get drunk and “profanely disparage women and mourn the fact that slavery is no longer legal.”⁹⁰

The *Borat* plaintiffs mostly lost or settled, probably for a small amount. The defendants had a strong defense grounded in contract because the plaintiffs had all signed agreements that were used against them, agreements that are arguably governed under the prevailing New York law. But one thing is obvious: the *Borat* producers intentionally lied to all the plaintiffs and that fraud cost the plaintiffs both their jobs and their self-esteem, while the movie made one-third of a billion dollars. Nonetheless, the contract was deemed to override lies, bad faith, and injury.

Of the many lawsuits brought by unwitting participants, suits by Psenicska and the two etiquette coaches were consolidated in the Southern District of New York against Baron Cohen, Twentieth Century Fox, and various producers and flunkies. The district court dismissed the complaints, and the Court of Appeals for the Second Circuit affirmed these dismissals.⁹¹ If the complaints had been dismissed on First Amendment grounds⁹² or because there was no substantive cause of action, I would have somewhat

88. Korobkin, *supra* note 31, at 53.

89. *Id.*

90. *Id.* at 53–54.

91. Psenicska v. Twentieth Century Fox Film Corp. (*Psenicska I*), No. 07-CIV-10972 (LAP), 08-CIV-1571 (LAP), 08-CN-1828 (LAP), 2008 WL 4185752, at *7 (S.D.N.Y. Sept. 3, 2008), *aff’d*, 409 F. App’x 368 (2d Cir. 2009). There were several other proceedings.

92. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1998) (dismissing the Reverend Jerry Falwell’s suit for intentional infliction of emotional harm for printing a “satire” label “fiction” saying that Falwell had had sex with his mother in an outhouse). But Falwell was a public figure, and the *Borat* plaintiffs were not.

less concern, but they were dismissed only on contract grounds. In the words of the district judge, “I conclude that each Plaintiff has executed a valid agreement releasing the claims he or she now attempts to litigate, and, consequently, Defendants’ motions [to dismiss] are GRANTED.”⁹³

Psenicska had been approached by Todd Schulman, Editorial Assistant to Sacha Baron Cohen,⁹⁴ who told Psenicska that the production company “was producing a ‘documentary about the integration of foreign people into the American way of life.’”⁹⁵ A few months later, Schulman asked Cindy Streit, one of the etiquette instructors, “to provide etiquette training to a Belarus dignitary and arrange a dinner party with guests to be filmed for an educational documentary made for Belarus television.”⁹⁶ At about the same time, the other etiquette instructor, Kathie Martin, “was contacted by Schulman to provide dining etiquette training to a foreign reporter whose travel experiences were being filmed . . . for Belarus television.”⁹⁷

All these statements were false. Baron Cohen had starred in a British television program called *Da Ali G Show*, which involved similar setups of celebrities and politicians who did not realize that they were not in a real interview, but he and his former program were largely unknown in the United States.⁹⁸ Each of the plaintiffs was asked to sign a document entitled “Standard Consent Agreement” (“Agreement”).⁹⁹ Schulman described it to Martin as a “standard release form.”¹⁰⁰ The district court wrote:

[T]he Agreements signed by the various Plaintiffs herein are identical in all material respects. They set forth each Plaintiff’s consent to appear in a “documentary-style . . . motion picture” intended “to reach a young adult audience by using entertaining content and formats.” Each Agreement states that the relevant Plaintiff:

specifically, but without limitation, waives, and agrees not to bring at any time in the future, any claims against the Producer, or against any of its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights or publicity or misappropriation (such as any allegedly improper or unauthorized use of the Participant’s name or likeness or image), . . . (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), . . . (m) prima facie tort, . . . [and] (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement).

93. *Psenicska I*, 2008 WL 4185752, at *1.

94. *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*, IMDB, <http://www.imdb.com/title/tt0443453/fullcredits> (last visited May 10, 2015).

95. *Psenicska I*, 2008 WL 4185752, at *1.

96. *Id.* at *2.

97. *Id.* at *3.

98. Kathie Martin’s husband had some familiarity with the *Da Ali G Show* so filming was rescheduled to avoid the husband’s being present and recognizing Baron Cohen. *Id.*

99. *Id.* at *1–3.

100. *Id.* at *3.

Furthermore, each Agreement includes a merger clause which notes, among other things, that “the Participant acknowledges that in entering into [the Agreement], the Participant is not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film.”¹⁰¹

The plaintiffs argued that the term “documentary-style film” was ambiguous, thus allowing the admission of extrinsic evidence of what Schulman said to them before they signed the Agreements.¹⁰² It should be obvious, after the fact, that the movie was fictitious, but the district court held “that the operative word in the phrase ‘documentary-style film’ is ‘style’ and not ‘documentary.’”¹⁰³ It continued, “[t]he fact that Borat is a fictional character, however, does nothing to diminish the fact that his fictional story is told in the *style* of a true one. Indeed, *Borat* owes such effectiveness as it may have to that very fact.”¹⁰⁴ With respect to the plaintiffs’ claims that the agreement was induced by fraud, the district court pointed to their express disclaimers of reliance in the agreement, citing a well-known New York case, *Danann Realty Corp. v. Harris*,¹⁰⁵ which the district court was *Erie*-bound to follow, if applicable. The Second Circuit affirmed the district court’s opinion in a short, unpublished opinion.¹⁰⁶

Danann is one of two leading New York cases on the role of merger clauses and non-reliance agreements when fraud is claimed in the inducement of a contract. It is a widely accepted concept that the PER does not bar extrinsic evidence to prove that a contract was induced by fraud,¹⁰⁷ but some courts, mostly those in New York and Pennsylvania, have barred extrinsic proof of the fraud when a writing contains a merger clause saying that the writing is the entire agreement between the parties, or has a clause stating that no representations were made outside the writing or that the non-drafting party has not relied on any representations not contained in the writing.¹⁰⁸ The argument against the evidence of the

101. *Id.* (citations omitted).

102. *Id.* at *4.

103. *Id.* at *5.

104. *Id.*

105. *Id.* at *6 (citing *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 598 (N.Y. 1959)). For a lengthy discussion of *Danann*, see 6 LINZER, *supra* note 14, § 25.20[B][2].

106. *Psenicka v. Twentieth Century Fox Film Corp.*, 409 F. App’x 368 (2d Cir. 2009).

107. RESTATEMENT (SECOND) OF CONTRACTS § 214(d) (1981); 6 LINZER, *supra* note 14, § 25.20[A]; Justin Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877, 877 (1961). In the supplement to the 1960 edition of Volume 3 of *Corbin on Contracts*, section 580, Corbin wrote a comment that has been reproduced in the treatise ever since:

It is Professor Sweet’s conclusion . . . that proof of fraud, whether in the execution of the writing or in the inducement to make it, whether it consists in the making of a fraudulent promise or in a fraudulent representation of some fact other than intention, should never be excluded by the “parol evidence rule.” . . . So far as it is possible to do so, Professor Sweet’s Article is now incorporated in this treatise.

6 LINZER, *supra* note 14, §25.20[A] n.1.

108. 6 LINZER, *supra* note 14, §§ 25.20[B][1]–[B][2].

fraud is either that the merger clause shows that the contract is totally integrated, thus barring extrinsic evidence, or that the “no reliance” or “no representation” language shows that the plaintiff was not injured by any false statement.

Two years prior to *Danann*, the New York Court of Appeals seemed to be moving in the opposite direction. In *Sabo v. Delman*, Sabo sued his employer, Delman, a manufacturer of fashionable women’s shoes, to rescind a contract in which Sabo had assigned the patents to a shoe cutting machine that he had invented, apparently in exchange for royalties.¹⁰⁹ Sabo claimed that Delman had falsely represented that he would finance the venture and use his best efforts to get the machine adopted by other shoe manufacturers.¹¹⁰ The contract between Sabo and Delman contained a merger clause, and the lower courts had dismissed the action pursuant to the PER.¹¹¹ The New York Court of Appeals, the highest court in the State, unanimously reversed.¹¹² In his opinion, Judge Stanley Fuld wrote that since the PER did not bar extrinsic proof of fraud, a merger clause did not either:

Indeed, if it were otherwise, a defendant would have it in his power to perpetrate a fraud with immunity, depriving the victim of all redress, if he simply has the foresight to include a merger clause in the agreement. Such, of course, is not the law.¹¹³

But only two years later, the same court decided *Danann*. There, the plaintiff, who had bought the lease on a building, sought damages for fraud, claiming that the seller had made oral misrepresentations “as to the operating expenses of the building and as to the profits to be derived from the investment.”¹¹⁴ But the court of appeals, over a dissent by Judge Fuld, held that extrinsic proof of the alleged misrepresentations was barred because the contract contained the following language:

The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises ‘as is’ It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other.

109. *Sabo v. Delman*, 143 N.E.2d 906, 907 (N.Y. 1957).

110. *Id.*

111. *Id.* at 909.

112. *Id.*

113. *Id.*

114. *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 598 (N.Y. 1959).

The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition.¹¹⁵

The majority distinguished this language from a general merger clause, agreeing that a general merger clause would not bar extrinsic proof of fraud.¹¹⁶ Note, however, that the clause in *Danann* deals primarily with the physical condition of the buildings and has only one reference to leases and expenses among all the other matters listed. Fuld, widely recognized for many years as the best judge on that court and rarely a demonstrative dissenter, wrote a dissent that built upon his argument in *Delman*:

If a party has actually induced another to enter into a contract by means of fraud and so the complaint before us alleges I conceive that language may not be devised to shield him from the consequences of fraud. . . . “The maxim that fraud vitiates every transaction would no longer be the rule but the exception.”¹¹⁷

He continued by arguing that the clause in *Danann* was incredibly broad, covering virtually everything, including, but certainly not limited to, expenses and operations, the specific matters that the plaintiff was suing over.¹¹⁸ Fuld quoted Judge Augustus N. Hand:

“[T]he ingenuity of draftsmen is sure to keep pace with the demands of wrongdoers, and if a deliberate fraud may be shielded by a clause in a contract that the writing contains every representation made by way of inducement, or that utterances shown to be untrue were not an inducement to the agreement,” a fraudulent seller would have a simple method of obtaining immunity for his misconduct.¹¹⁹

The New York courts have continued this running battle for more than fifty years—not over whether fraud took place, but whether a clause is a general merger clause (extrinsic evidence of fraud allowed) or a nonrepresentation or non-reliance clause (extrinsic evidence excluded). In Pennsylvania, the other state that has been debating this issue for time immemorial, the Pennsylvania Supreme Court made a further distinction.¹²⁰ According to the Pennsylvania court, a general merger clause bars evidence of *fraud in the inducement* of a contract or a false statement of fact that induced a party to enter into a contract—the most common form of fraud.¹²¹ However, a general merger clause cannot bar evidence of *fraud in the execution of the contract* (sometimes called fraud in the factum)—misleading the signer about what she was physically signing.¹²² It seems quite certain that most courts will refuse to give weight to language in a

115. *Id.*

116. *Id.*

117. *Id.* at 600 (Fuld, J., dissenting).

118. *Id.* at 602.

119. *Id.* (quoting *Arnold v. Nat'l Aniline & Chem. Co., Inc.*, 20 F.2d 364, 369 (2d Cir. 1927)).

120. *See Bardwell v. Willis Co.*, 100 A.2d 102 (Pa. 1953).

121. *Id.*

122. *See id.*

contract that a party has signed because she was tricked, not about the contents of the contract but about what the document was. If she did not understand what the document was, how can a clause in the contract bar her attempt to avoid it?

But isn't there a strong argument that the documents the *Borat* plaintiffs signed misled them about what they were signing, making the case one of fraud in the execution? To begin with, the agreements were labeled "*Standard Consent Agreement*,"¹²³ and Schulman described one to Martin as a "*standard release form*."¹²⁴ In fact, however, there was nothing standard about these forms. It is apparent that they were carefully tailored to cover the deception involved in the run-up to *Borat*. While some of the other waivers might have appeared in any acting contract, surely the waiver of "*(d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy) . . . [and] (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement)*," was specially tailored to cover exactly what the producers and Baron Cohen were planning to do when the cameras were running.¹²⁵ And the merger clause was just as tailored, stating, "the Participant acknowledges that in entering into [the agreement], the Participant is not relying upon any promises or statements made by anyone *about the nature of the Film or the identity of any other Participants or persons involved in the Film*."¹²⁶ This analysis might have been enough to relieve the district court of its *Erie* obligation to apply *Danann* because, pursuant to this reading, the case was inapposite.

Neither the New York district court nor the Court of Appeals stated that it was required by *Erie* to apply *Sabo v. Delman*. Neither court even mentioned *Sabo*. In fact, this is a further example of courts applying boilerplate writing to override the obvious fact that the plaintiffs fully relied on the lies they were told. They may have been gullible. They may have been carried away by the idea of being in a movie, even one that was only going to be shown in Belarus, but they certainly relied on exactly what the boilerplate said they were not relying on.

In his article on *Borat*, Korobkin puts enormous weight on the "duty to read," despite recognizing that drafters frequently load the dice against non-drafters. This is despite having shown in both his "bounded rationality" article,¹²⁷ as well as in the *Borat* piece,¹²⁸ why it is understandable that almost no one actually reads a contract. In a Subpart entitled "Risks to

123. See *supra* text accompanying note 99 (emphasis added).

124. See *supra* text accompanying note 100 (emphasis added).

125. See *supra* text accompanying note 101.

126. See *supra* text accompanying note 101 (emphasis added).

127. See generally Korobkin, *supra* note 29.

128. See generally Korobkin, *supra* note 31.

Nondrafting Parties,”¹²⁹ he says that most of the Subpart “contends that the intuition that ‘reading’ is cheap is wrong, at least in the context of the *Borat* Problem.”¹³⁰ Nonetheless, what he calls “the *Borat* Problem” is that if we abandon using merger, nonrepresentation, and non-reliance clauses, unscrupulous nondrafters will systematically cheat the trusting drafters of contracts by claiming oral fraud if the drafters do not use boilerplate language heavily weighted against the reader.¹³¹ I find this silly. In the *Borat* litigation, few if any observers would doubt that the stooges were telling the truth when they said that they didn’t realize that they were being made fun of, and I don’t think many people think that if they had known the truth, the plaintiffs would have let themselves be made laughing stocks for \$350 to \$500.

Korobkin’s “*Borat* Solution” is primarily to require what he calls “specific assent.”¹³² This would require a “clear statement” that the writing takes precedence over prior oral statements and “realistic notice,” some way of calling the disclaimer to the nondrafter’s attention.¹³³ He invites the parties to negotiate the terms, use neutral standard terms, or require the nondrafter to check off certain boxes. But he does not even consider requiring including a statement that reads, “THIS STATEMENT CONTRADICTS WHAT I JUST SAID TO YOU.” And it is hard to see how any of these prophylactic rules will really overcome the widespread unwillingness or inability to read a contract that Korobkin demonstrates so well in both articles.¹³⁴

To me there is an answer, but it is not an answer that will please those who put so much weight on written contracts. To be sure, memories slip and people “misremember” in ways that favor their interests. And a written document is usually more accurate than memory. But certainly, in the situation of a very plausible claim of fraud against one of the exculpatory clauses like those in *Borat*, the solution is to allow the writing into evidence against the nondrafter, not to bar the nondrafter’s contrary evidence. The lawyer representing the drafter can argue to the jury that the written word—which argues against fraud having taken place—is more trustworthy

129. *Id.* at 76–88.

130. *Id.* at 77. In the pages that follow, Korobkin discusses psychological game theory and empirical studies showing direct costs such as the complexity of reading legal documents, which have often deliberately made difficult and lengthy to discourage reading, “confirmation bias,” indirect costs such as undermining trust in that the drafter is led to think the nondrafter doesn’t trust her, loss aversion from the sense of giving up the gains that the oral misrepresentations have led the nondrafter to think he is getting, and the impact on efficiency of the amount of time that would be needed to read every contract. *Id.* at 78–88.

131. *Id.* at 51–52.

132. *Id.* at 92.

133. *Id.* at 93.

134. What about the fact that many nondrafters will not have the education to understand the disclaimer or won’t know that they need to bring their reading glasses, as happened to Michael Psenicska, who thought he was giving a driving lesson, not signing a “contract”?

than the nondrafter's arguably self-serving testimony. But the court should not bar the oral testimony. While many people do not trust juries,¹³⁵ and some may favor the underdog, the judge can still exclude untrustworthy evidence without the iron curtain of the PER.¹³⁶ As Arthur Corbin wrote many years ago with respect to interpretation through extrinsic evidence:

The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it. Just when the court should quit listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense. Even these things may be true for some purposes.¹³⁷

3. "Notice and Choice" in Online Privacy

Most of us are concerned about how private entities gather information about us. Whether it is from our use of online cookies, credit cards, or retailers' loyal customer discounts, there is a lot of information that other people or companies have about us. Congress or federal administrative agencies could impose laws or regulations limiting how cyber information gatherers may use it with respect to those who provide the information, since many of us do not realize how much information we are providing or what the recipients are doing with it. As opposed to government regulation, however, our current approach uses the *motif* of contract, called "notice and choice." Companies need only provide a rather generalized and indeterminate statement of what they propose to do with respect to privacy and then offer the consumer the choice of accepting these terms or not taking part. This is really just another contract of adhesion, with the "notice" often being quite long, hard to understand, incomplete, and full of vague words. While there have been several important statements of underlying privacy principles over the last forty years, these have been ideals to reach voluntarily rather than rules to be followed. Notice and choice is superficially a nongovernmental sharing of responsibility, with both parties designing a regime of privacy protection.

135. Korobkin cites for this the hoary old statement that "[t]he average jury will . . . lean strongly in favor of the side which is threatened with possible injustice and certain hardship by the enforcement of the writing." Korobkin, *supra* note 31, at 73 n.98 (quoting Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Controlling the Jury*, 41 YALE L.J. 365, 366 (1932)). He then quotes Corbin's 1944 Yale Law Journal article as support, but in fact Corbin was skeptical of this point. *Id.* (quoting Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 608–09 (1944)). Professor Korobkin responded to a late draft of this Article with a gracious e-mail saying that he agreed with my conclusion that the plaintiffs should have been permitted to put on their evidence before a jury, and that his article had said this, based on his proposed requirement of "specific assent." See Korobkin, *supra* note 31, at 102–04. With the greatest respect, I still feel that he puts too much emphasis on the written word, which remains a trap for the unwary in cases like this one.

136. On the related but more general issue of the role of the merger clause in triggering the PER, see 6 LINZER, *supra* note 14, §§ 25.8, 25.8[G], 25.20.

137. 3 CORBIN, *supra* note 87, § 579. He footnoted his third sentence with examples of Mexican and Confederate dollars. *Id.* § 579 n.55; 6 LINZER, *supra* note 14, § 25.25.

But in reality, the consumer has inadequate information, even in the unlikely case that she reads the “notice” carefully. This contractual approach has left consumers with little in the way of protection.¹³⁸

4. *Baseball’s Reserve Clause*

For nearly 100 years, from about 1880 to 1975, the “reserve clause” in baseball contracts automatically gave Major League Baseball teams (that is the owners) a right to their players’ services for the season after the players’ contracts expired, regardless of whether the players signed a new contract.¹³⁹ This made it impossible for the players to offer their services to other teams and greatly weakened their ability to negotiate a new contract with their present team.¹⁴⁰ All of the teams insisted on the same clause, and the Supreme Court, on three separate occasions, beginning in 1922 and covering nearly fifty years, refused to apply antitrust laws to baseball.¹⁴¹ Remarkably, the Supreme Court had, by 1969, found every other professional sport covered by antitrust laws, but it still refused to apply them to baseball. The third challenge came in 1969, when an excellent African-American outfielder named Curt Flood, backed by the Players Union, challenged the reserve clause,¹⁴² drawing parallels with the civil rights movement. Flood received hate mail for being “untrue” to baseball and wrecked his career, his health, and, ultimately, his life.¹⁴³ We (and at least some players) now recognize Flood as a courageous man who led to the

138. My discussion is based on the facts unearthed in an unpublished study conducted at New York University by Florencia Marotta-Wurgler. Florencia Marotta-Wurgler, *Does “Notice and Choice” Disclosure Regulation Work? An Empirical Study of Privacy Policies* (N.Y. Univ. Sch. of Law, Working Paper, 2015) (on file with author). The reporters for the ALI’s Restatement of Data Privacy Principles initially adopted a notice and choice approach, and asked in their Preliminary Draft No. 2, dated Oct. 24, 2014, whether the Restatement should be reoriented more toward a contract approach. After meeting with the Advisors, the Reporters indicated that they would abandon notice and choice, and appear to have withdrawn their question of reorientation toward contract.

139. *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922).

140. *See Flood v. Kuhn*, 407 U.S. 258, 258 (1972).

141. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, which involved organized baseball’s forcing the rival Federal League out of business, Justice Oliver Wendell Holmes wrote that baseball was an “amusement” and not commerce and was thus not covered by antitrust laws. 259 U.S. at 209. On two later occasions, attempts were directed specifically against the reserve clause, but the Court relied on Congress’s inaction to conclude that Congress had approved of the Court’s reading of the Sherman Act. *Toolson v. N.Y. Yankees*, 346 U.S. 356, 356 (1953); *Flood*, 407 U.S. at 258. Among the things wrong with these later decisions, they ignored the radical change in Commerce Clause jurisprudence beginning fifteen years after Holmes wrote *Federal Baseball Club*, sixteen years before *Toolson*, and fifty years before *Flood v. Kuhn*. *See, e.g., NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).

142. *Flood*, 407 U.S. at 258.

143. *See* Allen Barra, *How Curt Flood Changed Baseball and Killed His Career in the Process*, ATLANTIC (July 12, 2011, 2:05 PM), <http://www.theatlantic.com/entertainment/archive/2011/07/how-curt-flood-changed-baseball-and-killed-his-career-in-the-process/241783>. HBO has now produced a documentary as well. *THE CURIOUS CASE OF CURT FLOOD* (HBO 2011).

players' becoming millionaires, even though he lost his case in the Supreme Court.¹⁴⁴ He saw the issue as one of civil rights, not just contract law.¹⁴⁵

Though attacks on the underlying unfairness and irrationality of the reserve clause had failed for so long, it was finally defeated on a very clever reading of the players' contracts. In 1975, two excellent pitchers, Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Baltimore Orioles, refused to sign their contracts and played the 1975 season without a contract.¹⁴⁶ They then argued to an arbitrator that they had satisfied the reserve clause by playing in 1975, and that, therefore, their 1974 contract reserve clauses no longer bound them.¹⁴⁷ The arbitrator ruled in their favor and the owners promptly fired him.¹⁴⁸ Because an overall collective bargaining agreement governed all major league players, the decision signaled the death knell for the reserve clause, after 95 years and three trips to the Supreme Court.

Despite the obvious injustice of the reserve clause and the irrationality of applying the antitrust laws to every other sport except for baseball, only on a very clever reading of the contract by the players and their lawyers, and a formalistic reading by the arbitrator, finally killed this oppressive contract provision.¹⁴⁹ The death of the reserve clause stands as a rare example of the rigid written word trumping the usual tyranny of the written word, leading to a redistribution of wealth from the owners to the players.¹⁵⁰

144. In their pioneering "inside the Supreme Court" book *The Brethren*, Bob Woodward and Scott Armstrong report a wonderfully unverifiable piece of Supreme Court law clerks' gossip to the effect that Chief Justice Burger switched his vote in *Flood v. Kuhn* to give Justice Blackmun the deciding vote to defeat Flood's case in exchange for Blackmun's delaying his opinion in *Roe v. Wade* just long enough for Burger not to be embarrassed when he swore in Richard Nixon, who had appointed both of them and had run in 1972 on an anti-abortion platform. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 224 (1979).

145. See Barra, *supra* note 143.

146. PATRICK K. THORNTON, *LEGAL DECISIONS THAT SHAPED MODERN BASEBALL* 182 (2012).

147. *Id.*

148. *Id.* at 183.

149. And even after this, the union and the owners negotiated a deal that still left younger players and all minor leaguers subject to a modified reserve system. Major League Baseball Players Association 2012–2016 Basic Agreement, art. XX.B(1) (2011), http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf. Maybe that is a fair result; it was a major improvement. At least it was the product of hard bargaining, if only between the owners and the Major League Baseball Players Association.

150. Since baseball franchises are now being sold for hundreds of millions of dollars, it has not seemed to have harmed the owners. Whether fans paying high prices for tickets feel that they have not been affected is less clear.

5. *The Marchetti and Snepp Cases*

Two cases involving former Central Intelligence Agency (“CIA” or “Agency”) employees writing books illustrate the way that contracts can muddle thinking, even in the Supreme Court, and lead to the weakening of the freedom of speech and the press. We start from a basic distrust of prior restraints to free speech.¹⁵¹ While subsequent punishment is sometimes oppressive, at least it permits important information to get out. A prior restraint silences the speaker and keeps the people from learning what the speaker had to say. If classified information is involved, there is a stronger case for restraints on the speech, but even this is not absolute.¹⁵² But where the speech is merely critical of government or embarrassing to it, legislation requiring preclearance would be questionable if not *per se* unconstitutional.

Nonetheless, the CIA requires all employees to sign a “secrecy agreement” as a condition of employment.¹⁵³ Victor Marchetti signed one when he joined the Agency in 1955.¹⁵⁴ The agreement provided only that he would never divulge “any classified information, intelligence or knowledge” unless authorized to do so in writing by the Director of Central Intelligence.¹⁵⁵ Marchetti rose to be Executive Assistant to the Deputy Director, but resigned after fourteen years with the Agency.¹⁵⁶ At that time, he signed a “Secrecy Oath” in which he agreed not to divulge “any information relating to the national defense and security,” not limited to classified material.¹⁵⁷ Marchetti then wrote several magazine articles and a thinly disguised novel dealing with the CIA in an unflattering manner.¹⁵⁸ After the government sought an injunction against Marchetti writing additional books, the U.S. District Court for the Eastern District of Virginia ordered him to submit to the Agency thirty days in advance of release to anyone “any writing, fictional or non-fictional, relating to the Agency or to intelligence.”¹⁵⁹ The Court of Appeals for the Fourth Circuit, in a thoughtful opinion by Chief Judge Clement Haynsworth, upheld the injunction as far as it related to classified material not previously disclosed publicly, since that had been included in the 1955 Secrecy Contract and was, in the court’s view, properly the subject of a prior restraint.¹⁶⁰ But Haynsworth reversed the district court as to the rest, writing:

151. See *N.Y. Times Co., Inc. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971) (per curiam); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

152. *Pentagon Papers*, 403 U.S. 713.

153. *United States v. Marchetti*, 466 F.2d 1309, 1316 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972).

154. *Id.* at 1312.

155. *Id.* at 1312 n.1.

156. *Id.* at 1312.

157. *Id.* at 1312 n.2.

158. *Id.* at 1313.

159. *Id.* at 1311.

160. *Id.* at 1316–18.

Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights. We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.¹⁶¹

The Court of Appeals appended to this paragraph an important statement: “There was no apparent consideration for the secrecy oath, so that it would be, generally, unenforceable on that ground. The oath has the support of the moral force underlying solemn oaths, but it added nothing to the Government’s arsenal of legal rights in the context of this proceeding.”¹⁶² It continued: “Thus Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.”¹⁶³

Marchetti and his co-author submitted the book, *The CIA and the Cult of Intelligence*, to the CIA, which sought to excise 339 passages, but the authors resisted and only 168 passages were removed.¹⁶⁴ The distinguished publisher Alfred A. Knopf published the book with the CIA-censored portions replaced with blanks and bold-face type used for passages that the CIA did not censor but did dispute.¹⁶⁵ While Marchetti and his publisher were undoubtedly unhappy with this result, Haynsworth’s analysis was perceptive in seeing the problem as less one of contract and more of public policy and constitutional law, and in refusing to allow the contracts Marchetti had signed to override the First Amendment.

Unlike the Fourth Circuit in *Marchetti*, the Supreme Court looked at a similar but distinct contract with an almost total lack of sensitivity.¹⁶⁶ Having seen what happened to Marchetti, Frank Snepp, another former CIA agent, was less open. He wrote *Decent Interval*, a very critical account of our last days in Saigon, and illustrated how the United States cast aside the South Vietnamese who had helped us knowing they would face horrendous reprisals from our successful enemies, the Viet Cong and the North Vietnamese.¹⁶⁷ Snepp made a secret arrangement with Random

161. *Id.* at 1317.

162. *Id.* at 1317 n.6.

163. *Id.* at 1317. The Fourth Circuit also said that “[b]ecause we are dealing with a prior restraint upon speech,” the CIA was required to respond to any submission within thirty days and “since First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material.” *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965)).

164. VICTOR MARCHETTI AND JOHN D. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* xix (1983) (Publisher’s Note).

165. *Id.*

166. *See Snepp v. United States*, 444 U.S. 507, 520 (1980).

167. *See generally* FRANK SNEPP, *DECENT INTERVAL: AN INSIDER’S ACCOUNT OF SAIGON’S INDECENT END TOLD BY THE CIA’S CHIEF STRATEGY ANALYST IN VIETNAM* (1977).

House.¹⁶⁸ The manuscript was typed and printed in secret, and the bound volumes were put in bookstores before there was any publicity.¹⁶⁹ The government could not seek to enjoin publication of the book since it was already out, so it sued for damages.¹⁷⁰

There was a major difference between the agreement Marchetti had signed and the agreement Snapp had signed: Snapp's agreement was not limited to classified information; it required preapproval before publication of "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment."¹⁷¹ The government conceded that the book contained no classified information.¹⁷² Nevertheless, the Court wrote:

Whether Snapp violated his trust does not depend upon whether his book actually contained classified information. The Government does not deny—as a general principle—Snapp's right to publish unclassified information. Nor does it contend—at this stage of the litigation—that Snapp's book contains classified material. The Government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snapp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources. Neither of the Government's concessions undercuts its claim that Snapp's failure to submit to prepublication review was a breach of trust.¹⁷³

The opinion is very deferential to the CIA. The Court found, based on a conclusory affidavit submitted by a former Director of Central Intelligence, that the publication, even without any classified information, compromised the CIA, and that by taking the CIA job, Snapp entered into a trust arrangement that he breached. Justice John Paul Stevens, joined by Justices William J. Brennan Jr. and Thurgood Marshall, disputed these points as matters of contract, trust, and restitution law, as well as the underlying premise that the government could, through contract, obtain a blanket injunction against the publication of unclassified information without prior government approval.¹⁷⁴

Since the CIA had presumably read *Decent Interval* when it was published, it should have been able to point to content in the book it would have objected to if Snapp had submitted the manuscript. Instead, the majority found that Snapp's act of not submitting it in advance constituted a breach of trust—without any showing of injury—and

168. See *Irreparable Harm*, FRANK SNEPP, <http://franksnepp.com/irreparable-harm> (last visited May 10, 2015).

169. *Id.*

170. *Snepp*, 444 U.S. at 509. This end run seems to have greatly offended the majority, leading to much of the Court's breach of trust reasoning.

171. *Id.* at 508.

172. *Id.* at 510.

173. *Id.* at 511.

174. *Id.* at 516–17 (Stevens, J., dissenting).

imposed a constructive trust on his profits.¹⁷⁵ The Court also affirmed the Court of Appeals' injunction requiring Snepp to submit all future writings to the CIA.¹⁷⁶ Given our basic distrust of prior restraint, making this contractual prior restraint something that could trigger total forfeiture of Snepp's profits just because he failed to comply with his contractual duty, absent any proof of injury to the CIA, is draconian and insensitive to Snepp's right to speak and the public's right to know. The only apparent injury was criticism of how we made our chaotic escape from Vietnam when Saigon was falling—a matter that, while embarrassing in the extreme, was no secret.¹⁷⁷ Moreover, the injunction was not limited to classified material; it served as a prior restraint on anything that Snepp might write about the CIA. Thus, the majority allowed a contract required as a condition of employment by a federal government agency to permit a prior restraint much beyond what could have been allowed by law.

Snepp reflects deference not merely to contract, but to a freewheeling sort of contractarianism. The Supreme Court found a breach of trust without any sort of trust instrument. It applied that notion of trust to everything mentioned in the contract Snepp had signed, and mechanically found that the very act of not complying with the prior restraint required by the secrecy agreement was the breach of trust, without requiring the CIA to explain what it would have objected to and how the material injured it. The government should not be allowed to circumvent the First Amendment simply by requiring an employee, even a CIA agent, to sign a contract.

6. *More on Contract Overriding the Bill of Rights: Cohen v. Cowles Media Company*

In another case in which contract overcame constitutional rights, *Cohen v. Cowles Media Company*,¹⁷⁸ the Supreme Court held that a newspaper was liable on promissory estoppel grounds because it broke its reporter's promise of secrecy to a slimy politician who was anonymously trying to leak negative information on an opponent.¹⁷⁹ The majority opinion in the managed to be wrong on both contract and First Amendment grounds.¹⁸⁰ Even more, it was legally tone deaf because it did not appreciate

175. *Id.* at 516 (majority opinion). Justice Stevens in his dissent argued that a constructive trust was an inappropriate remedy, quoting the Court of Appeals, which had written that "a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment." *Id.* at 523 (Stevens, J., dissenting).

176. *See id.* at 509, 516 (majority opinion).

177. The public importance of Snepp's book is shown by *Last Days in Vietnam*, a documentary released in October 2014, which revisits, forty years later, our shameful exit. *LAST DAYS IN VIETNAM* (PBS 2014).

178. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

179. *Id.* at 670.

180. *Cohen* is also noteworthy because it appears in both contracts and constitutional law casebooks.

how these grounds were intertwined.¹⁸¹ Dan Cohen was a Republican *apparatchik* in Minnesota, working for an advertising agency employed by the Independent Republican¹⁸² candidate for governor, Wheelock Whitney. Cohen approached several reporters saying he had information

which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material with this, and you will also agree that you're not going to pursue with a question of who my source is, then I'll furnish you with the documents.¹⁸³

The reporters knew that Cohen was working for the Independent Republicans,¹⁸⁴ and they could have guessed that the leaked information would be detrimental to a candidate of the rival Democratic Farmer-Labor Party (“DFL”). Four reporters agreed not to disclose Cohen’s name and were given information that the DFL’s candidate for Lieutenant Governor, Marlene Johnson, had twice been arrested nearly twenty-five years earlier, once for unlawful assembly and once for petty theft.¹⁸⁵ Further investigation revealed that she had been arrested for unlawful assembly at a rally against the state’s not hiring enough minority workers on a construction project and that the charges were later dropped.¹⁸⁶ She had been convicted on the theft charge, which was for failure to pay for six dollars’ worth of sewing materials.¹⁸⁷ But this was said to have happened while she was distraught over her father’s recent death, and the conviction was vacated the following year.¹⁸⁸ The Minnesota Supreme Court said in a footnote, “These circumstances, of which Cohen was apparently unaware and which cast a somewhat different light on the two incidents, were likely to set in motion a boomerang effect. This suggestion of a boomerang may have prompted some of the editors to believe that Cohen’s identity was newsworthy.”¹⁸⁹

In any event, at the *Tribune* and the *Dispatch*, two newspapers whose reporters had given the confidentiality promise to Cohen, the

181. In fairness to Justice Byron White, who wrote for the majority, he did find that the Court had jurisdiction because the Minnesota Supreme Court had raised a federal question intertwined with state promissory estoppel law. *Id.* at 663, 667–68. The Minnesota Court had refused to enforce the reporters’ promises through promissory estoppel because, in its view, the First Amendment disabled the requirement that enforcement be necessary to avoid injustice. *Id.*

182. In Minnesota, the Democratic Party is known, for historic reasons, as the DFL, while the Republican Party was called the “Independent Republican” party from 1975 to 1995. DANIEL J. ELAZAR ET AL., *MINNESOTA POLITICS AND GOVERNMENT* 85 (1999).

183. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990).

184. *Id.*

185. *Id.*

186. *Id.* at 201 n.2.

187. *Id.*

188. *Id.*

189. *Id.*

editors believed that Cohen's name, and his connection with the Whitney campaign were themselves newsworthy and decided to print Cohen's name.¹⁹⁰ Another reporter for the *Tribune* had independently found a link to Cohen and to the person who had unearthed the documents.¹⁹¹ The newspapers had several options: (1) do not print the story at all, (2) print the story without revealing the source, (3) say that the source was someone close to the Whitney campaign, or (4) print Cohen's name with or without the name of his employer. The *Tribune* had endorsed the ticket that included Johnson.¹⁹² Its editors felt that they could not refuse to print the story, and that printing it with only a reference to it coming from a Whitney supporter would have cast aspersions on other people connected with the campaign.¹⁹³ After a heated editorial "huddle," the *Tribune* printed both Cohen's name and that of his employer, while the *Dispatch*, without as much *sturm und drang*, printed Cohen's name but did not mention his employer.¹⁹⁴ Both papers' reporters objected to their paper not abiding by their promises of anonymity, and the *Tribune*'s reporter insisted that her name not appear as the author of the article.¹⁹⁵ Neither paper mentioned its reporter's confidentiality promise.¹⁹⁶ In the brouhaha that followed, Cohen was fired by the advertising agency he had been working for.¹⁹⁷ It is not clear whether the advertising agency fired him because disclosure of his connection with the agency proved embarrassing or because they disapproved of his conduct. In any event, "[t]he newspapers [did not] dispute that Cohen was fired or otherwise forced to resign as a result of the story."¹⁹⁸

Cohen sued the *Dispatch* and the *Tribune* for breach of contract and misrepresentation. The jury awarded Cohen \$200,000 in compensatory damages and \$500,000 in punitive damages based on allegations of misrepresentation.¹⁹⁹ The Minnesota Court of Appeals threw out the misrepresentation claim and the resulting punitive damages because no scienter could be shown when the reporters made their promises but

190. *Id.* at 201.

191. *Id.*

192. *Id.* at 201-02.

193. *Id.* at 201.

194. *Id.* at 201-02.

195. *Id.* at 201.

196. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 253. (Minn. Ct. App. 1989). The other two media outlets kept their reporters' promises. *Id.* The Associated Press stated only that the documents "were slipped to reporters," and a local TV station decided not to broadcast the story at all. *Id.*

197. *Id.*

198. *Id.* at 254. Cohen testified that when he had described his leaking of the documents, "his supervisor had no reaction," but the supervisor testified "that he was upset by what he believed were Cohen's unscrupulous practices." *Id.* at 252. It seems undisputed that after his name came out, "Cohen's employer confronted him and a heated discussion ensued." *Id.* at 253. Cohen said he was then fired; the employer said he resigned. *Id.* at 253-54.

199. *Id.* at 254.

affirmed the contract-based award of \$200,000.²⁰⁰ The court found the First Amendment inapplicable and sounded quite hostile to the newspapers.²⁰¹ Judge Gary Crippen, dissenting on the contract ground, argued strongly that Minnesota's enforcement of contracts was not a compelling state interest that could override the First Amendment interest in the dispersal of information to the public, particularly when information relevant to an election was involved.²⁰²

The Minnesota Supreme Court affirmed the dismissal of Cohen's misrepresentation claim but dismissed the contract claim.²⁰³ It wrote, "The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive."²⁰⁴ It continued, "We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract."²⁰⁵ The Court reversed the entire award, over strong dissenters who chided the press for making promises and then hiding behind its supposed protected status to avoid responsibility.²⁰⁶

It was not until oral argument, when one of the justices on the Minnesota Supreme Court asked about promissory estoppel, that the issue that gets this case into the contracts books first emerged.²⁰⁷ The Minnesota Supreme Court rejected the claim because it felt that the violation of the newspapers' First Amendment rights outweighed the injustice to Cohen.²⁰⁸

When the case got to the U.S. Supreme Court, the contract and constitutional analysis took yet another turn. The majority mentioned but ignored the contract claim that the Minnesota Supreme Court had thrown out.²⁰⁹ Instead, it held that using the First Amendment to answer the injustice element of promissory estoppel was not a matter of nonreviewable state law but instead raised a federal question.²¹⁰ It also held that Minnesota promissory estoppel law was a state law of general

200. *Id.* at 262.

201. *Id.* at 256-57.

202. *Id.* at 262-68 (Crippen, J., dissenting in part).

203. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990).

204. *Id.* at 203.

205. *Id.*

206. *Id.* at 205-07 (Yetka, & Kelley, JJ., dissenting). One of the dissenters spoke of "the perfidy of these defendants, the liability for which they now seek to escape by trying to crawl under the aegis of the First Amendment, which, in my opinion, has nothing to do with the case." *Id.* at 207 (Kelley, J., dissenting).

207. *Id.* at 204 n.5.

208. *Id.* at 205.

209. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 666 (1991).

210. *Id.* at 667-68.

applicability from which the press had no special constitutional protection.²¹¹ This point was strongly disputed by the four dissenting Justices, who pointed out that the Court had rejected this approach with respect to tort when it radically rewrote the law of libel in the famous case of *New York Times Company v. Sullivan*,²¹² and when it applied *Sullivan* to the law of intentional infliction of emotional distress and reversed a judgment against *Hustler Magazine* for printing a “parody” suggesting that the Reverend Jerry Falwell had had sex with his mother in an outhouse.²¹³ The Supreme Court majority in *Cohen* did not reinstate the Minnesota Court of Appeals judgment, but sent the case back to the Minnesota Supreme Court, saying that since it had incorrectly found promissory estoppel inappropriate, it needed to reconsider whether promissory estoppel would support the jury verdict.²¹⁴

While the majority was not as hostile to the press as the Minnesota Court of Appeals and the Minnesota Supreme Court dissenters had been, it still treated promissory estoppel as sacrosanct in that it overrode the press’s First Amendment rights in ways that tort and other state law matters did not.²¹⁵ This case stands as another example of overvaluing contract analysis simply because it is contract—here, based on a promise to be sure, but treating the promise as overriding other immensely important values—specifically press coverage of questionable tactics in a statewide election.

7. *Freestanding Nondisclosure Agreements*

We have already discussed the CIA’s secrecy agreements, and we law professionals are all familiar with confidentiality agreements and covenants not to compete in private employment. But it is worth noting what the government did, perhaps with good motives, while the Afghan Taliban was holding Bowe Bergdahl prisoner. To keep the details out of the press, “[m]embers of Bowe’s brigade [apparently 3200 to 5000 soldiers] were required to sign nondisclosure agreements as part of their paperwork to leave Afghanistan.”²¹⁶ His parents “were required to sign a nondisclosure agreement with the National Security Agency in order to view classified and top-secret material.”²¹⁷ While we do not know exactly

211. *Id.* at 668, 670.

212. 376 U.S. 254 (1964).

213. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (citing in dissents of both Justice Harry Blackmun, *Cohen*, 501 U.S. at 674–76, and Justice David Souter, *id.* at 677–78).

214. *Cohen*, 501 U.S. at 672. The majority also suggested that the Minnesota court could apply the state constitution to shield the press from promissory estoppel claims of this type. *Id.* These hints from Justice White suggest that the majority opinion may not have been quite as hostile to newspapers or as oblivious to the interplay between state contract law and state and federal constitutional law as it seems at first blush.

215. See generally *Near v. Minnesota*, 283 U.S. 697 (1931) (discussing the law of nuisance).

216. Michael Hastings, *The Last American Prisoner of War*, ROLLING STONE, June 7, 2012, at 62.

217. *Id.*

what his parents' agreement included, Bergdahl's parents were then deprived of a right to speak out against matters like government delay or to make public statements about their son's captivity. Soldiers who knew anything about Bergdahl's disappearance and captivity were also kept quiet. Gagging what seems like more than 3000 soldiers by holding their transfers captive is obviously unenforceable. But, especially since these soldiers were still in uniform, the *in terrorem* effect of these "contracts" surely had a chilling—more likely a corrosive—effect on their ability to speak of what went on.

This use of contract limited what the public learned about Bowe Bergdahl before his much publicized release in a prisoner swap in the summer of 2014.²¹⁸ Maybe the government's use of these nondisclosure "agreements" served a noble purpose in protecting Bergdahl from retaliation by the Taliban, but it illustrates how contract and contract thinking can be used to suppress information that normally should be made available. We have no assurance that the government does not use this technique in less compelling circumstances, and our "profound national commitment"²¹⁹ in favor of disclosure of public information and against prior restraint raises a powerful argument against these supposed contracts.

III. WHAT'S IT ALL ABOUT, ALFIE?²²⁰

Contracts are about power. Not just the Hohfeldian "power" to make an accepted offer legally binding,²²¹ but also power in forcing undesired terms on a weaker negotiating adversary; power in imposing terms on a non-negotiating consumer, employee, credit card customer and the like; power in using contract to override a party's rights, whether consumer, baseball player, CIA employee, or newspaper; or the power to wriggle out of a deal because your lawyer was better than the other guy's, especially if the other guy is a town, a city, a union, representing many people who will be affected by the failure of the contract. I am not saying that we should all dance around the maypole, sing *Wimoweh*, and ignore hundreds of years of contract law, not to mention the realities of life and capitalism. I am saying that there is much more to life, and there should be much more to contract, than formal rules that ignore the underlying inequalities of the parties, including the greatest absences: perfect information and a perfect market.

218. Admittedly, Michael Hastings's article, which included information on the nondisclosure "agreements," was published two years before the swap for Bergdahl took place.

219. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

220. Those who are too young to get the allusion are advised to watch *Alfie*, a great 1966 movie that made Michael Caine (still going and now Sir Michael) into a star, and to listen to the title song, recorded the following year by Dionne Warwick. *ALFIE* (Paramount Pictures 1966).

221. See Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 *YALE L.J.* 169, 183 (1917).

When we deal with contracts between parties of roughly equal power and information, we should generally leave the contracts and the parties alone.²²² Those who build monuments to their own folly should not be restrained because we think they are fools.²²³ But contract is in many ways a matter of public law, often overwhelmingly so. And when we ignore that intertwining of public and private law and instead fall in love with contract and deify it as the product of individual free will, we forfeit the public's rights, as well as those of individuals, and hand them over to people and companies and their lawyers who can manipulate the contract process. Some, but not all of the examples I have given have involved consumers. But the reserve clause, the CIA secrecy agreements, the reporters' promises of anonymity, and the government's use of freestanding nondisclosure "agreements," do not involve consumers, though many of them are contracts of adhesion, writ large. While formalism and strict application of formal contract law are not always beneficial to those in power,²²⁴ on the whole, they benefit those who know how to exploit the status quo. And the status quo, particularly in contract, mostly benefits the strong.

Contract law chooses to ignore disparate power. It is time to change that approach. It will not be easy; we obviously do not want to make consumer contracts unenforceable, since that would deprive consumers of capacity to contract, as Arthur Leff told us nearly fifty years ago.²²⁵ But we need to cut loose from much of the formalism and rigid belief in contract as an end in itself and a matter of private volition, and recognize the many forms of contract, or at least transactions labeled as contract, that do not involve the freedom that we blithely speak of as free will and freedom of contract. That would reduce the evil side of contract. We will never get rid of all of it entirely, and probably do not want to, but reduction of evil is a good first step. And stamping a lot of it out is even better.

222. See REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY, *supra* note 13.

223. *Chamberlin v. Parker*, 45 N.Y. 569 (1871); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 760 (5th ed. 2011).

224. See *supra* Part II.B.4 (discussing the demise of baseball's reserve clause).

225. See Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).
