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## The Death of Contracts

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# The Death of Contracts

Franklin G. Snyder & Ann M. Mirabito\*

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INTRODUCTION

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

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

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1. 2 MARK TWAIN, AUTOBIOGRAPHY OF MARK TWAIN 11 (Benjamin Griffin et al. eds., 2013).  
2. See RON POWERS, MARK TWAIN: A LIFE 563-98 (2005).  
3. Reprinted in THE MAN THAT CORRUPTED HADLEYBURG, AND OTHER STORIES AND ESSAYS (Oxford Mark Twain 1996) (1899).  
4. GRANT GILMORE, THE DEATH OF CONTRACT (1974).  
5. *Id.* at 1.  
6. *Id.*  
7. See generally MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE (1998).  
8. See generally Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).  
9. See generally PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1990).  
10. The doctrine at its zenith was enshrined in RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).  
11. See generally CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (2004).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### I. CONTRACT LAW AS TECHNOLOGY

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

## II. THE STRUCTURAL TECHNIQUE OF CONTRACT LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. THE RULE TECHNIQUE OF CONTRACT LAW

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

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

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

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

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

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

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

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

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53. See part II, *supra*.

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

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

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

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

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

### A. *Development of Contract Rule Technique*

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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70. SIR HENRY SUMNER MAINE, *ANCIENT LAW* 179 (1861). He went on:

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

*Id.* at 179-80 (emphasis added).

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

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

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

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

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

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

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

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

77. *Id.* at 197-204.

78. *Id.* at 1-23.

79. *Id.* at 58-122.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

105. *Id.* §§ 9-16.

106. *Id.* § 14.

107. *Id.* § 15.

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

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

110. *Id.* §§ 17-70.

111. *Id.* §§ 18-23.

112. *Id.* §§ 24-34.

113. *Id.* §§ 35-49.

114. *Id.* §§ 50-70.

115. *Id.* § 71.

116. *Id.* § 73.

117. *Id.* § 74.

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

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

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

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118. *Id.* § 76.

119. *Id.* § 77.

120. *Id.* § 78.

121. *Id.* §§ 82-94.

122. *Id.* § 87.

123. *Id.* § 88.

124. *Id.* § 89.

125. *Id.* §§ 82-83.

126. *Id.* § 86.

127. *Id.* § 84.

128. *Id.* § 90.

129. *Id.* §§ 110-150.

130. *Id.* § 111.

131. *Id.* § 112-123.

132. *Id.* § 124.

133. *Id.* §§ 125-129.

134. *Id.* § 130.

135. U.C.C. § 2-201.

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

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

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

137. *Id.* §§ 134-135.

138. *Id.* § 138.

139. *Id.* § 139.

140. *Id.* § 145.

141. *Id.* § 145.

142. *Id.* §§ 151-158.

143. *Id.* §§ 159-173.

144. *Id.* §§ 174-176.

145. *Id.* § 177.

146. *Id.* §§ 178-199.

147. *Id.* § 181.

148. *Id.* § 186.

149. *Id.* § 191.

150. *Id.* § 195.

151. *Id.* § 196.

152. *Id.* § 192.

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

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

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153. *Id.* § 193.

154. *Id.* § 194.

155. *Id.* §§ 200-230.

156. *Id.* §§ 200-203.

157. *Id.* §§ 209-218.

158. *Id.* §§ 219-223.

159. *Id.* § 206.

160. *Id.* § 207.

161. *Id.* § 204.

162. *Id.* § 205.

163. *Id.* § 221.

164. *Id.* § 208.

165. *Id.* §§ 224-230.

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

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

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

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

167. *Id.* § 225.

168. *Id.* § 229.

169. *Id.* §§ 273-287.

170. *Id.* § 273.

171. *Id.* §§ 274-277.

172. *Id.* § 277.

173. *Id.* § 278.

174. *Id.* § 279.

175. *Id.* § 280.

176. *Id.* § 281.

177. *Id.* § 282.

178. *Id.* § 283.

179. *Id.* § 284.

180. *Id.* § 285.

181. *Id.* §§ 231-260.

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

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

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182. *Id.* § 236.

183. *Id.* §§ 231-233.

184. *Id.* § 234.

185. *Id.* § 241.

186. *Id.* §§ 250-251.

187. *Id.* § 242.

188. *Id.* §§ 261-272.

189. *Id.* § 261.

190. *Id.* § 262.

191. *Id.* § 263.

192. *Id.* § 264.

193. *Id.* § 265.

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

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

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

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194. *Id.* § 269.

195. *Id.* § 270.

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

197. *Id.* §§ 288-296.

198. *Id.* § 297-301.

199. *Id.* §§ 302-315.

200. *Id.* § 302.

201. *Id.* §§ 304.

202. *Id.* §§ 304, 315.

203. *Id.* §§ 316-333.

204. *Id.* § 317.

205. *Id.* § 318.

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

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206. *Id.* §§ 344-385.

207. *Id.* §§ 357-369.

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

209. *Id.* § 364.

210. *Id.* § 365.

211. *Id.* § 366.

212. *Id.* § 367.

213. *Id.* §§ 346-347.

214. *Id.* §§ 370-377.

215. *Id.* § 349.

216. *Id.* § 350.

217. *Id.* § 351.

218. *Id.* § 351.

219. *Id.* § 353.



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

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

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

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

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

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

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220. *Id.* § 355.

221. *Id.* § 356.

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

### *B. The World Reflected in Rule Technique*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. *Structural Technique*

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

### B. *Rule Technique*

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

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

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230. See part III, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

merchants would deliberately use language that might be confusing.<sup>268</sup> To the extent that courts insist on letting individual parties provide their own subjective definitions, it is likely that the number of merchants fleeing the regime of contract law technique will only accelerate.<sup>269</sup>

6. *Strict compliance with contract terms is frequently very difficult and parties rarely require exactitude in performance, so something less than what was agreed to is usually fine.* Despite the existence of a few anomalies—such as the “perfect tender” requirements for sales of good in the U.S.<sup>270</sup>—contract rule technique assumes that parties who insist on specific terms are never-

268. A frequent example used in defending trade usage is the instance of gold and other precious metals, which are always sold by troy ounces rather than avoirdupois ounces. The court in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 n.12 (3d Cir. 1980), used the following hypothetical in explaining the necessity for parol evidence on trade usage:

For example, a contract might provide for a party to pay “\$10,000 for 100 ounces of platinum.” A judge might state that the quoted words are so clear and unambiguous that parol evidence is not admissible to vary their meaning. That judge might never learn that the parties have a consistent past practice of dealing only in Canadian dollars and follow a standard trade practice of measuring platinum in troy ounces (12 to the pound instead of 16). This is because that judge’s linguistic frame of reference includes the dollars and the ounces he or she encounters in daily life. That is not the linguistic frame of reference of the commercial parties.

This is true enough, but in the first decades of the 21st century it seems doubtful that any parties reasonably sophisticated enough to make a deal for 100 ounces of platinum—worth about US\$145,000 as these words are written—would not have contracts using terms like “troy oz.” and “C\$” or “CAD,” rather than trusting to the courts’ ability to decide what the terms were *ex post*.

269. There are instances of the courts’ declining to recognize industry-specific language. For two hundred years, London’s Savile Row tailors have made “bespoke” suits. These were custom fitted to the wearer, and no doubt when custom fitting was required, human hand labor had to do it. Accordingly, the Savile Row tailors developed a technique that required hand-cutting and hand-sewing every detail of the suit. This formally came to be embodied in a set of standards for “bespoke” suits, each of which had to have fifty hours of actual cutting and sewing labor by qualified tailors to carry that title. When competitors developed technology that allowed machines to custom-cut and sew individually fitted suits, which are virtually identical and one-tenth the price, the Savile Row tailors sued to prevent them from calling the suits “bespoke.” They lost before the British agency responsible for trade names, on the ground that “bespoke” meant “custom-made,” not “hand made.” See Stephen Adams, *Bespoke suits can now be made by machines after Savile Row tailors lose legal battle*, DAILY MAIL, June 18, 2008, at 15. What is interesting is the tailors’ reaction. “The Advertising Standard Authority is a shoddy organization which has made a bad decision,” said one. “They accept that the word ‘bespoke’ means something special and then concluded that it doesn’t matter because people misuse it. A perfectly good word is being undermined.” Vidya Ram, *Savile Row Cut Down A Notch By ‘Bespoke’ Ruling*, FORBES, June 20, 2008, available at [http://www.forbes.com/2008/06/20/savile-row-bespoke-life-style-cx\\_vr\\_0620lifesavile.html](http://www.forbes.com/2008/06/20/savile-row-bespoke-life-style-cx_vr_0620lifesavile.html). The tailors, like craftsmen of many ages, are focused on the *process* (the technique), and not the *outcome*.

270. See UCC § 2-601; Joseph M. Perillo, CALAMARI & PERILLO ON CONTRACTS § 11.20 at 438-38 (5th ed. 2003).

theless usually satisfied with something that is “close enough.” The “substantial performance” standard of the famous *Jacob & Youngs v. Kent*<sup>271</sup> case has been universally adopted in American jurisdictions.<sup>272</sup> *Jacob & Youngs* rested on the twin ideas that (a) parties who had specified one thing (e.g., the “Reading pipe” specified in that case) would ordinarily be satisfied with something that was “just as good” as what was specified (e.g., “Cohoes pipe”), and (b) that judges and juries are capable of deciding what is, in fact, “just as good.” Both of those assumptions might well have been true in 1922, but the world of 2014 is not dominated by an ethos of “close enough,” but by one that demands absolute, strict adherence to standards.<sup>273</sup> The “quality revolution” of the last thirty years has fostered awareness that one flaw in a thousand can be devastating and that a delay of even an hour in delivery time can be enormously expensive. Many modern business techniques such as supply chain management,<sup>274</sup> lean production,<sup>275</sup> Six Sigma quality,<sup>276</sup> and continuous process improvement<sup>277</sup> are designed to maximize productivity by eliminating every kind of unnecessary variance in every aspect of the business. It is a world where “close

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271. 129 N.E. 889 (N.Y. 1921).

272. See Perillo, *supra* note 270, § 11.18 at 433-35; see also *id.* § 11.20, at 437 (noting that “[t]he doctrine of substantial performance . . . is almost universally applied”).

273. The business literature on the topic of continuously increasing quality and value is enormous, but leading texts include PHILIP B. CROSBY, *QUALITY IS FREE: THE ART OF MAKING QUALITY CERTAIN: HOW TO MANAGE QUALITY SO THAT IT BECOMES A SOURCE OF PROFIT FOR YOUR BUSINESS* (1979); THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST RUN COMPANIES* (1995); MASAOKI IMAI, *KAIZEN: THE KEY TO JAPAN’S COMPETITIVE SUCCESS* (1988); KAORU ISHIKAWA, *WHAT IS TOTAL QUALITY CONTROL?: THE JAPANESE WAY* (1988); KEKI R. BHOTE & ADI K. BHOTE, *WORLD CLASS QUALITY: USING DESIGN OF EXPERIMENTS TO MAKE IT HAPPEN* (1999); PETER S. PANDE, ROBERT P. NEUMAN & ROLAND R. CAVENAGH, *THE SIX SIGMA WAY: HOW GE, MOTOROLA, AND OTHER TOP COMPANIES ARE HONING THEIR PERFORMANCE* (2000); MICHAEL L. GEORGE, *LEAN SIX SIGMA FOR SERVICE: HOW TO USE LEAN SPEED AND SIX SIGMA QUALITY TO IMPROVE SERVICES AND TRANSACTIONS* (2003); JEFFREY LIKER & GARY L. CONVIS, *THE TOYOTA WAY TO LEAN LEADERSHIP: ACHIEVING AND SUSTAINING EXCELLENCE THROUGH LEADERSHIP DEVELOPMENT* (2011); JAIDEEP MOTWANI & ROB PTACEK, *PURSuing PERFECT SERVICE: USING A PRACTICAL APPROACH TO LEAN SIX SIGMA TO IMPROVE THE CUSTOMER EXPERIENCE AND REDUCE COSTS IN SERVICE INDUSTRIES* (2011); DAVID L. GOETSCH & STANLEY DAVIS, *QUALITY MANAGEMENT FOR ORGANIZATIONAL EXCELLENCE: INTRODUCTION TO TOTAL QUALITY* (7th ed. 2012).

274. See, e.g., SHOSHANAH COHEN & JOSEPH ROUSSEL, *STRATEGIC SUPPLY CHAIN MANAGEMENT: THE FIVE CORE DISCIPLINES FOR TOP PERFORMANCE* (2d ed. 2013).

275. See, e.g., JOHN NICHOLAS, *LEAN PRODUCTION FOR COMPETITIVE ADVANTAGE: A COMPREHENSIVE GUIDE TO LEAN METHODOLOGIES AND MANAGEMENT PRACTICES* (2010).

276. See, e.g., PANDE ET AL., *supra* note 273.

277. See, e.g., MASAOKI IMAI, *GEMBA KAIZEN: A COMMONSENSE APPROACH TO A CONTINUOUS IMPROVEMENT STRATEGY* (2012).



enough” is not a value that many companies can tolerate, let alone embrace.

7. *Asking six lay people without financial training to decide on the losses suffered under a contract, after listening to competing arguments made by counsel, is a perfectly reasonable way of determining damages.* In 1814 it was probably reasonable to assume that a jury of ordinary lay Americans was competent to determine how much money their neighbors—farmers, blacksmiths, sawmill operators, horse-copers, apothecaries, chandlers, dry-goods dealers, small merchants, sellers and buyers of real estate—would have made on a given transaction. But even by 1914, in a world increasingly dominated by sophisticated international businesses, this was probably a shaky assumption. And in the world of 2014 it seems entirely absurd. As we noted previously, it is unthinkable that even the least sophisticated business person would try to figure its profits on a prospective deal by calling together a group of strangers who know nothing about the business and conduct a focus group on the subject. In fact, one of the terrors of the litigation process for many potential defendants is the possibility of damage awards that are almost entirely irrational.<sup>278</sup> There are sophisticated analytical tools available today that allow for predictions with vastly more confidence than there were even twenty years ago. A system that continues to rely on a kind of trial-by-battle rather than on modern financial approaches is not likely to be popular or influential.

8. *It is critical to get the most accurate outcome in every given dispute, regardless of time or cost.* In some kinds of cases, such as criminal trials, it is obviously important to make sure that the result of the trial is as close to perfectly accurate as possible. There are powerful personal and societal interests in making sure both that the guilty are punished and the innocent are freed. When an individual is on trial for capital murder, we willingly supply procedures and resources nearly inexhaustibly to try to ensure that the verdict is correct. The cost of that kind of procedure is substantial—some \$400,000 in defense costs alone.<sup>279</sup> But the vast majority of businesses are repeat players in the world of

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278. See, e.g., *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987).

279. See KANSAS JUDICIAL COUNCIL, REPORT OF THE JUDICIAL COUNCIL DEATH PENALTY COMMITTEE 1 (Feb. 13, 2014), <http://www.kansasjudicialcouncil.org/death%20penalty%20cost%20report%20final.pdf>.

contractual disputes,<sup>280</sup> and the vast majority of contract disputes cannot possibly justify that amount of legal expense. Moreover, the vast majority of contract litigation in the contemporary world is not made up of unusual, one-shot matters involving enormous stakes. Rather, litigation is a simple cost of doing business. Any given company may have dozens or even hundreds of disputes going on at the same time, with customers, suppliers, employees, competitors, regulators, and so on. The results of very few of these are significant in themselves. What matters is the total cost of the disputes. Thus, modern businesses may well prefer an inexpensive system that is ninety percent accurate to an expensive system that is ninety-nine percent accurate. The same is likely true of consumers and employees, at least those not involved in class actions or those whose claims are so large that they are very nearly life-or-death. A free or very inexpensive arbitration process that gives a consumer a reasonable likelihood of collecting \$2,500 in a dispute over a car warranty might be far preferable to one that gives the same consumer a certainty of collecting that sum if the consumer would have to pay hourly legal fees in the latter situation. Yet contract rule technique, with its elaborate doctrines and its reliance on the sort of general standards required where lay juries are involved, seems not to grasp this issue at all.

9. *Courts deciding contract cases are the chief backstop against fraud and unfair practices in contracting.* Contract rule doctrine is full of rules designed to protect one party from the predation of the other. Many of these were doubtless important in the early formation of the common law of contracts. When contract law was taking shape, there were no regulatory agencies, no consumer protection statutes, and no family law as we know it today. There were hardly even police forces in the sense we use them today, to prevent or punish deliberate fraud or classical gun-to-the-head duress. In the absence of virtually any other mechanism for protecting people against unfair practices, courts no doubt quite reasonably saw themselves as the chief mechanism for policing such bad actions. But that is hardly the world of today, where every state has elaborate mechanisms governing proper and improper methods of doing business. These bodies of law, such as state deceptive trade practices acts (DTPA), give aggrieved consumers far more tools than does contract law, and as a result have as a prac-

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280. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

tical matter become the primary source of consumer relief.<sup>281</sup> Contract law permits a consumer who has been defrauded or coerced to *defend* herself if she is sued by the bad actor—so long as she can find a lawyer and can afford to pay the hourly fees—so it provides little help for those who have already paid, and does little to discourage the bad actors, who at worst find themselves unable to collect on a single contract. But that same consumer can bring a DTPA claim *on a contingency basis* and recover *multiple* damages and attorneys' fees. And this is only one remedy; state and federal agencies of every sort—nearly all of which are better suited than are nonspecialist judges to determine what kinds of practices ought to be prohibited or regulated—are actively involved in preventing precisely the same sort of unfair practices that contract rule technique tries to govern.<sup>282</sup>

### C. *The Shape of Things to Come*

There are two common views of the future. One is that it is likely to be “much like the present, only longer.”<sup>283</sup> The other is that “the only thing we know about the future is that it is going to be different.”<sup>284</sup> Both, of course, are true: The future will be similar to today, only different. The difficulty is determining where the differences lie.

Looking forward over the coming decades, it is impossible, of course, to tell precisely what will happen, but there are certain trends that will very likely accelerate, and looming new technologies that may bring radical changes. Several of the trends we identified earlier will probably continue. Contract cases will continue to flee the judicial system. The use of standardized contracts and practices will keep growing. Globalization will reduce variations in contracting practices around the world. The drive for

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281. See G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198 (1988) (describing growth of state deceptive trade practices acts as substitutes for common-law contract restraints); Donald R. Stroud III, Comment, *Beyond Deception: Finding Prudential Boundaries Between Breach of Contract and Deceptive Trade Practices Act Violations in Wisconsin*, 93 MARQ. L. REV. 1157, 1164 (2010) (noting how such acts allow courts to police sharp dealing without relying on the specific terms of contracts).

282. A sample of the host of non-contractual remedies available to consumers with complaints can be found at *Consumer Protection, USA.GOV*, <http://www.usa.gov/topics/consumer.shtml> (last updated Mar. 31, 2014).

283. THE GIGANTIC BOOK OF BASEBALL QUOTATIONS 579 (Wayne Stewart & Roger Kahn eds., 2007) (quoting Dan Quisenberry).

284. PETER DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 44 (1973).

efficient processes and improved quality in goods and services will intensify. The view of contract disputes not as discrete legal matters but as a simple cost function within a larger system will gain even more strength. This is in effect the present, only longer.

But there are also changes that will raise new issues and will likely make our current contract law techniques even less adequate. We mention only a few here, from the relatively simple to the mind-bogglingly complex.

*Nonlegal Self-Help Remedies.* One of the striking features of the past decade is the rise of various extralegal systems for consumer self-help. The meteoric rise of social media on the Internet has restored the concept of public shaming—once limited to insular communities where reputation was particularly important—to a prominent position. Traditionally, weaker parties who lacked the resources to litigate in court often had no way to retaliate against the stronger parties who they believed had breached their agreements. Today, ubiquitous ratings systems on popular web sites, sometimes with free and open (and often virulent) commentary, allow individual consumers to extract a measure of vengeance on the businesses that they believe have wronged them.<sup>285</sup> Contracting parties who once were able to view each customer as an isolated transaction, and who saw the harm of dissatisfaction as limited, now face a world in which a handful of disgruntled consumers can seriously affect their reputations and their businesses. Systems like these are today only in their infancy, but they will doubtless play a substantial role in regulating commercial behavior in the years to come.

*Do-It-Yourself (DIY) Contracting.* The days when it was difficult for an ordinary person to be able to generate a sophisticated written contract are quickly passing. Web sites like LegalZoom and Rocket Lawyer have been providing DIY contracts for a few years now, but the launch in 2013 of the Shake application for smartphones marks such a huge step forward that one early reviewer titled his piece, “We (Lawyers) Just Got Replaced By a Contract-Drafting App.”<sup>286</sup> Shake is a phone app that allows ordinary people—small businesses, freelancers, buyers and sellers—to

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285. See, e.g., Wayne R. Barnes, *Social Media and the Rise in Consumer Bargaining Power*, 14 U. PA. J. BUS. L. 661 (2012) (noting rise in consumer self-help remedies using social media).

286. William Peacock, *We (Lawyers) Just Got Replaced By a Contract-Drafting App*, FINDLAW (Sept. 16, 2013), <http://blogs.findlaw.com/technologist/2013/09/we-lawyers-just-got-replaced-by-a-contract-drafting-app.html>.

generate surprisingly sophisticated contracts in a few moments and to have them signed digitally on their devices. The spread of such simple-to-use technologies means that even for small transactions the parties will have written documentation of their promises, and the documentation will consist of standardized terms developed over millions of transactions, not the often confusing quasi-legalisms lay people often employ when writing “contract” terms. The tools as presently designed are suitable for smaller transactions. ShakeLaw, for example, advises using the product for selling your computer on Craigslist, not for selling your company. But the products are likely to become more sophisticated as designers and users gain experience.<sup>287</sup>

*Spend Analysis and Integrated Source-to-Settle Procurement.* The very concept of contracting has changed in many cutting-edge businesses. Instead of thousands of individual contracts that are individually issued, monitored, paid, disputed, and resolved, most businesses are aiming to integrate the sourcing of materials, components, and labor.<sup>288</sup> These procurement processes are governed by highly detailed specifications that are designed to reduce variation and disputes, and to resolve matters efficiently. Modern supply chain management is aiming to do for the contracting process what modern production techniques have done for manufacturing: to eliminate human variance and resulting errors.

*Big Data.* People have used computers to process data for half a century, but the idea of “big data”—the process of using artificial intelligence to harvest insights from standard databases, click-stream data from the Web, social network communications, sensor data and surveillance data—only entered the popular lexicon a few years ago.<sup>289</sup> Yet in that short period we all now are beginning to feel the effects of the “Age of Big Data.”<sup>290</sup> The sheer volume of

287. One leading firm already has a much more sophisticated free product available to clients who are putting together term sheets for venture capital deals. See *WSGR Term Sheet Generator*, WILSON, SONSINI, GOODRICH & ROSATI, <http://www.wsgr.com/wsgr/display.aspx?sectionname=practice/termsheet.htm> (last visited May 5, 2014).

288. See, e.g., KIRIT PANDIT, *SPEND ANALYSIS: THE WINDOW INTO STRATEGIC SOURCING* (2008); FRED SOLLISH & JOHN SEMANIK, *STRATEGIC GLOBAL SOURCING: BEST PRACTICES* (2011); FRED SOLLISH & JOHN SEMANIK, *THE PROCUREMENT AND SUPPLY MANAGER'S DESK REFERENCE* (2d ed. 2012).

289. Steve Lohr, *Amid the Flood, A Catchphrase Is Born*, *NEW YORK TIMES*, Aug. 12, 2012; Steve Lohr, *The Age of Big Data*, *NEW YORK TIMES*, Feb 11, 2012.

290. See Joshua Gruenspecht, “Reasonable” *Grand Jury Subpoenas: Asking for Information in the Age of Big Data*, 24 *HARV. J. L. & TECH.* 543 (2011); Omer Tene & Jules Polonetsky, *Privacy in the Age of Big Data: A Time for Big Decisions*, 64 *STAN. L. REV. ONLINE*

data is mind-numbing; the total amount of digital information available in 2013 was estimated at 4 ZB (zettabytes), or roughly twenty-five times the sum total of all the information stored on all the computer drives in the world in 2006. The 2013 figures are nearly double those of 2012 and four times those of 2010.<sup>291</sup> What is more important is that with artificial intelligence this data can be mined and put to use to predict not only behavior, but how different rules will affect behavior. Simply put, big data enables better predictions, and better predictions yield better decisions.<sup>292</sup> If the law, in Holmes's famous dictum, is nothing more than the prediction of what results the judicial system will produce,<sup>293</sup> big data will almost certainly yield better predictions than will the study of appellate cases.<sup>294</sup> As agreements and the outcomes of those agreements are captured in databases, transactional lawyers will better predict which language will reduce disputes, protect their clients' interests, and yield the best results in the ultimate event of a dispute. Judges and juries, instead of relying on gut instinct and vague notions of "reasonable" contractual behavior will have hard data as to what parties routinely do in any possible situation. Big data looks to be the key to understanding and optimizing business processes. Contracting is as much a business process as manufacturing, marketing, and distribution, and it seems fair to say that the impact of Big Data on how contracts are written, performed, and interpreted will be substantial.

It is impossible to tell exactly what form these developments will take, but together we believe that they will have an enormous impact on the way commercial transactions are conducted and thus will continue to eat away at our existing contract law technique.

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63 (2012); Nicolas P. Terry, *Protecting Patient Privacy in the Age of Big Data*, 81 UMKC L. REV. 385, 388 (2012); Neil M. Richards & Jonathan H. King, *Three Paradoxes of Big Data*, 66 STAN. L. REV. ONLINE 41 (2013); Nolan M. Goldberg & Micah W. Miller, *The Practice of Law in the Age of "Big Data,"* NAT'L L.J. (Apr. 11, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489457214>.

291. Frank Gens, *IDC Predictions 2013: Competing on the 3rd Platform*, IDC (Nov. 2012), <http://www.idc.com/research/Predictions13/downloadable/238044.pdf>.

292. Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV., Oct. 2012, at 60-67.

293. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

294. See Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909 (2013).

## VI. IMPLICATIONS FOR “CONTRACTS” AS A SUBJECT

In this part of the paper we look at the implications of our previous observations on the legal subject traditionally called “Contracts.” What parts of the subject will likely still be important a decade from now? Which parts will fall into desuetude? Which parts, having outlived their usefulness, will linger on to inflict occasional damages on the unwary? We believe that for the two most important categories of contracting parties—consumers purchasing from merchants (what businesses call business-to-consumer or “B2C” transactions) and business engaged in mercantile exchanges with other merchants (business-to-business or “B2B”), the rules are worthless at best and pernicious at worst.

For consumers in an age of standardization there are three problems with contemporary contract law. First, the time, expense, and uncertainty necessary in employing the contract technique mean that most consumers are priced out of the system.<sup>295</sup> Even if the technique was useful in dealing with their claims, they cannot afford to use it. Second, the great bulk of the technique is simply irrelevant in consumer disputes over standardized products. Third, the technique does a remarkably bad job addressing the three questions that *are* important to consumers: (a) to what extent the consumer is bound to the merchant’s standard form terms; (b) what precisely those terms mean, and (c) in the absence of a writing—as in the case of a purchase at a store—what obligations the merchant assumes. All are questions on which it is highly desirable to get predictable, standardized answers that all consumers can rely on, and yet our technique assigns them to be resolved case-by-case, leaving individual consumers at the whim of the particular trial judge or jury.

As for merchants in B2B transactions, the technique is slightly more relevant. There certainly are one-shot negotiated contracts which fit the model assumed by the technique, so if we assume that parties and their lawyers have done an unusually bad job in the contracting process—or some other set of circumstances raises

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295. The primary exceptions are the consumers who act as mascots in lawyer-driven class action litigation, where potential settlement values make the litigation profitable and provide rewards to the plaintiffs beyond their ordinary breach of contract remedies. But the very existence of the class action remedy is an admission that the ordinary contract law remedies for consumers are worthless. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005) (“Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action . . .”).

an unusual question—resort to the courts will sometimes be necessary. But this is a very small slice of the field of contractual commercial transactions. To the extent that the technique has any relevance in most transactions, it is as a hidden land mine waiting to explode. In the modern world, rule technique is much less a way of determining the parties' intent when evidence is lacking, and more as a way of undermining written agreements that have carefully been prepared by lawyers.<sup>296</sup> Far from the simple, clear, rational, and certain system that Karl Llewellyn thought would help businesses and lawyers avoid problems and plan carefully for the future,<sup>297</sup> we have one that they are fleeing like patrons from a burning theater.

In what follows, we will take a brief look at each of the basic conceptual building blocks of contract rule technique—the subsets of rules that make up the traditional subject—and give our thoughts on how they will evolve or disappear in the years ahead.

#### A. *Consideration*

The consideration doctrine is what contract technique traditionally uses to decide if the parties have made a bargained-for exchange (in which case they have a “contract” that courts will enforce), or if they have done something else, such as made gratuitous promises or exchanged gifts. It is already the conventional wisdom in the modern world that the doctrine is used chiefly in contracts as a pedagogical tool rather than something that will ever likely arise in practice.<sup>298</sup> There are still rare cases where

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296. Well-known modern cases include *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981) (using disputed trade usage testimony to override express, negotiated price term in written contract); *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996) (mangling rules of interpretation to hold that employees who had expressly declined certain benefits had nevertheless contracted for them); *Nora Beverages, Inc. v. Perrier Group of America, Inc.*, 164 F.3d 736 (2d Cir.1998) (finding buyer who had not agreed on either quantities or length of the agreement and who had not signed contract was bound anyway). Prominent cases that involve similar but less successful attempts to avoid explicit and very carefully drafted language include *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

297. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1146-47 (1985). “Llewellyn believed businessmen needed rules on which they could rely, rules that would produce predictable results. The existence of predictable rules would make commercial activity more rational and would thereby encourage its expansion.” *Id.* at 1147.

298. “With luck,” write the authors of a leading contract law casebook, “you will be able to practice years without ever seeing a contract that lacks consideration, since nearly all commercial contracts and most non-commercial ones involve reciprocal, bargained-for



doctrine plays a role, and a few more where it is manipulated by courts to achieve a desired result that cannot be justified on other grounds, but as an important part of the technique its days are over.<sup>299</sup>

### B. *Reliance*

The primary alternative to consideration-based contract theory is the piece of doctrine known historically as “promissory estoppel” and more commonly today as “reliance.” Reliance is a concept lifted from tort (where it is an element of the tort of fraud) and equity jurisprudence (from whence the terminology was taken), which imposes liability without regard to bargain. In other words, a promise can become enforceable, even if the promisor does not intend it to be such, if the promisee relies on it. At one point, as we noted at the beginning of this paper, it seemed poised to swallow up contract law whole. That did not happen, for a variety of reasons.<sup>300</sup> But while reliance ultimately did not conquer, it left enough of itself around to create substantial problems for the unwary.

Over the coming years, whatever little justification reliance ever had as a theory is likely to disappear. The drive to standardize contracting processes and make them efficient and predictable requires a system that allows firms to determine the extent to which their contracts will be legally enforceable *before* they begin performance. A reliance system, like a tort system, is inherently unpredictable because liabilities cannot be reliably ascertained until after the event happens. In tort the threat of substantial *ex post* liability is sensible, because we want to deter parties from engaging in the kind of activity that might harm others. But the point of contract law is to encourage commercial transactions, not

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promises.” BRUCE W. FRIER & JAMES J. WHITE, *THE MODERN LAW OF CONTRACTS* 33 (3d ed. 2012).

299. See James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 *CORNELL L. REV.* 987, 1006 (1990) (“Perhaps someday contract law will more closely reflect common sense and modern commercial practice, business people will not have to seek legal advice reflecting irrational rules from centuries long past.”).

300. One in particular is that enforcement based on reliance quickly becomes circular. Traditionally, it was reasonable to rely something identifiable as a “contract” because courts would enforce it if the other party reneged. The new approach turned that on its head, finding that any promise might create was a “contract” if the other party reasonably relied on it. In the 19th century, one relied on a promise that one expected the state to enforce; in the 20th, the state enforced a promise on which one relied. Shortly after the doctrine reached fully iconic status with its inclusion as § 90 of the *Second Restatement*, courts begin backing away from it. See note 10, *supra*.

to deter them, and a reliance regime that makes liability dependent not on the agreement but on unpredictable conduct of the other party is antithetical to that. The lingering remains of the doctrine only encourage further exodus from the courts to arbitration and the continuing decline of contract technique.

### C. Formation

The contract formation principles embedded in the technique—which make up fifty-three of the 385 sections of the *Second Restatement*—can for our purposes be divided into three broad parts. The first is the *doctrinally* important dance of offer, acceptance, rejection, revocation, counter-offer, and so on, which makes up the bulk of the relevant doctrine, but in practice is largely irrelevant. The second is the *practically* important treatment of how standard form contracts are made and enforced, with which the doctrine hardly engages at all. The third is the confusing question of when parties who anticipate signing written agreements may be bound before they sign them, which is practically dangerous and doctrinally a mere hash.

The great bulk of the *Second Restatement's* treatment of formation is made up of the first category, including such well-known doctrinal chestnuts as the “mailbox rule” and the “overtaking acceptance” and such peculiar one-shot cases as *Adams v. Lindsell*<sup>301</sup> (what happens when you mail the offer to the wrong address?) and *Dickerson v. Dodds*<sup>302</sup> (at what point does the offeror's repeated attempts to avoid you indicate that an offer has been withdrawn?). Most of them seem to reflect the quaint problems of a bygone world, as can be seen by the titles of many: “Necessity That Manifestations Have Reference to Each Other”,<sup>303</sup> “To Whom an Offer Is Addressed”,<sup>304</sup> “Form of Acceptance Invited”,<sup>305</sup> “Methods of Termination of the Power of Acceptance”,<sup>306</sup> “Indirect Communication of Revocation”,<sup>307</sup> “Purported Acceptance Which Adds Qualifications”,<sup>308</sup> “Effect of Performance by Offeree Where Offer Invites

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301. 106 ER 250 (K.B. 1818).

302. 2 Ch. Div. 463 (1876).

303. REST. 2D, *supra* note 90, § 23.

304. *Id.* § 29.

305. *Id.* § 30.

306. *Id.* § 36.

307. *Id.* § 43.

308. *Id.* § 59.

Either Performance or Promise”;<sup>309</sup> “Reasonableness of Medium of Acceptance”;<sup>310</sup> “Effect of Receipt of Acceptance Improperly Dispatched”;<sup>311</sup> and “Effect of Receipt by Offeror of a Late or Otherwise Defective Acceptance.”<sup>312</sup> These reflect a world in which most contracts are made by individual one-to-one correspondence on individualized terms. But the world of tomorrow, as we note above, is one where contracting is dominated by supply chain management, source-to-settle procurement, master supply agreements, online purchasing, standardized service contracts, in-store retail sales, machine-to-machine or machine-to-person ordering, and even by sophisticated written agreements prepared by consumers and microbusinesses on smartphones. There will be clear, standardized written documents to which parties have clearly indicated agreement, leaving little scope for the elaborate dance of offer-and-acceptance and its doctrinal subtleties.<sup>313</sup>

The second, and much more important issue in contract formation, is the one that the doctrine paradoxically ignores. There are many important and contentious issues involving the question of when a party manifests consent to standard terms,<sup>314</sup> but no answers will be found in the current technique.<sup>315</sup> The rules are not designed for current situations. “Mutual assent” simply requires “that each party either make a promise or begin or render a performance,”<sup>316</sup> but the tough question is whether downloading a coupon or clicking “like” on a Facebook page should be counted as “promise” or a “performance,” and guidance on this issue is entirely lacking. Nothing in current rule technique suggests any meth-

309. *Id.* § 62.

310. *Id.* § 65.

311. *Id.* § 67.

312. *Id.* § 70.

313. We are not saying that there will be *no* cases in the future where rules like this might have to be resorted to. There is probably no body of law, however arcane, that does not need to be dredged up from time to time to deal with unusual cases. But as a part of rule technique, it is headed toward desuetude.

314. As these words are being written, the Internet is ablaze over the issue whether merely visiting a web site, clicking “like” on a social media board, or downloading a coupon is “assent” to standard terms that the seller has posted somewhere. See Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES, April 16, 2014, at B1; Stephanie Strom, *General Mills Reverses Itself on Consumers’ Right to Sue*, N.Y. TIMES, April 20, 2014 at A17.

315. The concept of standard-form contracts is almost entirely absent from the formation sections; the only place in the *Second Restatement* that it bubbles to the surface enough to be noticed is in connection with the parol evidence rule. See text at note 298, *infra*.

316. REST. 2D, *supra* note 90, § 18.

odology for providing intelligent answers.<sup>317</sup> It is of obvious importance that both businesses and consumers be able to understand clearly what counts as assent and what that assent means. Doubtless such rules will be developed in the coming decade, but they will almost certainly come from regulatory agencies, not from courts relying on contract technique.

The third important area of formation doctrine is the body of rules regarding when parties are bound to contracts *before* they have formally signified their assent. Most lay people—and probably most business people—have a “Big Bang”<sup>318</sup> view of contract: liability attaches when the party “signs on the dotted line.” Everything before that point is negotiation, while everything thereafter carries legal liability. But contract technique reflects the opposite rule. The default position is that the contract is formed when “manifestations of assent” are exchanged during discussions, and that a contract will be found unless “the circumstances show” that the parties did not intend to be bound until the writing was signed.<sup>319</sup> This approach rests upon the observation that parties “necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agreeing upon all the terms which they plan to incorporate therein.”<sup>320</sup> This is doubtless true—it is difficult to imagine a situation in which parties have neither talked about nor generally agreed to terms before they are asked to sign a written agreement—but that is not the question. The question is whether the law should enforce the alleged oral promises (which will doubtless involve the conflicting

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317. It may seem unfair to criticize the technique for failing to come to grips with the intricacies of modern internet commerce. Law necessarily is always behind the technology curve, and the drafter of the *Second Restatement*, for example, can hardly be faulted for not foreseeing such phenomena as internet commerce. Yet standard-form contracts have been important, and known by legal scholars to be important, for well over half a century. The problems raised by internet commerce are not much different from those raised by technologies—such as door-to-door sales, direct marketing, catalogue sales, and telemarketing—that have been employed for at least that long. As long ago as the Second World War scholars were criticizing the fact that the contemporary doctrine did not deal adequately with standard forms. See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (noting that “our common law of standardized contracts is highly contradictory and confusing, and the potentialities inherent in the common law system for coping with contracts of adhesion have not been fully developed”).

318. The term is from Jeff C. Dodd, Essay, *Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts*, 36 HOUS. L. REV. 195 (1999).

319. REST. 2D, *supra* note 90, § 27.

320. *Id.* cmt. a.

testimony of the two parties long after the fact) or simply wait until there is a signed agreement. In the days when preparing the written agreement was a costly and cumbersome procedure and parties routinely began performing before anything was signed, the rule may have made some sense. Today, the rule exists merely to trip up parties who are not sophisticated enough to make the proper disclaimers at the beginning of negotiations. As such, it is yet another hazard for those who are trying to use contract law to achieve some predictability in commercial transactions.

#### D. *Writing Requirements*

We have noted previously that the arcane rules involving the statute of frauds and the parol evidence rule are relics of the days when writings were rare and carried substantial value. Paradoxically, however, the very ubiquity of written agreements may make the requirements and effects of writings even more important. To be at all useful, however, the technique will have to change substantially.

In the days when the vast majority of contracts were oral, it made sense for certain types of contracts—those particularly susceptible to fraud and abuse—to be in writing before they would be enforced.<sup>321</sup> Hence, the writing requirements known collectively as the statute of frauds were created. These statutes were never popular with judges, and over time became “riddled with exceptions.”<sup>322</sup> The result is a mess which manages simultaneously to make planning less certain and to drive up the cost of ultimate litigation. There are two obvious ways to get rid of the mess. One is simply abolishing the statute of frauds, as the United Kingdom did in 1954.<sup>323</sup> The other is to require the writing and eliminate the encrusted exceptions. Predictability would likely be enhanced and litigation costs reduced by the latter—a simple rule that if it

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321. These included most of the kinds of contracts that the ruling elites of England in the late 17th century would find troublesome: contracts for sales of jealously hoarded family land; promises by heads of the family to pay the debts of poor relations, either live (as sureties) or deceased (as executors); promises allegedly made in the course of carefully arranged dynastic marriages; and contracts with tenants and servants who claimed their contracts were longer than the customary one year.

322. Ronald K. L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 532-33 (1992). A good account of the various exceptions is found in JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS §§ 75-81 (5th ed. 2011).

323. *Id.* at 33.

is not in writing, it isn't enforceable—but the point is that whichever solution is adopted, this part of the technique is irrelevant.

The same problems plague the issues of parol evidence in contracts. The basic rule is that where parties have a writing that sets out the terms of their agreement, they will not be allowed to introduce outside testimony to show that the deal was something other than what was included in the writing. Like the statute of frauds, the parol evidence rule is so infested with limitations and exceptions<sup>324</sup> that it serves as little more than a vehicle for driving up legal fees in litigation.<sup>325</sup> Again, the only two apparent solutions are keeping the rule and eliminating the exceptions or eliminating the rule and allowing all writings to be contradicted by outside testimony in all cases. In a world of ubiquitous and carefully crafted writings, eliminating the exceptions and giving conclusive effect to the written terms is probably the better course. But whichever course is ultimately adopted, this part of the technique will likely wither.

### *E. Defenses*

Current technique has developed two broad categories of defenses to contract formation: defenses said to go to the quality of the mutual assent, and those derived from public policy. The former include duress, undue influence, fraud, misrepresentation, nondisclosure, mutual mistake, and unilateral mistake, the presence of which will make a contract unenforceable due to lack of "consent." The latter include contracts that are illegal, are contrary to public policy, or seem to be "unconscionable" to the judge. These contracts are unenforceable even if the parties knowingly consented to them. Both categories date to the days when most contracts were negotiated face-to-face, and refusing to enforce a tainted contract was the state's only tool for reaching socially harmful activities like coercion, fraud, and high-pressure sales.

Today few contracts involve the kind of face-to-face situations involving relatively high stakes where duress and undue influence might possibly be employed. To the extent these tactics are used

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324. *See id.* § 86.

325. To show that the parol evidence rule should not apply in a particular case, a party must produce and the other party must defend against the same evidence that would come in if there were no such rule. In fact, costs are often increased because the parties must battle over the same evidence twice, once at the stage of admissibility and once again at trial.

by merchants, there exists a bevy of much more effective tools for consumers and regulators to reach the bad conduct.<sup>326</sup> These tools include explicit consumer protection regimes and even criminal prosecutions. Fraud, misrepresentation, and nondisclosure, on the other hand, obviously can flourish in a world of mass transactions, but the problem is that individual one-shot non-enforcement of the resulting contracts is perhaps the least effective way of dealing with the problem, because most of the defrauded will likely pay up rather than endure the costs and uncertainties of litigation. These undesirable practices seem to be precisely the sort of thing that consumer agencies with fact-finding procedures and regulatory authority should address on a mass basis. It is likely that there would be very little effect—except for a reduction in uncertainty and litigation costs—if all of these defenses were removed from contract law and the issues handled by competent regulatory bodies.

The issues are different with respect to public policy defenses. These involve situations in which the legislature has not prohibited particular agreements, but courts on their own decide that the activity should be barred. In many cases, the issue is not whether a particular agreement is contrary to public policy, but whether judges or legislatures get to decide what that policy is. By far the most common areas where courts invoke public policy concerns relate to: (1) employee covenants not to compete,<sup>327</sup> (2) employee and consumer arbitration agreements,<sup>328</sup> (3) failure to comply with regulatory licensing requirements,<sup>329</sup> (4) clauses that limit liability for negligence or other harm,<sup>330</sup> and (5) agreements relating to family relationships.<sup>331</sup> Each of these involves issues that are remarkably unsuited for resolution on a case-by-case basis based on vague factors of the “public policy.” They are ideally suited for legislative or administrative resolution. If legislatures and regulatory authorities have not barred certain types of con-

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326. Private coercion or undue influence in family-related transactions—such as the quintessential case of the care-giver who pressures an elderly relative to change her will—will still arise and certainly will need to be dealt with, but that can be done without overarching contract doctrines like duress and undue influence. Family and probate courts presumably are the better venues for dealing with such problems.

327. *See, e.g.,* *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 982 P.2d 1277 (en banc 1999).

328. *See, e.g.,* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005).

329. *See, e.g.,* *U.S. Nursing Corp. v. Saint Joseph Medical Ctr.*, 842 F. Supp. 1103 (N.D. Ill. 1994).

330. *See, e.g.,* *Hanks v. Powder Ridge Restaurant Corp.*, 885 A.2d 734 (Conn. 2005).

331. *See, e.g.,* *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

tracts, judicial invalidation on an *ad hoc* after-the-fact basis provides little regulatory effect—ski slopes still put negligence disclaimers in their contracts even when courts have found them invalid, and consumers continue to believe that they are enforceable—and adds significant uncertainty and cost to the process. There is little likelihood that a technique appropriate for the future would assign this task to the courts enforcing contracts.

### *F. Interpretation*

It is ordinarily not difficult in contracts to determine what the contract language means. But because language is an imperfect tool, questions arise with some frequency about exactly what a contract requires. Thus, contract technique necessarily must deal with issues of contract interpretation. The problem is that the technique historically has focused on what *these* particular parties meant when they used particular language. That may have been a plausible approach when contracting was local, usage was idiosyncratic, and the tools for crafting clear written documents were unavailable, but it makes little sense in a world where the very language of business is, as we noted above, being standardized.

Courts and legal scholars for years have pointed out, quite correctly, that the plain meaning of a written agreement may not necessarily reflect what the parties actually agreed. Where they have erred is assuming that courts routinely should try to enforce the latter – the underlying intentions—rather than the former—the actual agreement. In the world to come, the pressure for standardization means that words must acquire meanings that are reliable and predictable, and parties must assume responsibility for using them correctly. For example, a manufacturing process for a product designed to work in complex systems must conform exactly to what is required. A manufacturer whose products do not meet the specifications will suffer. Similarly, we expect that the contracting parties of the future will take on the responsibility of using precise language.

This is particularly true given that standardized contracts are used for mass transactions. It is highly desirable that the same term used in contracts by two separate suppliers be interpreted in the same way, and that it be interpreted the same way in every court in the United States. It would also be helpful if ordinary words in a cell phone contract and a construction contract were held to have the same meaning, so that unsophisticated buyers who have experience with one are not led astray by the other.



There will be increasing pressure for standardized agreements to converge, so that clauses that have proven clear and effective supersede those that are less so. But this process can only proceed if courts are willing to adhere to a concept of plain meaning that puts the onus on the *parties*, and not the *judge*, to specify what is meant.

These changes will likely require wholesale scuttling of the whole body of doctrine relating to trade usage. Where commerce is global and transactions among merchants in the same kind of goods is the exception rather than the rule, a system that leaves a party free to argue that 49.5 percent counts as "at least" 50 percent<sup>332</sup> invites confusion and wasted transactional costs at best, and abuse and sharp dealing at worst.

### G. *Performance and Breach*

Once the terms of the contract are determined, the key question in a contract dispute usually becomes whether the parties have done what they were supposed to do. If they did not, there is a breach. Unlike many of the other parts of contract technique, this is actually a factual question that necessarily must often be decided on a case-by-case basis. Determining exactly what was required and exactly what a party has done are questions that can only be answered after a full factual hearing. Determining facts like this is one of the things that the judicial system is reasonably good at doing. But current technique goes far beyond this straightforward task. There are two particularly pernicious doctrines.

#### 1. *Substantial Performance*

The doctrine of "substantial performance" allows (even requires) judges to second-guess the parties and determine not whether the party has done what *it promised*, but whether it has done *what the other party needs*. Determining whether the party has done what it promised is a straight factual inquiry. Determining what the other party needs, on the other hand, invites judges who are often unfamiliar with commercial practices to remake the parties' bargain based upon subsequent self-serving evidence produced by the parties long after the fact. It is possible that at the time the doc-

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

trine first developed, judges and juries were able to determine, at least roughly, whether the value of a house was affected by the brand of pipe put in the walls of a residence.<sup>333</sup> But in the world of today—and still less of tomorrow—how can we expect a single judge supported by half a dozen lay people to determine whether a contractor whose human resources software installation has failed to comply with certain contract specifications is “close enough” to what was ordered to require the other party to pay?

Eliminating the doctrine of substantial performance would increase predictability and eliminate litigation costs. It would also have very little effect on parties for whom “close enough” actually is good enough. A party who wants to be paid even though it has installed the wrong brand of product can protect itself by inserting a clause that says “or equivalent.” Parties are free to include clauses that allow them to be paid even though there are defects. If parties choose not to indicate when they will be happy to agree to something less than what was bargained for, it is difficult to see why courts should bail them out, especially when it adds substantial transaction costs to the process.

## 2. *Impracticability and Frustration*

The second troublesome piece of the technique is the body of doctrine usually called “impracticability and frustration of purpose.” One of the key functions of contract is to allocate the unknown risks that lie in the future. Often, when the bets turn out badly, and either the cost of performance has drastically risen, or the value of the reciprocal performance has sunk, a party wants to get out of the deal. The party argues that performance is now “impracticable,” or that the return promise is so worthless that the purpose of the contract is “frustrated.”

Obviously, there are two broad categories of contracting parties. The first is made up of those who are deliberately using contracts to allocate risks—e.g., in a fluctuating market, specifying delivery of certain goods at a certain price in the future. It is critical to these parties that they get exactly what they bargained for, no matter how impracticable or frustrating it appears to the other party. The second is made up of those for whom that level of strictness is not required. It is relatively easy to tell these two categories of contracting parties apart. The second group routine-

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333. See *Jacob & Youngs v. Kent*, N.Y. 239, 129 N.E. 889 (N.Y. 1921).

ly includes *force majeure* clauses which allow parties to back out of the deal in the event of certain unforeseen problems like natural disasters, wars, shortages of raw materials, labor troubles, new government regulations, and so on. Where these clauses are part of the contract, courts should certainly give them full effect. But the first group, which specifies precise performance and does not provide for the disaster scenarios, ought to get what it bargained for. In a world where adding a *force majeure* clause is as simple as clicking a button on a smartphone, there seems little reason for courts to add another layer of difficulty for parties trying to enforce their agreements.

#### H. Capacity

Capacity to contract is an important concept, but it has very little practical significance in the contemporary world. Today it is relevant to only two classes of people, infants (people under the legal contracting age) and the mentally infirm. Neither group makes up a sizeable slice of actual contract litigation. As for infants, they engage in billions of dollars in commercial transactions daily.<sup>334</sup> Most of these are relatively small standardized transactions for goods and services and are virtually never litigated. Where there is litigation, it often seems to take the form of quasi-consumer-protection litigation, as courts rely on the doctrine to knock out particular provisions of contracts that seem unfair.<sup>335</sup> As for the mentally infirm, the issue of competence is raised relatively infrequently and is rarely successful. This is, in our view, probably because the doctrine generally does not provide relief if the transaction is on fair terms, the other party does not know of the infirmity, and it has already been performed.<sup>336</sup> In a world of anonymous transactions on standardized terms, there will be relatively few situations where one party is actually in a position to exploit knowledge of the other's mental defect.<sup>337</sup> As standardiza-

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334. See, e.g., *\$211 Billion and So Much to Buy—American Youths, the New Big Spenders*, HARRIS INTERACTIVE (Oct. 26, 2011), <http://www.harrisinteractive.com/NewsRoom/PressReleases/tabid/446/ctl/ReadCustom%20Default/mid/1506/ArticleId/896/Default.aspx>.

335. See, e.g., *Ex parte Odem*, 537 So.2d 919 (Ala. 1988) (holding that a minor was bound to pay for medical expenses incurred for her own minor child, but that she was not bound to specific provisions of the hospital contract that required her to pay the hospital's lawyers).

336. See REST. 2D, *supra* note 75, § 15.

337. One situation where there is still some scope for the doctrine to operate is in settlements of personal injury claims where the victim claims the other party took advantage

tion of processes and terms increases, the importance of the given individual's mental state is likely to decline.

### I. Damages

As we have noted above, the manner in which contract technique assesses damages is anachronistic. Legal scholars, applying the arcane set of rules, find it difficult to answer such simple questions as how much money a retail boat dealer loses if a customer backs out of a contract.<sup>338</sup> Thus, the assumption that this is simple for untrained lay people to figure out is probably misplaced. Outside the judicial system, parties in mediation and arbitration rely on the same kinds of sophisticated financial tools that any modern company uses to model and forecast its probable future, and have them evaluated by financial experts who can understand what they are being told. To the extent that the current technique allows for the wild range of speculative amounts that are inherent in the jury system, contracting parties will continued to prefer to opt out of the technique and the courts.

## CONCLUSION

In this paper we have been critical of contemporary contract technique and pessimistic about the role it will play in the future. But there are silver linings in this. First, contract law—like equity jurisprudence—is dying as a separate subject in part because issues that once were part of contract law have now become entirely new and distinct bodies of law, while other issues are sprouting. Regimes that mix the classic private-ordering orientation of contract law with a distinctive regulatory overlay have blossomed in areas as distinct as employment law, noted above, and closely held business enterprises.<sup>339</sup> To the extent that contract law is dying, it has given birth to new sprigs in other disciplines.

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of a mental infirmity. But even here, most claimants seem to lose. *See, e.g.*, *Marston v. United States*, 2012 U.S. Dist. LEXIS 141459 (D. Mass. Sept. 30, 2012) (finding worker who suffered on-the-job brain damage to have been competent to sign settlement agreement); *Adsit v. Wal-Mart Stores, Inc.*, 912 N.Y.S.2d 314 (Sup. Ct. App. Div. 2010) (finding injury victim who became light-headed when her oxygen tank stopped working during settlement discussions was nevertheless competent).

338. The permutations are set out in Melvin A. Eisenberg, *Conflicting Formulas for Measuring Expectation Damages*, 45 ARIZ. ST. L.J. 369 (2013).

339. *See, e.g.*, Del. Code § 18-1101 (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”); Myron T. Steele, *Freedom of Contract and Default Contractual*

Second, there are, in our view, a few areas described below where contract law—though probably not in its current form—will likely play a very important role in the years to come. That is the good news. The bad news is that these areas play very little role in the current contracts curriculum, and are unlikely to gain much traction in the years ahead. Still, whether this work is done inside contract technique or in some outside system of private ordering, these four areas will be important:

○ *Standardization of Agreements.* Lawyers are not the designers or architects of contracts; instead they are the engineers and construction workers who carry out the vision of the contracting parties. Those who are responsible for building and ensuring the safety of the airy skyscraper design, inked by architects, have developed standardized practices and procedures that help ensure that the structure does what it is intended to do.<sup>340</sup> Those who are responsible for creating the master agreements that will dominate the world of tomorrow are similarly in a position to develop agreements that are clear, efficient, and predictable. Pairing sophisticated legal judgment with modern technology offers the chance to create a world in which the same clause in the same contract means the same thing everywhere in the world. Part of this will be the critical function of standardizing contract language, so that contracting parties can reliably know in advance what they are agreeing to.

○ *Transaction Engineering.* In a world where more and more transactions, involving larger and larger sums, will be standardized, the ones that are not will become even more important. The success of a major deal relies on many things, both tangible and intangible, but the terms of the contract can be critical to the venture. This is another area where sophisticated legal knowledge and cutting-edge technology can be used to improve the process, yet relatively few scholars in the field of law even focus on this as a field of study, and even fewer law schools offer the kind of training that will be need-

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*Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221 (2009).

340. The manner in which builders use standardized, reliable process to translate the most innovative ideas into solid, practical buildings that do not collapse is outlined in ATUL GAWANDE, *THE CHECKLIST MANIFESTO* 48-71 (2009).

ed to engineer deals in the future. The chief assist that conventional contract technique can lend this process is to try to keep out of the way.

○ *Contracting System Design.* The growth of business-to-business contracting systems will only accelerate in the years ahead. Based on their training, lawyers are uniquely positioned to be able to imagine the areas of potential problems in advance, and to develop appropriate solutions. This will require a body of highly trained lawyers who are also technically competent to be involved in building these systems.

○ *Contract Assembly Software.* The world is moving to one where every individual transaction can be embodied in a well-drafted tangible agreement that the parties can rely on in planning for and carrying out their obligations. This will require not only the technological skills to allow for easy and simple assembly, but also the technical legal skill and judgment of lawyers involved in developing these programs. This is a particularly fertile area that few law schools are exploring.

The world of contract technique has had a dizzying run, from its birth at the dawn of the nineteenth century to it approaching extinction in the coming decades. It has helped to build one of the greatest engines of freedom and economic growth in history, and has contributed substantially to the development of the modern American state. The law owes a good deal to the traditional body of law known as “contracts,” as much, perhaps, as it owes to the traditional body of law known as “equity jurisprudence.” But neither independent body of law will likely be relevant to lawyers working a decade hence.

