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## Enforcing the Contract at All (Social Costs: The Boundary Between Private Contract Law and the Public Interest

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# ENFORCING THE CONTRACT AT ALL (SOCIAL) COSTS: THE BOUNDARY BETWEEN PRIVATE CONTRACT LAW AND THE PUBLIC INTEREST

*Deborah Zalesne*<sup>†</sup>

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## I. INTRODUCTION

It is with great pleasure that I introduce three articles originally presented at a “Private Law and Public Interest” panel that I moder-

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ated during a symposium celebrating the 150th Anniversary of *Hadley v. Baxendale*. The articles approach a broad array of issues ranging from protection of the wetlands to copyright law to modern trends in technology-related legislation. While each seemingly addresses radically different areas of the law, the articles share common ground in one distinct way: using different contextual settings, each article explores the role of private contract law in furthering the public good.

In her article, *A Common Tragedy: The Breach of Promises to Benefit the Public Commons and the Enforceability Problem*, Professor Irma Russell examines the use of private contract law to benefit the public commons, and specifically our nation's wetlands.<sup>1</sup> She argues that contractual promises made to the public, such as a promise to jumpstart a wetland, are often unenforced because citizens who might be harmed by a breach would incur enforcement costs disproportionate to the limited benefits received from enforcement, and enforcement mechanisms are "diluted in the context of individual action to address breaches to the public trust."<sup>2</sup>

Panelist Leah Theriault discusses the extent to which non-negotiated mass market licenses are able to circumvent the Copyright Act. She posits that through private contract, copyright owners are often able to protect subject matter which copyright law explicitly refuses to protect. She suggests that the problem persists not because of the preemption provision of the Copyright Act, but rather because of the loose application of traditional contract law of offer, acceptance, and mutual assent to protect the flow of goods and services in the commercial marketplace.

Finally, Courtney Perry's article, *My Kingdom for a Horse: Reining in Runaway Legislation from Software to Spam*, addresses the problems that occur when legislatures rush to codify developing fields of law, without considering the actual practices in the developing marketplace.<sup>3</sup> She points to the success of the U.C.C., which developed rules to reflect the common practices among merchants, and cautions legislatures against deviating too far from commercial norms.

Each of the three articles emphasizes the importance modern contract law places on the enforcement of commercial contracts. Today, contract law is a viable and innovative tool to protect commercial rights, eagerly inventing novel approaches to issues with an economic or commercial component.<sup>4</sup> For example, contracts of adhesion are often enforced, despite the lack of true assent, in recognition of the

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1. Irma Russell, *A Common Tragedy: The Breach of Promises To Benefit the Public Commons and the Enforceability Problem*, 11 TEX. WESLEYAN L. REV. 557 (2005).

2. *Id.* at 575.

3. Courtney Lytle Perry, *My Kingdom for a Horse: Reining in Runaway Legislation from Software to Spam*, 11 TEX. WESLEYAN L. REV. 523 (2005).

4. U.C.C. Article 2 was specifically developed to provide flexibility for contracts in a commercial context. See *infra* Part III.A.

realities of modern commerce, in which most buyers and sellers never meet and most signatories do not read the agreements they sign.<sup>5</sup> But its use for the protection of third parties and the public is not always equally pursued, resulting in less attention to non-economic issues and losses.<sup>6</sup>

Using the examples posed by the panelists, this Article explores the limitations on the ability of contract law to deal with the protection of third parties and the public. This limitation is manifested in two distinct ways: (1) Commercial contracts are typically enforced without regard to the negative impact they may have on the public;<sup>7</sup> and (2) although some courts appear willing to stretch the bounds of the law to ensure contracts are enforced in commercial contexts,<sup>8</sup> there has been substantially less motivation to enforce contracts for the public good.<sup>9</sup> Accordingly, Part III will discuss the innovative and flexible nature of the common law of contracts as it applies to protecting commercial interests and players and its concomitant insensitivity toward the public interest. Part IV will address the inadequacy of contract law as a means of protecting public and non-economic interests.

## II. SHIFTING EMPHASIS IN THE DEVELOPMENT OF THE COMMON LAW OF CONTRACTS

The common law has always been associated with limited government in general and specifically with few government restrictions on individual economic autonomy.<sup>10</sup> “English common law developed as it did because landed aristocrats and merchants wanted a system of law that would provide strong protections for property and contract rights and limit the Crown’s ability to interfere in markets.”<sup>11</sup> It follows that common-law systems are typically viewed as “productive of greater economic growth.”<sup>12</sup>

In the common-law tradition, modern contract law has shown primary concern for protection of contract rights and economic freedom,<sup>13</sup> with less attention typically given to social institutions and nontraditional subject areas such as protection of employees, the envi-

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5. See *infra* Part III.A.1.

6. See *infra* Parts III.B, IV.

7. See *infra* Part III.B.

8. See *infra* Part III.A.

9. See *infra* Part IV.

10. Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 504 (2001) [hereinafter Mahoney, *Common Law*].

11. *Id.* at 504.

12. Gillian K. Hadfield, *Contract Law Is Not Enough: The Many Legal Institutions That Support Contractual Commitments*, University of Southern California School of Law, Law & Econ. Working Paper Series, Paper 3 at 5 (2004), available at [http://lawweb.usc.edu/cleo/working-papers/cleo/documents/C04\\_5\\_paper.pdf](http://lawweb.usc.edu/cleo/working-papers/cleo/documents/C04_5_paper.pdf) (last visited January 29, 2005) (on file with the Texas Wesleyan Law Review).

13. Mahoney, *Common Law*, *supra* note 10, at 508.

ronment or public health and welfare.<sup>14</sup> Notably, the drive for free contracting did not come in the sixteenth century when the Crown's power was at its zenith or at the point when the powers of the nobility and the gentry were at their peak in the eighteenth century. Rather, the push came in the nineteenth century, when the commercial classes began to take a powerful role in society.<sup>15</sup> Whereas contract law in the eighteenth century expressed hostility "to the interests of commercial classes,"<sup>16</sup> by inquiring into the fairness of the exchange, nineteenth century contract law, spurred by the fluctuating nature of the modern market economy, rejected the premise that fairness could be objectively measured.<sup>17</sup> At the same time, courts moved away from reflecting the legal and ethical mores of small businesspeople and farmers and came to represent the interests of larger commercial interests.<sup>18</sup>

Nineteenth century courts embraced the "will theory" of contract, which relied on offer, acceptance, and consideration to find a valid

14. Friedrich Hayek argued that "English and French concepts of law stemmed from English and French models of liberty, the first (derived from Locke and Hume) emphasizing the individual's freedom to pursue individual ends and the second (derived from Hobbes and Rousseau) emphasizing the government's freedom to pursue collective ends." Mahoney, *Common Law*, *supra* note 10, at 511 (citing FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 54-70 (1960)); see also Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 *YALE L.J.* 1019, 1020 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)) (describing the "Lochner era" as the era surrounding "the 1905 decision of the United States Supreme Court that most notably defended 'liberty of contract' from the intrusions of social legislation"). J. Willard Hurst and his followers "stressed the economic forces influencing American legal policy in the nineteenth century" and recognized a changed attitude in the twentieth century based on the notion that "unchecked economic aggrandizement had produced many social costs that needed to be paid and that the expansion of some men's liberty had come at the expense of others' oppression." Michael E. Parrish, *Friedman's Law*, 112 *YALE L.J.* 925, 932 (2003) (book review) (reviewing LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* (New Haven: Yale University Press 2002)) (citing JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 33-108 (1956)).

15. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 *HARV. L. REV.* 917, 917-19 (1974) [hereinafter Horwitz, *Historical Foundations*]. Horwitz has been much criticized, even vilified, by other legal scholars. See Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 *TULSA L. REV.* 915, 918-19 (2002). A.W.B. Simpson's seminal article, *The Horwitz Thesis and the History of Contracts*, 46 *U. CHI. L. REV.* 533, 600 (1979), challenged Horwitz's claim that the will theory was a product of the nineteenth century and that the judiciary had been guided by equitable concerns. However, Patrick Atiyah's book, *The Rise and Fall of Freedom of Contract*, supported much of Horwitz's scholarship. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979). See Gordon, *supra* note 15, at 915-27 for an interesting and concise discussion of the philosophical clash between Horwitz and his peers.

16. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 167 (1997) [hereinafter HORWITZ, *TRANSFORMATION*].

17. See Horwitz, *Historical Foundations*, *supra* note 15, at 949.

18. HORWITZ, *TRANSFORMATION*, *supra* note 16, at 167.

contract. Will theory was readily used to the advantage of employers in labor contract cases, where courts frequently acquiesced to unjust terms in labor contracts based on the myth that they were freely bargained.<sup>19</sup> However, the dogmatic approach to will theory was not applied with equal force to building contracts, for which the courts allowed recovery on a quantum meruit theory, despite the existence of a contract with express terms.<sup>20</sup> This bifurcation evidences the fledgling class bias of the courts in favor of commercial players.<sup>21</sup> Morton Horwitz argues forcefully that courts continue to apply the old equitable principles when they intentionally choose the parties who will receive their beneficence.<sup>22</sup>

### III. PROTECTION OF COMMERCIAL INTERESTS AT THE EXPENSE OF THE PUBLIC GOOD

Modern contract law has grown out of, and is largely reflective of, the nineteenth century sea change in the courts—the abandonment of equity as a fundamental component in analyzing contract claims in favor of the enforcement of business contracts based solely on promise for a promise and sufficient consideration.<sup>23</sup> Rarely will courts consider the inherent fairness of a transaction. More typically, courts enforce one-sided bargains if evidence shows they were freely entered, particularly in the commercial context where true assent is not always requisite to enforcement.

Section A examines the extent to which courts are willing to forego formalistic rules of contracting to enforce commercial contracts in the commercial context, particularly in the context of adhesion contracts involving disparities in bargaining power and limited assent to boilerplate terms. To illustrate this point, the Author focuses primarily on the enforcement of shrink-wrap, click-wrap and browse-wrap licenses, as well as the special flexibility of Article 2 of the Uniform Commercial Code when it comes to commercial contracts. Section B explores the unintended effects of rigorous enforcement of commercial contracts on third parties, consumers, the environment, and communities, and the law's lack of real concern for such negative externalities. By way of illustration, Section B discusses the prioritization of commer-

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19. See *id.* at 186–87. For example, in *Coolidge v. Puaaiki*, 3 Haw. 810, 810, 814 (1877), rather than inquire into the unjust terms of a plantation worker's contract, the court assumed it was freely bargained for, based on the parties' signatures. The court, in willfully ignoring the realities of plantation laborers' bargaining power, stated, "If they wished to confine themselves to any particular kind of labor, they should have themselves caused it to have been designated in their contract . . ." *Id.* at 814. The court upheld the contract, although it was the plantation owner's wife who had signed the instrument. *Id.*

20. Horwitz, *Historical Foundations*, *supra* note 15, at 954.

21. *Id.* at 955.

22. *Id.* at 955–56.

23. *Id.* at 917–19.

cial players' interests over the public's right to fair use of copyrighted material when the two conflict.

### A. *Flexibility of Contract Rules in the Commercial Context*

Courts have typically been enthusiastic about upholding private exchanges to protect commerce, the business community, and the efficiency of the marketplace.<sup>24</sup> Underlying this practice is the belief that legal enforcement of voluntary exchanges is "essential to the smooth functioning of the economic system,"<sup>25</sup> in that "a legal system that enforces contracts reliably and efficiently plays an important role in economic growth."<sup>26</sup> Commercial contracts have taken on particular importance, especially since the development of the Uniform Commercial Code, which identifies a primary goal of fostering the "continued expansion of commercial practices."<sup>27</sup> Market efficiency and the protection of industry have also been used to justify the enforcement of standard adhesion contracts, including shrink-wrap, click-wrap, web-wrap, and browse-wrap license agreements.<sup>28</sup> The purpose of this Section is not to tackle the question of whether mass market license agreements should be enforceable. Rather, in this Section the Author considers the courts' willingness to enforce commercial contracts as a meter against which to evaluate how courts handle third party interests and contracts for the public interest.

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24. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 8-9 (3d ed. 1987) (putting forth the theory that "contract law is based upon the needs of trade, sometimes stated in terms of the mutual advantage of the contracting parties, but more often of late in terms of a tool of the economic and social order"); Hadfield, *supra* note 12, at 1 (stating that "the problem of enforcing agreements in exchange is at the heart of economic life").

25. Paul G. Mahoney, *Contract Law and Macroeconomics*, 6 VA. J. 72, 81 (2003) [hereinafter Mahoney, *Macroeconomics*]; see also Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 558 (2003) (explaining that "[s]ociety is . . . better off when it adopts laws that improve market functioning").

26. Mahoney, *Macroeconomics*, *supra* note 25, at 80; see also Hadfield, *supra* note 12, at 2 (stating that "the effectiveness of contract law is critical to the growth of economic activity"); Schwartz & Scott, *supra* note 25, at 548 (stating that "a good contract law is a necessary condition for a modern commercial economy"). Contract enforcement affects the larger economy, in that "countries that enforce property rights and contracts experience more rapid economic growth than those that do not." Mahoney, *Macroeconomics*, *supra* note 25, at 77. Furthermore, enforcement of contracts has "regularly accompanied the rise of long-distance trade among strangers." Mahoney, *Macroeconomics*, *supra* note 25, at 78.

27. U.C.C. § 1-102(2)(b). With the advent of the U.C.C. in the 1960s, the law saw a shift away from the old "I-sell-my-horse-or-manner-to-you" paradigm toward greater emphasis on commerce.

28. See *infra* notes 53-58 and accompanying text.

## 1. Efficiency of Standardization: Enforcement of Adhesion Contracts Regardless of True Assent

The prototypical example of courts' predisposition to uphold less than perfectly bargained-for contracts to protect commerce is the adhesion contract. Adhesion contracts are standardized contract forms drafted by one party who usually has superior power in the bargaining process.<sup>29</sup> Generally, the other party must accept the terms as written or walk away from the transaction.<sup>30</sup> The take-it-or-leave-it terms most often favor the drafting party,<sup>31</sup> and the party with the weaker bargaining position often has no opportunity to shop around for better terms, either because better terms are not available with competitors or because there are no competitors.<sup>32</sup> Typically, the consumer has no time or inclination to read the contract and no opportunity to negotiate for more favorable terms.<sup>33</sup> Even if given the time to read the contract, most consumers will not do so, assuming that they would not understand the legalese<sup>34</sup> or that such efforts would be futile because they have no power to change the terms.<sup>35</sup> Accordingly, it is

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29. *But see infra* text accompanying notes 34–35, discussing adhesion contracts between merchants.

30. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

31. See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) (arguing that with form adhesion contracts business parties are tempted to impose one-sided and unfair provisions); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 251 (2002); Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 326 (1999) (noting that “[t]here are inherent evils associated with standardization since it provides the means for one party to impose terms on the other unknowing, or resisting, party”); Sierra D. Sterkin, Comment, *Challenging Adhesion Contracts in California: A Consumer's Guide*, 34 GOLDEN GATE U. L. REV. 285, 323 (2004) (arguing that “consumers need judicial protection from oppressive contractual terms” often found in adhesion contracts).

32. James V. Jordan & Judith B. Gitterman, *Franchise Agreements: Contracts of Adhesion?*, 16 FRANCHISE L.J. 1, 15 (1996).

33. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1270 (1993); Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 382 (2003); White & Mansfield, *supra* note 31, at 233.

34. See generally Meyerson, *supra* note 33, at 1270 (explaining that consumers generally “lack the legal background to understand the subordinate clauses” of contracts they sign); Rakoff, *supra* note 30, at 1179 (stating that “the adhering party is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them”); White & Mansfield, *supra* note 31, at 242 (discussing literacy research which suggests that most consumers are unlikely to understand critical information on consumer contracts).

35. Daniel R. Cahoy, *Oasis or Mirage?: Efficient Breach as a Relief to the Burden of Contractual Recapture of Patent and Copyright Limitations*, 17 HARV. J.L. & TECH. 135, 158 (2003) (noting that “the non-drafting party is generally given no information on how or with whom a renegotiation could take place (or that it is even an option)”); Meyerson, *supra* note 33, at 1270 (explaining that consumers often conclude that “there is little to be gained from reading a non-negotiable contract”); Rakoff, *supra*



commonplace for consumers to be held to contract terms they never knew existed.

Adhesion contracts are also enforceable against businesses, which are also routinely stuck with terms they did not know about. The classic example arises in situations in which commercial buyers and sellers each use their own pre-printed standardized forms. Under section 2-207 of the Uniform Commercial Code, such contracts are enforceable, even where the terms in the seller's acknowledgement form are different from the terms in the buyer's purchase order, as long as the bargained-for terms agree.<sup>36</sup> This rule accounts for the fact that, most often, the boilerplate terms in the buyer's form are different from the boilerplate terms in the seller's form, but the parties still agreed on the primary terms and still intended to proceed with the contract.<sup>37</sup> In these cases, the Uniform Commercial Code has no requirements for "assent" to the boilerplate terms, no matter who the parties are.

Despite the frequent lack of true assent to vital terms in adhesion contracts, these contracts have become the backbone of modern contracting because of their efficiency and predictability. Adhesion contracts are beneficial to both businesses and consumers. Standardization of terms "reduces transaction costs . . . and stabilize[s] the incidents of doing business,"<sup>38</sup> thereby saving both the buyer and seller money.<sup>39</sup> Businesses prefer uniformity in transactions and a quick and smooth flow of business.<sup>40</sup> Consumers are also unlikely to benefit from having to negotiate each and every consumer transaction in the marketplace, as a "close reading" of standard form contracts at the time of purchase "seems grossly arduous."<sup>41</sup> As explained in com-

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note 30, at 1229 (stating that "even the individual who reads and understands is, and may well perceive himself to be, essentially helpless"); White & Mansfield, *supra* note 31, at 233. According to the Restatement, "employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

36. U.C.C. § 2-207 (1994).

37. *See id.* at cmt. 1 ("Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction.").

38. Rakoff, *supra* note 30, at 1221.

39. *Id.* at 1222. Professor Rakoff explains that standardization "promote[s] efficiency" and "make[s] it possible to process transactions as a matter of routine." *Id.* at 1222; *see also* Goodman, *supra* note 31, at 325 (noting that "[s]ince the forms can be customized, operations are simplified and costs reduced to the advantage of all concerned").

40. Sterkin, *supra* note 31, at 292 (noting that "by treating all its customers with the same 'standard and fixed' manner, a company can act with greater 'efficiency, simplicity, and stability'" (citations omitted)).

41. Rakoff, *supra* note 30, at 1226; *see also* Prentice, *supra* note 33, at 379 (noting economists argue that "adhesion contracts are generally necessary in that it is logistically impossible in our commercial world for both parties to negotiate the terms of each individual contract"); Sterkin, *supra* note 31, at 287 (noting that "[I]n many situations, negotiating individual contracts with each consumer would be impractical, for both cost and time considerations").

ment a of the Restatement (Second) of Contracts, section 211, “[s]tandardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.”<sup>42</sup> Over the years, there has been extensive scholarly debate regarding the fairness of holding a consumer to terms he or she likely has not read,<sup>43</sup> but generally, courts will enforce adhesion contracts unless they are unconscionable or violate public policy.<sup>44</sup>

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42. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt a (1981). Karl Llewellyn explained the utility of “form-pad” agreements as follows:

[B]y standardizing terms, and by standardizing even the spot on the form where any individually dickered term appears, one saves all the time and skill otherwise needed to dig out and record the meaning of variant language; one makes check-up, totaling, follow-through, etc., into routine operations; one has duplicates (in many colors) available for the administration of a multidepartment business; and so on more. The content of the standardized terms accumulates experience, it avoids or reduces legal risks and also confers all kinds of operating leeways and advantages, all without need of either consulting counsel from instance to instance or of bargaining with the other parties.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362 (1960).

43. See, e.g., Prentice, *supra* note 33, at 380 (noting that “[i]t is difficult to argue plausibly that the parties are negotiating to an efficient end when one side does not negotiate nor, typically, even read the contract before signing it”); Rakoff, *supra* note 30, at 1190, 1197 (arguing that, with respect to adhesion contracts, “if the presumption of enforceability is retained, it threatens to continue to generate undesirable results”); Slawson, *supra* note 31, at 531 (arguing that with form adhesion contracts business parties are tempted to impose one-sided and unfair provisions); Sterkin, *supra* note 31, at 323 (arguing that “consumers need judicial protection from oppressive contractual terms” often found in adhesion contracts); White & Mansfield, *supra* note 31, at 251 (arguing that courts generally still fail to note the realities of consumer transactions, artificially “prop[ing] up the fiction of consumer assent”).

44. See, e.g., *Cooper v. MRM Inv. Co.*, 2004 FED App. 0126P (6th Cir.) (holding that adhesion contracts are enforceable under Tennessee law unless they are unconscionable); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (holding that adhesion contracts are enforceable unless they are “unduly oppressive, unconscionable, or against public policy”); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000) (stating that adhesion contracts are enforceable under Massachusetts law unless they are unconscionable, unfair, or offend public policy); *Smith, Bucklin & Assocs., Inc. v. Sonntag*, 83 F.3d 476, 480 (D.C. Cir. 1996) (holding that adhesion contracts are enforceable unless they are unconscionable or violate public policy). See generally 8 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 18:5 (4th ed. 1998) (stating that adhesion contracts are generally enforceable absent unconscionability or violation of public policy); Rakoff, *supra* note 30, at 1176 (setting forth the general presumption in contract law that “contracts of adhesion, like negotiated contracts, are prima facie enforceable as written”); White & Mansfield, *supra* note 31, at 250–51 (explaining that “the judiciary’s response to adhesion contracts . . . still is to assume manifestation of assent and to apply the ‘you signed it, you’re bound’ rule,” subject only to “the enforceability defenses of unconscionability, fraud, and public policy”).

## 2. "I accept" Whatever Terms May Be in the Agreement: The Enforceability of Mass Market License Agreements

While standard adhesion contracts are a market commonplace, much controversy has surrounded variations in which the buyer not only lacks bargaining power, but actually lacks access to the terms at the time of purchase, as with shrink-wrap agreements, or is not likely to look at the terms or even know about them, as with browse-wrap agreements.<sup>45</sup> Despite much scholarly criticism, courts have widely upheld these types of agreements.<sup>46</sup>

Shrink-wrap licenses, which apply to store-bought software, have been at the center of much contract debate in recent years.<sup>47</sup> Generally, reference to these license agreements is placed on the outside of software packaging, but the detailed terms are often placed inside the package, or they are encoded as part of the set-up of computer pro-

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45. See, e.g., Roger C. Bern, "Terms Later" Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL'Y 641, 641 (2004) (arguing that "[t]erms later" contracting is bad economics, bad morals, and a bad idea for a uniform law"); Stephen Fraser, *Canada-United States Trade Issues: Back from Purgatory? Why Computer Software "Shrink-Wrap" Licenses Should Be Laid To Rest*, 6 TUL. J. INT'L & COMP. L. 183, 233 (1998) (arguing that "there are few reasons for the continued use of shrink-wrap licenses for computer software," because "most of the restrictive provisions in these licenses have uses that are dubious at best"); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 434 (2002) (arguing that "the existing law governing standard-form contracts [with some refinement] adequately addresses the concerns that electronic standard-form contracts raise"); Jane M. Rolling, *The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses*, 104 COMM. L.J. 197 (1999) (arguing that shrink-wrap licenses go too far to protect commercial interests at the expense of consumers); Darren C. Baker, Note, *Pro CD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 N.W.U. L. REV. 379, 410 (1997) (arguing that "[s]tandard form agreements, in the form of shrinkwraps, are particularly valuable to both vendors and purchasers in the context of the computer software industry and are supported by the practical reality of mass-market software transactions"); Dan Streeter, Comment, *Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses*, 39 SAN DIEGO L. REV. 1363, 1367 (2002) (advocating the enforceability of mass market license agreements, arguing that "[a]ny unnecessary restrictions on digital contracting could have negative effects on the development of future technologies"); Joseph C. Wang, Case Note, *Pro CD v. Zeidenberg and Article 2B: Finally, the Validation of Shrinkwrap Licenses*, 16 J. MARSHALL J. COMPUTER & INFO L. 439, 472 (1997) (arguing that "[g]iven . . . mass-market licenses are omnipresent in the software industry, to hold such contracts invalid would be disastrous"); Tarra Zynda, Note, *Ticketmaster Corp. v. Tickets.com, Inc.: Preserving Minimum Requirements of Contract on the Internet*, 19 BERKELEY TECH. L. J. 495, 507 (2004) (arguing that mass market license agreements that do not involve a meaningful exchange, including offer and acceptance should not be enforced).

46. See *infra* notes 63–65 and accompanying text.

47. See sources cited *supra* note 43. Shrink-wrap licenses came to be known by that name because they initially were pre-printed on the outside packaging of the software. Once the consumer opened the wrapping, she became bound by the terms of the agreement. Michael H. Dessent, *Digital Handshakes in Cyberspace Under E-Sign: "There's a New Sheriff in Town,"* 35 U. RICH. L. REV. 943, 949 (2002).

grams. When a consumer uses the product or clicks on the “accept” button referencing the contract agreement, the purchaser agrees to the provisions as stated, even though those terms were not accessible at the time of purchase.<sup>48</sup> Generally, shrink-wrap licenses are used to disclaim warranties, limit liability for the breach of warranties, and prohibit or limit the copying and use of material protected under the Copyright Act.<sup>49</sup>

Shrink-wrap agreements are problematic to the extent they offend traditional notions of mutual assent. As with any adhesion contract, there is no bargaining between the parties, and the consumer is forced to live with the terms of the contract if he or she wants the product. The terms are largely favorable to the seller, and the consumer has no chance to negotiate for better terms. What makes some critics perceive these agreements differently, though, is that the terms themselves are hidden inside the box and are not readily apparent to the consumer, even if he or she were inclined to read them at the time of purchase. Although the reality is that consumers agree to terms without reading or understanding them in everyday adhesion contracts, those terms are usually available, creating at least the appearance of a bargain. In light of the small likelihood that the average consumer will read an ordinary adhesion contract, this argument appears to value form over substance. But the lack of availability of terms is nevertheless unsettling to many.

Judge Easterbrook responded to this concern in the landmark shrink-wrap case, *ProCD, Inc. v. Zeidenberg*,<sup>50</sup> by explaining that acceptance does not occur at the time of purchase—rather, acceptance occurs after the consumer has an opportunity to read the terms and to reject them, but uses the software instead.<sup>51</sup> Before that point, the consumer has the right to return the product without being bound by the terms. Critics point out that such reasoning fails to account for a retailer with a no-return policy.<sup>52</sup> Additionally, even if the retailer allows the return, it may not be practical for the consumer to take the time to return the software, or the consumer may incur a penalty or costs of postage if she purchased the product over the phone or Internet.<sup>53</sup>

Less problematic is the click-wrap agreement, which applies to Internet transactions. These agreements generally appear on computer screens when a user enters a website and attempts to buy a good or access a service. Click-wrap agreements are less offensive to tradi-

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48. Dessent, *supra* note 47, at 951–52.

49. Garry L. Founds, Note, *Shrink-Wrap and Clickwrap Agreements: 2B or Not 2B*, 52 *FED. COMM. L.J.* 99, 121 (1999).

50. 86 F.3d 1447 (7th Cir. 1996).

51. *See id.* at 1451–53.

52. Rolling, *supra* note 45, at 226.

53. *See id.*

tional notions of contract formation and assent because the user is required to take the affirmative step of clicking on an icon stating "I agree," indicating assent to the contract terms before obtaining the good or service. The agreement is unconventional, however, in that the user never signs a written agreement but rather manifests assent merely by clicking an icon on a computer screen.

Browse-wrap licenses are of greater concern. Like click-wrap agreements, the website provides notice of the terms and conditions for the online sale of goods and services. But the website provides notice by placing a small print hyperlink on the bottom of the home page. Although the user is alerted to the location of the terms and conditions on the website, the user is not required to view the license or show express assent by clicking on the link or by clicking on an "I accept" icon. Rather, users typically bind themselves by using the website or installing the software. Problematically, there is a substantial lack of uniformity among websites regarding how they provide notice of the agreement,<sup>54</sup> and in some cases the user may not be aware of the agreement at all.

Shrink-wrap agreements became prevalent in the computer market in the early 1980s and other forms of standardized license agreements followed with the advent of Internet sales. In the software market, shrink-wrap agreements are considered a "commercial necessity"<sup>55</sup> in light of the "mass market approach to software."<sup>56</sup> Because of the amount of software purchased on the Internet or by phone, software developers are not able to negotiate each sale individually, and requiring consumers to sign a contract at the time of sale would "inhibit the flow of the software into the lucrative commercial market."<sup>57</sup> It would not be efficient for "consumers . . . to read all the restrictions included with products that are purchased. Nor would it be reasonable to expect a salesperson to spend an exorbitant amount of time reading the terms to every customer."<sup>58</sup> It is widely believed that

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54. Various titles of links to the agreement include "user agreement," "conditions of use," "terms of use," "legal notices," "terms," or other similar language chosen by the website designer. Drew Brock, Note, *Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites*, 14 LOY. CONSUMER L. REV. 227, 230 (2002).

55. Rolling, *supra* note 45, at 199 (citing Baker, *supra* note 45 and Wang, *supra* note 45).

56. *Id.* at 211.

57. *Id.* at 212.

58. Dessent, *supra* note 47, at 972 (footnote omitted). In justifying the use of shrink-wrap agreements, the *Hill v. Gateway* court explained that:

Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral

standardized license agreements have become an important part of today's business environment as they "promot[e] predictability in order to facilitate transactions"<sup>59</sup> and provide a useful way to "encourage a more prolific business arrangement."<sup>60</sup>

Initially, courts found shrink-wrap licenses invalid on the basis of lack of assent.<sup>61</sup> Some commentators continue to argue that shrink-wrap and browse-wrap licenses go too far to protect commercial interests at the expense of consumers,<sup>62</sup> and Judge Easterbrook's reasoning in *ProCD* has been heavily criticized.<sup>63</sup> Nonetheless, many continue to advocate their use,<sup>64</sup> and since the *ProCD* case was decided, shrink-

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recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Consumers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device.

105 F.3d 1147, 1149 (7th Cir. 1997).

59. Rolling, *supra* note 45, at 200; see also Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 571 (1999) (stating that "to better promote the industry, greater protection of the industry's products are necessary").

60. Dessent, *supra* note 47, at 972. As the *ProCD* court pointed out, transactions in which the consumer receives the terms of a contract after purchasing the product are common not just in the software industry, but also with the sale of insurance, airline tickets, concert tickets, and the like. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996). Notably, browse-wrap licenses are becoming more and more popular, although, unlike shrink-wrap and click-wrap agreements, they are used less out of commercial necessity than convenience. Browse-wrap agreements are usually used "because of Web-page-layout considerations or perhaps because they are perceived as less intrusive to the user's access to the content." Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 280 (2003).

61. Prior to *ProCD*, the only four cases in which courts dealt with the issue held shrink-wrap licenses to be unenforceable. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 108 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269 (5th Cir. 1988); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993); *Foresight Res. Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1010 (D. Kan. 1989).

62. See, e.g., Rolling, *supra* note 45, at 199 (arguing that despite the efficiency of mass-market license agreements, there is a clear need for "equitable balance between commercial necessity and consumer protection under the UCC").

63. Bern, *supra* note 45, at 641. Reviewing the broad range of criticism by legal scholars, Professor Bern states that "terms later" contracts have been described as:

[A] "swashbuckling tour de force that dangerously misinterprets legislation and precedent," a "real howler" that is "dead wrong" on its interpretation of section 2-207 of the UCC, a decision that "flies in the face of UCC policy and precedent," a "detour from traditional U.C.C. analysis" "contrary to public policy," with analysis that "gets an 'F' as a law exam."

*Id.* at 642-43 (footnotes omitted). For a list of seventeen law review articles opposing Judge Easterbrook's reasoning in *ProCD* and its progeny see *id.* at 642 n.5.

64. See, e.g., Michel A. Jaccard, *Securing Copyright in Transnational Cyberspace: The Case for Contracting with Potential Infringers*, 35 COLUM. J. TRANSNAT'L L. 619, 644-45 (1997); Joel Rothstein Wolfson, *Contract and Copyright Are Not at War: A Reply to "The Metamorphosis of Contract into Expand,"* 87 CAL. L. REV. 79 (1999);

wrap licenses have been generally enforceable as long as they are not unconscionable.<sup>65</sup> Although judicial support for browse-wrap licenses is less uniform than other types of mass market license agreements,<sup>66</sup> these licenses have also generally been enforced if the website provides sufficient notice of the license.<sup>67</sup>

### 3. U.C.C. Flexibility: Reflecting Commercial Norms

Another example of prioritizing the enforcement of commercial contracts over the need for assent is found in the underlying principles and rules of the U.C.C. itself. The U.C.C., a realist code,<sup>68</sup> operates largely under the premise that “courts should enforce private ordering arrangements.”<sup>69</sup> “Drafted by Karl Llewelyn, the UCC is specifically designed to give greater legal recognition and enforcement to sales contracts . . . .”<sup>70</sup> In particular, Article 2 was meant to alleviate “the apparent rigidity and incompatibility [of pre-Code law] with commercial norms”<sup>71</sup> by adopting “pragmatic rules that reflect the commercial practices that business people actually employ.”<sup>72</sup>

Accordingly, the drafters assured that if contracting parties intended to create a contract, courts would find an enforceable contract even if one or more crucial terms were omitted,<sup>73</sup> or where the terms in the acknowledgement were different from or added to the terms in the purchase order.<sup>74</sup> Under Article 2, it is not necessary to identify the precise moment a contract was formed in order for it to be en-

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Baker, *supra* note 45, at 410; Brandon L. Grusd, Note, *Contracting Beyond Copyright: ProCD, Inc. v. Zeidenberg*, 10 HARV. J.L. & TECH. 353 (1997); Jerry David Monroe, Comment, *ProCD, Inc. v. Zeidenberg: An Emerging Trend in Shrinkwrap Licensing?*, 1 MARQ. INTELL. PROP. L. REV. 143 (1997); Wang, *supra* note 45, at 472.

65. See generally *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, (N.Y. App. Div. 1998).

66. Kunz et al., *supra* note 60, at 282–88 (discussing the split outcomes of the four cases addressing the validity of browse-wrap licenses); see also Zynda, *supra* note 45, at 507.

67. See Kunz et al., *supra* note 60, at 282–88.

68. See John M. Breen, *Statutory Interpretation and the Lessons of Llewelyn*, 33 LOY. L.A. L. REV. 263, 268–69 (2000). Karl Llewelyn, the principal drafter, believed that “the meaning of a sales contract depends upon the commercial and historical context within which it is made and executed.” *Id.*

69. Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO L. 547, 556 (1999).

70. John P. Esser, *Institutionalizing Industry: The Changing Forms of Contract*, 21 LAW & SOC. INQUIRY 593, 596 (1996); Rolling, *supra* note 45, at 204 (noting that “[i]n general, contracts are easier to form under the UCC”).

71. Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller’s Right of Reclamation*, 44 UCLA L. REV. 247, 263 (1996).

72. Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 18 (1997); see also Perry, *supra* note 3, at 543. These default rules “promot[e] predictability in order to facilitate transactions” and “save[] everybody time and money.” Rolling, *supra* note 45, at 200.

73. U.C.C. § 2-204(3) (1994).

74. U.C.C. § 2-207 (1994).

forceable,<sup>75</sup> and the acceptance need not be a mirror image of the offer.<sup>76</sup>

Additionally, although applicable to all sales of goods, Article 2 has carved out a series of special rules for merchants, many of which protect actual business practices by recognizing and enforcing contracts, despite some informality or flaws in the bargaining process or the execution of the contract.<sup>77</sup> For example, section 2-201(2) broadens the type and content of writings required between merchants to satisfy the statute of frauds,<sup>78</sup> and section 2-205, which deals with firm offers, allows merchants to create an option that is binding for up to three months and that only requires a signed writing.<sup>79</sup> To protect market efficiency, informality and flexibility protect commercial parties from facing unenforceable contracts when they are contrary to their intentions.

Default rules with such flexibility generally protect the business community,<sup>80</sup> and “stimulate[] and structure[] future commercial growth . . . .”<sup>81</sup> The U.C.C. has displayed little sympathy for consumer concerns, focusing its efforts primarily on commercial interests, which have been said to “dominate the the [sic] U.C.C. drafting process.”<sup>82</sup> Although the Article 2 revision group originally considered more explicit consumer protection to be a priority, after strong opposition from commercial interests, the drafts with the most progressive pro-

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75. U.C.C. § 2-204(2).

76. U.C.C. § 2-207; *see also* Rubin, *supra* note 72, at 18 (“[I]n drafting Article 2, Llewelyn dispensed with the rule of title, perfect tender, and the mirror image rule for offer and acceptance, replacing them with flexible provisions for allocating loss, curing defects and enabling the transaction to go forward despite minor disagreements.”). Another example can be found in section 2-202, the U.C.C.’s “quite relaxed version of the parol evidence rule,” which permits the introduction of all evidence of trade usage, course of dealing and course of performance to explain or supplement the contract, as long as it does not directly contradict the written agreement, and any consistent additional terms that do not contradict, as long as the contract is not fully integrated. *See* Breen, *supra* note 68, at 269.

77. *See, e.g.*, U.C.C. §§ 2-103(1)(b), 2-209, 2-312, 2-314, 2-316(2), 2-327(1)(c), 2-402(2), 2-403(2), 2-509(3), 2-603, 2-605, 2-609 (1994). *See generally* Rustad, *supra* note 69, at 557 n.72.

78. U.C.C. § 2-201(2) (1994). Under the merchant’s exception, a writing between merchants satisfies the statute of frauds “if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, . . . unless written notice of objection to its contents is given within 10 days after it is received.” *Id.*

79. U.C.C. § 2-205 (1994).

80. Rustad, *supra* note 69, at 557.

81. Rolling, *supra* note 45, at 202; *see also* Dessent, *supra* note 47, at 950 (explaining that the U.C.C. is meant “to do away with many of the old common law conventions that plagued contract law and impeded efficient business transactions”).

82. Rubin, *supra* note 72, at 13. “[A]lthough the UCC was designed for both commercial parties and consumers, in practice the UCC may protect commercial parties more efficiently because business people are often more likely to be more familiar with the provisions of the UCC.” Rolling, *supra* note 45, at 225 (footnote omitted).



tection for consumer interests were abandoned.<sup>83</sup> In the end, most consumer protection clauses considered did not make it into the final amendments, and the underlying importance of market efficiency has not been disturbed.<sup>84</sup>

Notably, many scholars have pointed out that Article 2's success has much to do with its attention to and concern for reflecting existing commercial norms, rather than making any attempts to legislate commercial behavior.<sup>85</sup> Panelist Courtney Lytle Perry enumerates the hazards of legislation that attempts to "create law that would prescribe the actions of players in the technology field."<sup>86</sup> This salient point solidifies the notion that laws which deviate from protecting commercial interests and transactions are more likely to lack legitimacy.

### B. *Lack of Regard for the Impact of Private Contracts on the Public*

Section A above illustrates that the rigorous enforcement of contracts is meant to protect the value of promises and foster economic growth, but such benefits come at a cost. What of the family who lives above a nightclub and is negatively impacted when patrons contract with the club to listen to pulsating dance music late at night, or the impact on the environment when a consumer buys an automobile that

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83. Over a decade ago, the National Conference of Commissioners on Uniform State Laws (NCCUSL) decided to do a major overhaul and update of Article 2, to "meet the demands of modern commerce." Gregory E. Maggs, *The Waning Importance of Revisions to U.C.C. Article 2*, 78 NOTRE DAME L. REV. 595, 596 (2003). After more than a dozen, detailed drafts and much controversy, however, the final amendments approved by NCCUSL on August 5, 2002 included only modest changes to a few provisions. *Id.* One of the biggest hurdles faced by the drafting committee involved consumer protection issues. Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787, 792 (2001). According to Professor Speidel, the chair of the revision Study Group, the limited provisions under consideration in the July 1999 draft providing commercial protection were wholly inadequate to consumer groups, while considered excessive by commercial interests. *Id.* He explains that "[t]he Study Group, 'for both conceptual and practical reasons,' endorsed Article 2's neutral position on consumer protection and was content to leave these matters to federal and other state law." *Id.* (quoting *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869, 1876 (1991) ("Article 2 is 'primarily' a commercial statute, . . . the history of consumer protection laws reflects local, non-uniform development, and . . . a more inclusive approach would impair the chances for approval and ultimate adoption of any revised Article 2.")).

84. The drafting committee included additional consumer protection provisions in the draft and faced strong opposition from commercial interests, which ultimately succeeded in convincing NCCUSL leadership to abandon the 1999 draft altogether. Speidel, *supra* note 83, at 792-93.

85. *See, e.g.*, Perry, *supra* note 3, at 545; *see also supra* notes 66-70 and accompanying text.

86. Perry, *supra* note 3, at 551 (arguing that the UCITA movement's abandonment of Llewellyn's philosophy created great opposition and led to its ultimate demise).

emits exhaust? And who considers the person who is offended by someone else's purchase of garish clothing or a distasteful lawn jockey? Certainly, some of these unintended consequences are regulated by other areas of the law,<sup>87</sup> and, indeed, other effects are not necessarily important enough for the law to regulate.<sup>88</sup> But there are also contract doctrines that purport to internalize the negative impact of private contract law on the public. For example, the contract defenses of unconscionability, public policy, and capacity purport to limit enforcement of privately bargained contracts when such enforcement would negatively impact the public good. What I undertake to show in this Section, however, is that most often, third-party and public concerns are not addressed through contract law, and where they are addressed, the limitation on private autonomy does not always promote the public interest.

### 1. The Problem of Externalities

In the courts' eagerness and vigor to enforce contracts to protect the free flow of goods and services, the direct or indirect effect of such contracts on third parties and the public is often overlooked. Contract law, which is generally based on a theory of private autonomy, implicitly recognizes the importance of individual preferences as a fundamental principle of the private ordering.<sup>89</sup> Presuming that individuals are better equipped than courts to determine how they value goods and services,<sup>90</sup> and that people act rationally and in their own self interest,<sup>91</sup> courts are loath to impose their view of the fairness of an exchange on the individual parties.<sup>92</sup> However, when individuals act in furtherance of their individual preferences there are certain inevita-

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87. For example, the noise pollution from the nightclub contract is regulated through zoning laws, as well as the United States Constitution, and the EPA regulates air pollution resulting from a car purchase.

88. The garish clothing and distasteful lawn jockey may well be sufficiently regulated by public ridicule.

89. See CALAMARI & PERILLO, *supra* note 24, at 8 (explaining that under a theory of private autonomy, "[r]ecognizing the desirability of allowing individuals to regulate, to a large extent, their own affairs," the State delegates its power to its inhabitants); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 863 (2003) [hereinafter Posner, *Economic Analysis*].

90. Schwartz & Scott, *supra* note 25, at 549 (stating that "firms are better able than courts or statutory drafters to choose efficient terms and strategies").

91. Posner, *Economic Analysis*, *supra* note 89, at 865.

92. See *id.* at 863; Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1272 (1996); Schwartz & Scott, *supra* note 25, at 549 (stating that "the state should let the preferences of firms control because firms can better pursue the objective that both the state and firms share").

ble consequences that reach beyond the contracting parties to third parties, the environment, communities, and societies.<sup>93</sup>

When courts enforce private contracts in the name of market efficiency and freedom of contract, and individual maximizing behavior predominates, there is tension with outlying social relationships and institutions that may suffer as a result. Professor Trebilcock notes that sets of values are likely to be “systematically unaddressed or under-addressed in the common law of contracts.”<sup>94</sup> He explains that market economies that fail to consider the wants and needs of each member of the community are not protective of “personal, social, and community relationships and networks.”<sup>95</sup> According to Trebilcock, any theory of contract premised on a private ordering paradigm that cares about individual autonomy, voluntariness, and consent will surely lack sensitivity to the social costs to individuals and communities.<sup>96</sup>

Arguing that efficiency should be contract law’s only normative goal, Professors Schwartz and Scott recognize that in exclusively maximizing profits, firms “sometimes do bad things” that impose costs on third parties, such as polluting the environment or erecting barriers to entry.<sup>97</sup> They assert, however, that contract law should not attempt to regulate these types of behaviors because other areas of the law, such as environmental and antitrust laws, regulate them.<sup>98</sup> Accordingly, their analysis of an efficiency theory of contract assumes the absence of externalities, or rather, disregards possible negative externalities resulting from the exchange.<sup>99</sup> Other scholars justify non-intervention by pointing out that, despite the inevitable existence of negative externalities when parties choose terms that are optimal for themselves,

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93. See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 29 (1993) (“[F]ew transactions have no tangible or intangible impacts on third parties.”); Posner, *Economic Analysis*, *supra* note 89, at 861 (“When two parties design a contract, they will choose terms that are optimal for themselves; they will not take account of the interests of third parties who might be affected by the contract. But there are such third parties.”). *But see* Schwartz & Scott, *supra* note 25, at 555 (arguing that “as a descriptive matter, most commercial contracts affect only the parties to them”).

94. TREBILCOCK, *supra* note 93, at 22.

95. *Id.* at 2.

96. See *id.* at 18 (citing KARL POLANYI, *THE GREAT TRANSFORMATION* (1944)).

97. Schwartz & Scott, *supra* note 25, at 545.

98. *Id.* at 555.

It is a firm’s systematic decisions that may affect third parties in material ways. For example, a firm may run a factory with disregard for the environment or the rights of its workers. Systematically inefficient or unfair behavior of this kind is subject to legal regulation under the headings of environmental and employment law.

*Id.*

99. *Id.* at 546.

judicial intervention is impractical because of the lack of information available to judges.<sup>100</sup>

Nonetheless, there are areas of contract law that do purport to consider the potential negative impact of private contracting on non-consenting third parties, such as the contract defenses of unconscionability, public policy and capacity. For example, illegal contracts and contracts that violate public policy are not enforceable:

“not because [courts] desire[ ] to relieve one of the parties to such an agreement from the obligation that he assumes, but because of the fact that the making of such an agreement is an injury to the public, and that the only method by which the law can prevent such agreements from being made is to refuse to enforce them.”<sup>101</sup>

Similarly, unconscionable contracts are unenforceable not only to protect the party victimized by the dominant party's sharp business practices, but also to protect the public by discouraging sharp business practices. Courts typically intervene where one party takes advantage of its superior bargaining position to impose unfair terms on the other party, often by artificially raising the contract price beyond what would be justified in a competitive market. The purpose of such intervention is at least in part to protect the public from such oppressive contracting, and to maintain a competitive market. Likewise, the policy that renders contracts with minors voidable at their option, is meant not just to protect the improvident minor, but also to discourage crafty sellers from taking advantage of young people.

Judicial intervention in such cases, however, often harms the very parties such doctrines are intended to protect, and does not always achieve its public policy goals.<sup>102</sup> When courts fail to enforce contracts based on unconscionability, they sometimes cause the stronger party to pass the burden on to the party the courts are intending to protect in the form of higher prices.<sup>103</sup> For example, in the landmark unconscionability case *Williams v. Walker-Thomas Furniture Co.*,<sup>104</sup> the court invalidated a cross-collateralization clause as excessively onerous to consumers, taking away the added “protection” the Walker Thomas furniture store thought it needed to do business with its low income customers. The likely result of such judicial intervention is increased prices and interest rates, if not refusal altogether to serve that population of un-creditworthy customers. Where that is the case, requiring better terms actually forces the “protected party” out of the

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100. Posner, *Economic Analysis*, *supra* note 89, at 860–63.

101. *Miltenberg & Samton, Inc. v. Mallor*, 151 N.Y.S.2d 748, 751 (N.Y. App. Div. 1956) (quoting *Coverly v. Terminal Warehouse Co.*, 85 A.D. 488, 489–91, 83 N.Y.S. 369, 371 (N.Y. App. Div. 1956)).

102. *See, e.g.*, Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 305–06 (1975).

103. *See id.* at 313.

104. 350 F.2d 445 (D.C. Cir. 1965).

market altogether for those goods, and restricts the availability of credit for poor people.<sup>105</sup>

Invalidating freely formed contracts for reasons like unconscionability may also foster a “false consciousness” or “better for them” approach that perpetuates stereotypes about poor people and oftentimes about people of color as well.<sup>106</sup> For example, in her article about teaching the *Walker-Thomas* case, Professor Spense points out that the *Walker-Thomas* court assumed that Williams, the low-income plaintiff, was relatively uneducated—an assumption she calls “essential to the holding.”<sup>107</sup> She suggests that the court actually hurts low-income consumers “when their decisions depend upon the view that such consumers are weak, uninformed participants in the retail marketplace.”<sup>108</sup>

When courts choose not to enforce a contract perceived as violating public policy, the result is often harm to some countervailing public policy or policies, which the court perceives as less important. For example, in *In re Baby M*,<sup>109</sup> the court invalidated a surrogacy contract because of the perceived harm to the child,<sup>110</sup> the biological mother,<sup>111</sup> and the larger society, all harmed by the “sale of a child” where “profit motive predominates, permeates, and ultimately governs the transaction.”<sup>112</sup> The court also cautioned that surrogacy contracts are generally used “for the benefit of the rich at the expense of the poor.”<sup>113</sup> In the process, the court questioned the surrogate’s capacity for true assent<sup>114</sup> and paternalistically regulated what should

105. Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 29–31 (1993).

106. Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 572 (1982).

107. Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 97 (1993). She explains that, “[w]ithout the notion that Williams is relatively uneducated, the court may be reluctant to conclude that the disputed clause involved the ‘oppression and unfair surprise’ that the U.C.C. suggests is a pivotal element of unconscionability.” *Id.* at 97.

108. *Id.*

109. 537 A.2d 1227 (N.J. 1988).

110. *Id.* at 1246 (pointing to “the settled law that the child’s best interests shall determine custody”).

111. *Id.* at 1247–48 (stating that “[t]he surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child” and that the contract violates the rights of the mother who is “irrevocably committed before she knows the strength of her bond with her child”).

112. *Id.* at 1248–49.

113. *Id.* at 1249.

114. *Id.* at 1248. The court noted that

[s]he never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby’s birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.

*Id.*

arguably be an individual's choice regarding the use of her own body as an economic resource, ultimately threatening women's, particularly poor women's, autonomy.<sup>115</sup> The public policy defense allows the court to refuse to enforce a contract that conflicts with public interests recognized by the court—policies typically grounded in moral values. In the case of *In re Baby M*, how the court resolved the surrogacy issue depended largely on the court's views and assumptions about procreation, with broad class and gender implications. Certainly society differs widely on these matters. With competing public policy implications, the court cannot guarantee a result "fair" for society.

Finally, the capacity doctrine discourages sellers from entering into contracts with minors. Using a bright line test of age, this doctrine makes assumptions about minors that are un rebuttable, yet not always true. While the capacity doctrine assumes that children are emotionally and intellectually unable to protect their own interests and are vulnerable to overreaching, other areas of the law such as criminal law, routinely charge minors as adults with the implicit assumption that they are responsible for their own actions.<sup>116</sup> Studies show that minors spend billions of dollars of their own money each year and influence how billions of dollars of their parents' money is spent.<sup>117</sup> Unconditionally restricting the market activity of this group arguably is bad for the commercial marketplace, as well as for the individual freedom of the minors themselves.

Typically, however, external impacts from an exchange are universally tolerated and justified by notions of individual autonomy. For example, if I buy a car when I formerly did not own one, then "my purchase may marginally increase pollution in the environment, to the detriment of other members of the community."<sup>118</sup> Or, "[i]f I buy garish clothing that offends your sense of taste, or engage in unconventional private sexual practices with a partner that offend your sense of decency, the transactions or interactions involved generate negative externalities."<sup>119</sup> Intervention in these and other similar cases would bring commerce to a grinding halt and severely limit individuals in

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115. The court also ignored the likely consequence to future parties seeking to have children genetically related to them—greater costs of having to screen potential surrogates more carefully and lower prices paid to the surrogate because her performance would be uncertain. See RICHARD A. POSNER, *SEX AND REASON* 426–27 (1992).

116. Until recently, the Supreme Court has upheld the constitutionality of the death penalty as applied to juveniles sixteen and older. Compare *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding the constitutionality of the death penalty as applied to juveniles sixteen and older), with *Roper v. Simmons*, No. 03-633 (U.S. Mar. 1, 2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed).

117. Don Oldenberg, *Consummate Consumer; Children's Business; American's \$90 Billion-Plus Youth Market*, Wash. Post, July 6, 1993, at C5.

118. TREBILCOCK, *supra* note 93, at 58.

119. *Id.*

their freedom to contract.<sup>120</sup> Contract law is ill equipped to recognize such broad-reaching externalities and makes no claim of trying to deal with them.

## 2. The Intersection of Private Contract and Copyright Law

One area of the law that exemplifies the dichotomy between private contract and public interest involves copyrights. Upholding private contracts without regard to the public interest considerations of the copyright doctrine leads to inherent conflicts. In that arena, panelist Leah Theriault argues that copyright owners frequently use private contract law to extend intellectual property rights beyond those rights granted to them by the Copyright Act.<sup>121</sup> For example, a copyright owner may want to prevent generally permissible activities under copyright law, such as reverse engineering of its software program or a consumer's ability to engage in small amounts of uncompensated "fair use" copying.<sup>122</sup> Thus, copyright owners have turned to the private law of contracts and, specifically, various forms of adhesion contracts, including shrink-wrap and end-use agreements, to accomplish that which copyright law will not.<sup>123</sup> These private arrangements, especially when accomplished through adhesion contracts, cause concern because they impact the public's right to freely use data, material, and ideas and, thus, undermine the very purpose of the federal law. Copyright owners, in effect, perform an end run around the fair use provisions of the Copyright Act, using contract law as private legislation to exact a result contrary to Congress's intent. The use of contract law

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120. Posner, *Economic Analysis*, *supra* note 89, at 58. Even cases where courts choose to intervene, such as in those involving unconscionability, incapacity or violation of public policy, where arguably the court substitutes its judgment for the judgment of the parties, are often criticized as being paternalistic or harming the very parties they intend to protect. *See, e.g.*, Craswell, *supra* note 105, at 29–31 (arguing that when courts require better terms in contracts, "protected" parties are often disadvantaged because the prices of the goods in question are raised and, thus, some buyers of those goods are forced out of the market altogether); Epstein, *supra* note 102, at 305–06, 313 (arguing that when courts fail to enforce contracts based on defenses such as duress, fraudulent misrepresentation, and lack of competency, they sometimes cause more harm than good by causing the stronger parties to pass the burden, in the form of higher prices, onto the parties whom they are intending to protect); Craig Horowitz, Comment, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 950 (1986) (arguing that invalidating freely formed contracts for unconscionability is paternalistic and "may foster a 'false consciousness' or 'better for them' approach that actually restricts the availability of credit for poor people").

121. *See, e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450, 1455 (7th Cir. 1996) (upholding contract limiting use of application program and non-copyrightable database of telephone directory listings to noncommercial purposes).

122. *See* David A. Rice, *Copyright and Contract: Preemption After Bowers v. Baystate*, 9 ROGER WILLIAMS U. L. REV. 595, 604 (2004) (reverse engineering of computer programs constitutes fair use under section 107).

123. *See id.* at 607.

thus permits commercial players with enough resources to establish their own rules—in essence, creating a parallel system of law.

The new and invigorated power of contract law as a tool to protect author rights not otherwise recognized under the Copyright Act is only possible where courts do not find the preemption clause inviolable. The Federal Circuit Court held in *Bowers v. Baystate Technologies, Inc.*<sup>124</sup> that the preemption section of the Copyright Act<sup>125</sup> does not prevent the enforcement of shrink-wrap agreement terms under state contract law.<sup>126</sup> *Bowers* permits the use of private agreements, supported by mutual assent and consideration, to protect an author's rights where, until now, the Copyright Act had chosen to protect the public's right of access.<sup>127</sup> Essentially, the *Bowers* court held that commercial interests trump those of the public, in direct contradiction to the rationale underlying the fair use doctrine.<sup>128</sup> Interestingly, the court focused on the sanctity of private parties to contract as they wish.<sup>129</sup> Such freedom of contract rhetoric suggests the predisposition of some members of the judiciary to support traditional contract principles even when that doctrine conflicts with other laws and is in opposition to the public good.

#### IV. RELUCTANCE OR INABILITY TO ENFORCE CONTRACTS FOR THE PUBLIC GOOD

A second level of concern arises in the non-commercial context. Although some courts, *a la* Judge Easterbrook, appear willing to take contract law to its outer limits to find enforceable contracts in commercial contexts, there has been substantially less motivation to enforce contracts for the public good. This Section addresses the law's

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124. 320 F.3d 1317 (Fed. Cir. 2003).

125. Section 301(a) provides:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a) (2000).

126. *Bowers*, 320 F.3d at 1325–26 (holding that an agreement prohibiting reverse engineering of a computer program code, an otherwise fair use, is not preempted by the Copyright Act).

127. *See id.*

128. *See id.* at 1325.

129. The court stated, “Courts respect freedom of contract and do not lightly set aside freely-entered agreements.” *Id.* at 1323 (citing *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 662 N.E.2d 1015, 1017 (Mass. 1996)). The court later reiterated that “no evidence suggests the First Circuit would extend this concept of [preemption of state law by the Federal Copyright Act] to include private contractual agreements supported by mutual assent and consideration.” *Id.* at 1325.



failure to make the same accommodations for contracts with a public interest component, examining in particular, the lack of consistency in protecting the public as a third party beneficiary to a government contract.

#### A. *Government Contracts: Third Party (Non) Beneficiaries*

One way in which the public is protected under contract law is through third-party claims to government contracts. The test for bringing a claim as a member of the public injured by the breach of a contract under third-party beneficiary law is quite narrow,<sup>130</sup> strictly limiting the number of potential plaintiffs. The process of bringing a lawsuit in this context can be daunting, particularly for someone with few resources. In many cases, the legal fee alone may be greater than the amount at issue, or the amount of recovery expected per person in a class action suit is too low. For these reasons, the public rarely brings claims.

Originally, persons other than the contracting parties had no right at law to enforce the terms of a contract because they lacked privity, had given no consideration, and had no mutuality of obligation.<sup>131</sup> This maxim held sway until 1859, when *Lawrence v. Fox*<sup>132</sup> was decided and courts began to grant third-party standing with some regularity.<sup>133</sup> In 1932, the First Restatement of Contracts memorialized this judicially-created concept of third-party standing, thereby granting enforceable rights to certain third parties even though they were never a party to the contract.<sup>134</sup> Under the Restatement of Contracts, section 133, a claimant could achieve third-party status if she showed that she was a creditor or donee beneficiary.<sup>135</sup>

The test for whether a third party has standing to enforce a government contract has always been more rigorous because the government contracts on behalf of its citizens for the public good, and, thus, everyone is a potential beneficiary. The current rule for third party beneficiary standing when the government is a party to a contract requires two things: (1) the third party must be an intended beneficiary, such as where the promisee is the third party's debtor or the promisee in-

130. See *supra* notes 91–98 and accompanying text.

131. Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1113 (1985).

132. 20 N.Y. 268 (N.Y. 1859).

133. Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Government Intent*, 94 YALE L.J. 875, 875 n.3 (1985); Amy M. Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind To Improve Education*, 45 B.C. L. REV. 667, 689 n.183 (2004).

134. See RESTATEMENT OF CONTRACTS § 133 (1932) (requiring party to qualify as either a creditor or donee beneficiary to achieve third party status); *Id.* § 145 (requiring intent of promisor to compensate members of the public for consequences of performance or failure to perform in order for a non-party to a government contract to achieve third party status).

135. *Id.* § 133.

tended the contract to benefit a third party; and (2) for a promisor to be liable to a member of the public for consequential damages “(a) the terms of the promise [must] provide for such liability; or (b) the promisee is subject to liability to the member of the public for damages and a direct action . . . is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for the breach.”<sup>136</sup> It is not enough for a third party to show that she benefits from a government contract or that the purpose of the contract was to benefit a third person. Rather, “[t]here must be a showing of an intent that the promisor shall assume a direct obligation to the third party.”<sup>137</sup> Circumscribing third-party standing to enforce government contracts protects private parties who contract with the government from endless litigation.<sup>138</sup>

Courts indiscriminately analyze third-party beneficiary claims under the rigorous rubric of the Restatement of Contracts, section 313, disregarding express provisions limiting its applicability to (1) members of the public and not a discrete class of individuals; and (2) consequential damages, not specific performance.<sup>139</sup> For example, in cases involving housing, employment, and the environment, in which the remedy sought is solely specific performance or the value of promised performance, courts frequently require plaintiffs to meet the requirements of sections 302 and 313, despite direct statutory language limiting the applicability of those sections to consequential damages.<sup>140</sup> This represents both a misreading of the law and, perhaps more importantly, an implied rejection of the underlying rationale of section 313, which was to protect parties who contracted with the government from potentially bankrupting lawsuits for unforeseen damages not to

136. RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 313(2) (1981).

137. *Mont. Bank of Circle, N.A. v. United States*, 7 Cl. Ct. 601, 611 (Cl. Ct. 1985).

138. *Oppedahl & Larson v. Network Solutions, Inc.*, 3 F. Supp. 2d 1147, 1158 (D. Colo. 1998); see *Adelson, supra* note 133, at 878–79.

139. *Adelson, supra* note 133, at 879 nn.21 & 24.

140. See, e.g., *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) (although applying federal common law, relying on section 313 without regard to nature of damages sought where, in a suit on contract between federal government and private company to manage dam, irrigators presumably sought specific performance); *Concerned Tenants Ass’n of Father Panik Vill. v. Pierce*, 685 F. Supp. 316 (D. Conn. 1988) (applying section 145 even though plaintiffs sought specific performance in the form of a judgment requiring owners to properly maintain premises); *Martinez v. Socoma Cos., Inc.*, 521 P.2d 841 (Cal. 1974) (applying section 145 where plaintiffs, who had been accepted in job training program, were seeking the value of the promised performance in the form of lost wages and training).

In fact, section 145, the precursor to the Restatement (Second) section 313, “developed out of cases in which the plaintiff sued for consequential damages bearing no relation to the value of the promised performance” and was meant only “to limit liability for ‘personal injury and property damage arising out of the operations of a government contractor.’” Recent Case, *Martinez v. Socoma Cos., Inc.*, 521 P.2d 841 (Cal. 1974) (*en banc*), 88 HARV. L. REV. 646, 650 (1975) (quoting 44 ALI Proceedings 331 (1967)).

provide a loophole for performance.<sup>141</sup> Further support of the inapplicability of section 313 to public programs comes from the illustrations accompanying the text of that section, which primarily concern contracts for services or construction.<sup>142</sup>

The public has struggled to achieve third-party standing in a variety of public program contexts with varying degrees of success. The difficulty of achieving standing is illustrated in housing cases where courts are sharply divided over the issue of whether tenants are intended beneficiaries of contracts between HUD and project owners.<sup>143</sup> Notably, in this context, lack of standing to bring suit may mean that low-income families have no recourse when landlords provide inadequate

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141. See Adelson, *supra* note 133, at 879 n.18.

142. See RESTATEMENT (SECOND) OF CONTRACTS § 313 cmt. a, illus. 1; cmt. c, illus. 3, 6 (1981); Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV. C.R.-C.L.L. REV. 1, 20 n.62 (1983); Waters, *supra* note 131, at 1201-02 (noting that illustrations are a manifestation of what the Restatement drafters had in mind).

143. The split in the circuits is perhaps best illustrated by the Fourth and Seventh Circuits, which decided leading cases on third party beneficiary status in 1981. Compare *Perry v. Hous. Auth. of Charleston*, 664 F.2d 1210, 1218 (4th Cir. 1981) (rejecting third-party beneficiary claim under USHA, § 1437d (annual contributions provision)), with *Holbrook v. Pitt*, 643 F.2d 1261, 1271 (7th Cir. 1981) (interpreting section 1437f to find that tenants were intended beneficiaries of housing assistance program). Other courts have since interpreted the United States Housing Act in the context of third party beneficiary claims. See, e.g., *Ashton v. Pierce*, 716 F.2d 56, 66 (D.C. Cir. 1983) (holding tenants are intended beneficiaries of Annual Contribution Contract); *Concerned Tenants Ass'n of Father Panik Vill.*, 685 F. Supp. at 324 (rejecting *Perry* and expressly adopting the Seventh Circuit's reasoning in *Holbrook*). At first blush, it seems that the divergent outcomes occur because of the difference in how state and federal law governs. See *Zigas v. Superior Court*, 174 Cal. Rptr. 806, 809 (Cal. Ct. App. 1981) (applying state law to contract between HUD and project owner); cf. *Reiner v. W. Vill. Assocs.*, 768 F.2d 31, 33 (2d Cir. 1985) (holding federal common law applicable in housing case); *Holbrook*, 643 F.2d at 1270 n.16. However, it becomes a negligible factor when the courts repeatedly state that the result would have been the same under state law. See, e.g., *Reiner*, 768 F.2d at 33 (holding that the result would be the same under New York law); *Holbrook*, 643 F.2d at 1270 n.16 (holding the result would be the same under Wisconsin law). Thus, standing does not turn on the issue of federal governmental immunity; rather, the inconsistency in the circuits regarding who is an intended beneficiary is due mainly to a lack of a cohesive and uniform doctrine concerning third-party-beneficiary law. In direct conflict with *Zigas*, the *Reiner* court held that the statute vesting power to enforce the contract in the HUD Secretary established the exclusive remedy under the National Housing Act. *Reiner*, 768 F.2d at 33-34. The contradictory holdings in housing cases stems from the courts's intent analyses. There appear to be two camps: those who require explicit language describing the intended beneficiary and those, like *Zigas*, which look to the purpose of the legislation or the contract. Compare *Perry*, 664 F.2d at 1213 (holding that the primary purpose of sections 1441 and 1437d of USHA was to assist the states; secondarily, it was to help low income families whom the states would assist, rendering tenants incidental beneficiaries), with *Holbrook*, 643 F.2d at 1271 ("If the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt.").

or unsafe housing.<sup>144</sup> Contract law is particularly inadequate in these types of situations, especially where a statutory scheme seems to vest sole discretion in the federal government to enforce government contracts.<sup>145</sup> Because the government is the only party that can enforce a contract on behalf of the public, the government's failure to act is particularly devastating, rendering this "exceptional privilege" a chimeric.<sup>146</sup> Consequently, the public is forced to rely on the federal government to seek redress, thereby creating a substantial burden both on the government, which must decide which contracts to litigate, and on the public, which suffers the consequences when a contracting party breaches.

B. *Wetlands Contracts: Private Development and the Enforcement of Replacement Guarantees*

Contracts between developers and the government involving the nation's wetlands are a paradigmatic example of the failure of both the government and the judiciary to enforce private contracts meant to benefit the public. Panelist Professor Irma Russell discusses the interplay between laws developed for the protection of wetlands and private development of those lands.<sup>147</sup> When developers plan developments in wetland areas it is often necessary to dredge and fill the wetland. To do so, The Clean Water Act requires the developer to obtain a permit from the Army Corps of Engineers ("the Corps").<sup>148</sup> As part of the permit process, a developer enters into a contract with the Corps, in which she promises to create replacement wetlands to prevent their net loss. Because of the vital role wetlands play, the Corps requires this promise before it issues a permit for development, even when the developer owns the wetlands areas.<sup>149</sup> Although the original promisee is the Corps, the developer's promise runs to the public, who is the true beneficiary. The Corps's goal is to use private contract law to bind developers to the promise of safeguarding wet-

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144. The HUD grievance process does provide a remedy for aggrieved tenants; however, it is cumbersome and lengthy. See 24 C.F.R. §§ 966.50–.57 (2004). A complainant must first file a grievance orally or in writing to the local PHA and go through an informal settlement procedure. *Id.* § 966.55(d). Then the complainant must obtain a formal hearing if he or she is not satisfied with the recommended disposition. *Id.* § 966.54. Only after a hearing may a tenant seek judicial review of the hearing panel's decision. *Id.* § 966.57(c). The court in *Samuels v. District of Columbia*, 770 F.2d 184, 198 (D.C. Cir. 1985), recognized the historical inaction of PHAs in not providing an appropriate and effective grievance procedure for tenants, and, therefore, held such claims could be brought under section 1983 for systemic failure on the part of a PHA to not enforce provisions of the Housing Act. See also Michael D. Weiss & Lauri Thanheiser, *Helter Shelter: The [Dis]organization of Public Housing Policy*, 51 WASH. U. J. URB. & CONTEMP. L. 189, 232 (1997).

145. See *supra* note 141 discussing the *Reiner* case.

146. *Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003).

147. Russell, *supra* note 1, at 576.

148. *Id.*

149. *Id.*

lands; it stands in the shoes of the public in bargaining for replacement of wetlands used in developing areas near waterways.

In reality, because of the difficulty in jumpstarting a wetland, the developer oftentimes fails to establish a replacement wetland as promised in its permit plan.<sup>150</sup> The common results are that the public never receives the benefit of the bargain between the Corps and a developer, and the protective environmental policies fail in practice because the Corps does not enforce the contract. Lawsuits are uncommon because concerned parties believe they lack standing to seek redress for the public.<sup>151</sup> This problem exemplifies the limitations of using the common law in securing the public expectations set forth in private contracts created by agencies to protect the public.

## V. CONCLUSION

It is not a coincidence that *Hadley v. Baxendale*, venerated as arguably the most famous case in contract law, is a case involving commercial actors. That is the paradigm of contract law—a series of rules governing private individuals who engage in commercial ventures. Although in some cases, judges have intervened to protect parties from overreaching and zealous business people, as well as to refuse the court's relief when an agreement contravenes current public mores and beliefs, judicial activism to stretch the boundaries of the definition of an enforceable agreement seldom extends beyond the borders of commercial interests.

However, particularly now that we live in a technologically intertwined global village, these discrete agreements sometimes impact persons, communities, and environments beyond the parties to a contract, constituencies whose interests have frequently been neglected by the common law of contracts. Just two of many examples, commercial contracts often get priority over fair use provisions in copyright law and third party beneficiary doctrine—in these cases, many judges are hesitant to enforce the rights of the external parties. When copyright owners are permitted to circumvent copyright law meant to protect the public interest, the government contracts on behalf of its citizens but does not seek enforcement of a breached contract or a judge dismisses a third party beneficiary claim, society is the ultimate loser.

Arguably, judicial intervention is not always practical. Negative externalities are inevitable, but most often, they are not addressed through contract law, as many unintended effects of contracting are already regulated by other areas of the law, and broader reaching externalities are more typically tolerated. Contract law is often ill equipped to recognize these more remote externalities, and any at-

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150. *Id.*

151. *Id.*

tempts to do so would undoubtedly result in new unwanted consequences, not the least of which is a limitation to the freedom to contract. Application of protections for third parties on too broad a scale, at the expense of freedom of contract, has not always served, and cannot be guaranteed to serve, a useful function. If courts are to consider the effects of contracts on third parties, they must realize this will come at a cost. As seen with the doctrines of unconscionability, public policy and incapacity, a refusal to enforce contracts negatively affecting third parties and the public may have effects that work against the economic interests of the "protected" parties. With better terms often come higher prices, which may ultimately be passed along to the consumer. And of course, as Judge Posner so aptly stated, "It is a detriment, not a benefit to one's long-run interests not to be able to make a binding commitment."<sup>152</sup>

Nonetheless, it would be a mistake to dismiss contract law as a viable means to protect the public interest. It is not existing contract doctrine that is hostile to the interests and rights of third parties and the public. Rather the issue is whether the judiciary will ever privilege those parties' concerns to the same extent they have traditionally done so for commercial players. Even if the predominant modus operandi of contract doctrine has been the protection of economic interests in order to protect the greater market economy, the judiciary has often been at its best when it champions the rights of less powerful parties. Should lay people and scholars perceive contract law as a dead end for the pursuit of noncommercial claims, it will be in danger of becoming obsolete.

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152. *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 928 (7th Cir. 1983).