

1988

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Recommended Citation

56 U. Cin. L. Rev. 845 (1988)

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ON THE KNOWING INCLUSION OF UNENFORCEABLE CONTRACT AND LEASE TERMS

Bailey Kuklin *

Contracts and leases commonly include terms that are unenforceable as contrary to common or statutory law.¹ Form documents, offered on a take-it-or-leave-it basis by retailers, manufacturers and landlords, may include unenforceable provisions in a context in which it is likely that the offeror is aware of the unenforceability. An offeror may be tempted to include such terms on the rationale that little may be lost and much might be gained. For if the offeree never learns of his rights and a dispute arises, the offeror might gain an advantage not otherwise obtainable, such as an immediate capitulation by the offeree or a beneficial settlement. If the offeree does

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1. Even after occasional revisions, traditional leases remain inconsistent with the applicable statutes. For instance, N.Y. Multiple Dwelling Law § 302-a provides for rent abatement in the event that serious violations go uncorrected for more than six months. Most traditional leases state that no set-off or reduction of rent of any kind shall be allowed. N.Y. Real Property Law § 259-c invalidates jury waiver clauses in leases insofar as such clauses pertain to claims for personal injury or property damages.

Traditional form leases contain unqualified jury waivers.

Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 837 n.10 (1974); see also *id.* at 849 n.77, 851-52, 879 (liability disclaimer in traditional form lease probably voided by statute; form lease deprives tenants of protections of law; statutory lease only effective remedy); Note, *Preventing the Use of Unenforceable Provisions in Residential Leases*, 64 CORNELL L. REV. 522, 522, 524 (1979) [hereinafter cited as Note, *Residential Leases*] (lease clause without legal effect still has practical effect; New York leases continue to contain such unenforceable provisions); Note, *Standard Form Leases in Wisconsin*, 1966 WIS. L. REV. 583, 592 (propriety of including invalid, unenforceable provisions in leases approved by Wisc. Real Estate Comm'n).

In a survey of landlord-tenant cases decided over a two-year period, Professor Berger discovered that residential landlords continued to use form leases even though they had lost over sixty per cent of the cases involving the standardized agreements. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 791-92 (1974); see also Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U.L. REV. 204 (1976). Similarly, sellers continue to use warranty disclaimers in sales contracts even though courts invalidate an overwhelming percentage of such provisions. See Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 IND. L.J. 8 (1973).

Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1070 n.35 (1977). What percentage of cases must a group lose before they "know" the term in question is unenforceable? For a fuller discussion of one standard instance of the problem, see the Appendix.

learn, well, what can he do about it other than exercise the rights he had anyway. Unless there is a specific statutory prohibition of the practice which provides an admonitory sanction, there is little to deter the offeror. Common law actions are generally inadequate. Moreover, the offeree who knows of his rights is not likely to suffer significant actual damages, whereas the one who does not know or learn of his rights is in no position to object.²

This legal state of affairs is morally disquieting. It seems unfair that one should knowingly take advantage of another's ignorance of the law when, by including an unenforceable contract or lease term, one is misleading the other into believing he is not ignorant. That this conscious bluff exists may be presumed, for the usual assumption regarding a written provision is that it is enforceable. Why else would it be inserted by the knowledgeable offeror? The offeree is thus less likely to resist the implicit assertion of the provision.³

This practice can be deterred by statutes with substantial penalties. Some have been enacted.⁴ Although there are common law forms of action approaching the problem, each one fails as a general solution. Even if one does provide a remedy, the relief is typically

2. The offeree who learns later of his rights may, in the meantime, have suffered actual damages giving rise to common law relief. For a more detailed discussion, see *infra* text accompanying notes 130-35 & 149-51. The percentage in this category is probably small—small enough not to deter the continued practice by offerors.

3. "Uninformed or misinformed parties to a contract are easily terrorized or disarmed into foregoing their rights and remedies . . ." Berger, *supra* note 1, at 815. See also Note, *Residential Leases*, *supra* note 1, at 526-27 (tenants believe unenforceable lease clauses are binding). Though I and others believe that tenants do have faith in the enforceability of terms, and thus are less likely to resist them, this is difficult to document. For some documentation, see Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 272-74 (1970). Against this intuitive idea is the possibility that there exists such a cynical state of affairs that people standardly do not believe the legitimacy of provisions included by a knowledgeable offeror. That such cynicism may exist, see *id.* at 257. The social consequences of this condition are discussed later. One would think, however, that the offeree's belief in the legitimacy of inserted provisions grounds the reasoning process, along with the term's nuisance value for settlement purposes, that induces the offeror to insert the unenforceable one. Especially when the unenforceability is beyond debate, other reasons for including the term are not evident. The one exception, and a complicating one it is, is where the offeror includes the term as a means to challenge and overturn its unenforceability. For further discussion, see "Growth of the Law," at 879-81 of text.

4. See, e.g., UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(b) (1972) ("If a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover in addition to his actual damages an amount up to [3] months' periodic rent and reasonable attorney's fees."); MODEL RESIDENTIAL LANDLORD-TENANT CODE § 3-404(2) (1969) (misdemeanor to include prohibited confession-of-judgment clause); TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1986) (treble damages, injunctive relief, court costs, and reasonable attorney's fees). That judicial innovation may be more efficacious than legislation or public enforcement for a problem like ours, see Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 49-51 (1974).

too slight to admonish the offeror. Even punitive damages, because of doctrinal restrictions, fall short of significant deterrence.

The problem under consideration is hardly cosmic. Society will manage to muddle along despite the ongoing practice. Nevertheless, aspects of the question are intriguing and worth examining. Foremost are interesting moral questions, private and public.⁵ The economic consequences (aren't they everywhere?) include an unusual twist or two and provide a tidy example for close analysis. The general repercussions to society of allowing or disallowing the practice touch upon a wide range of basic social values. Finally, on the assumption that more can be said for than against a legal remedy, an excursus into the historical principles of the actions of deceit and *prima facie* tort, and the extraordinary remedy of punitive damages, will show why no broad common law relief thus far has been forthcoming. The forward-looking Restatements may portend a change in the future. My aim is to explore this narrow problem from a broad perspective as an exercise in comprehensive legal problem-analysis.

I. PUBLIC POLICY

A. Ethics

Taking advantage of another's ignorance of the law, particularly when one has encouraged it by providing implicit misinformation, just does not sound morally proper. Morals, however, are not based upon sound alone. This section discusses the general bases of private morality and the specific application of them to our question.⁶

5. Thus, "[u]tilitarianism has always been discussed . . . in two different roles: on the one hand as a theory of personal morality, and on the other as a theory of public choice, or of the criteria applicable to public policy." *UTILITARIANISM AND BEYOND* 1, 1-2 (A. Sen & B. Williams eds. 1982) (Introduction by editors) (footnote omitted).

6. That the question occurs in the context of the marketplace, and therefore may be considered a question of public rather than private morality, is not to be ignored. "To argue, in the manner of Machiavelli, that there is one rule for business and another for private life, is to open a door to an orgy of unscrupulousness before which the mind recoils. To argue that there is no difference at all is to lay down a principle which few men who have faced the difficulty in practice will be prepared to endorse as of invariable application, and incidentally to expose the idea of morality itself to discredit by subjecting it to an almost intolerable strain." R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 184 (1926) (quoted in *MORALS AND VALUES* 41 (M. Singer ed. 1977)). A proper balance must be struck. As suggested by Tawney, "[a] free enterprise system not founded upon personal morality will ultimately lose freedom." *Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 54, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966). Within the marketplace, whether an action is morally acceptable may depend upon the role of the actor. For example, "it is illegal or immoral for a *seller* to conceal information but laudable for a *buyer* to do so." S. MAITAL, *MINDS, MARKETS, AND MONEY* 7 (1982) (emphasis in original) (citing A.C. PIGOU, *THE ECONOMICS OF WELFARE* 202 n. (1920)).

1. General Discussion

Normative ethical theories fall into two broad categories: deontology and teleology.⁷ The dichotomy is based upon an age-old distinction between the "good" and the "just."⁸ Purely deontological theories subordinate the good to the just and emphasize that one must be just, *i.e.*, do one's duty or accede to another's rights, even if the result in the particular instance is that the good will be outweighed by the bad. The sheriff, therefore, is thought to carry out his official duty justly when he unavoidably kills several persons in putting down a lynch mob trying to hang a convicted murderer. Or, if the serum to combat a worldwide, fatal epidemic can be obtained only by sacrificing nonvoluntarily the one person with a natural immunity, humanity must perish. Duties and rights come first. Extreme cases of "justice" such as these are said, not surprisingly, to exemplify why purely deontological systems are controversial.⁹

From another point of view, there remains a doubt whether, or to what extent, morality ought to be brought to bear on social questions. It has a tendency to favor the status quo, the powerful over the weak. See J.L. MACKIE, HUME'S MORAL THEORY 154-56 (1980). Yet moral conflicts are inevitable, see Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 23-53 (S. Hampshire ed. 1978); F. KNIGHT, *Science, Philosophy, and Social Procedure*, in FREEDOM AND REFORM 207-08 (1947). The resolutions always require the sacrifice of some individual interests. See Strasnick, *Individual Rights and the Social Good: A Choice-Theoretic Analysis*, 10 HOFSTRA L. REV. 415 (1982). Turning one's back to the sacrifice does not make it less bloody.

7. These labels are late upon the scene. They are introduced in C.D. BROAD, FIVE TYPES OF ETHICAL THEORY 162-64 (1930). The dichotomy may not be totally rigid. See Sher, *Antecedentialism*, 94 ETHICS 6 (1983). Nor must one be in either one camp or the other. Plato and Aristotle each had a foot in both. See J. HALL, FOUNDATIONS OF JURISPRUDENCE 24-25 (1973) (with citations).

Absolutism [deontology] does not, of course, require one to ignore the consequences of one's acts. It operates as a limitation on utilitarian [teleological] reasoning, not as a substitute for it. An absolutist can be expected to try to maximize good and minimize evil, so long as this does not require him to transgress an absolute prohibition like that against murder.

Nagel, *War and Massacre*, in WAR AND MORAL RESPONSIBILITY 3, 8 (M. Cohen, T. Nagel & T. Scanlon eds. 1974). Finally, there may be hybrid ethical doctrines, such as rule-utilitarianism. See Sen, *Evaluator Relativity and Consequential Evaluation*, 12 PHIL. & PUB. AFF. 113, 130-31 (1983). Smart was even able to interpret Kant, the supreme deontologist, as a rule-utilitarian. See Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 3, 9 (1973). Certainly Kant noted consequences. See *infra* note 28. For several possible combinations of deontology and teleology, see R. NOZICK, PHILOSOPHICAL EXPLANATIONS 494-98 (1981).

8. Instead of "just," the idea may be expressed by such terms as "duty," "right," "obligation," or "ought." See W. FRANKENA, ETHICS 14-17 (2d ed. 1973); P.H. NOWELL-SMITH, ETHICS 12-13 (1957).

9. See W. FRANKENA, *supra* note 8, at 30-32; W.D. ROSS, THE RIGHT AND THE GOOD 17-19, 28 (1930). Perhaps the best known attempt at avoiding this type of consequence originated with Ross who argued that one does not have absolute duties; rather, one has only *prima facie* duties that can be overridden by other, conflicting duties. W. D. ROSS,

Teleological theories, on the other hand, subordinate the just to the good.¹⁰ The greatest happiness (the "good") for the greatest number of persons is a utilitarian expression of the general aim.¹¹ This version of teleology is known as hedonistic utilitarianism because it identifies the "good" with such concepts as "happiness," "pleasure," or "avoidance of pain,"¹² all of them being aimed at satisfactions.¹³ The criminal conviction of innocent persons and extreme penalties for minor transgressions can be defended using a utilitarian calculus when the unhappiness of defendants is out-

supra, at 19-22, 28. But how does one measure the relative value of conflicting prima facie duties? According to Ross, by internal reflection, not by a calculus aimed at a maximization of the "good" or minimization of the "bad." *Id.* at 29-34. See R. BRANDT, *ETHICAL THEORY* 392-93 (1959); P.H. NOWELL-SMITH, *supra* note 8, at 25-27; R. WOLFF, *UNDERSTANDING RAWLS* 12 (1977).

10. See J. RAWLS, *A THEORY OF JUSTICE* 24-26 (1971). In teleological theories, "the good is defined independently from the right, and then the right is defined as that which maximizes the good." *Id.* at 24 (footnote omitted). Bentham is the modern father of utilitarianism, the most famous version of teleology. See S. TOULMIN, *AN EXAMINATION OF THE PLACE OF REASON IN ETHICS* 195 (1950). J.S. Mill is his best known disciple. Philosophers who preceded Bentham with similar ideas include Epicurus, Locke, Hobbes, and Hume. See R. BRANDT, *supra* note 9, at 300-01.

11. Teleologists differ on the question of whose good it is that one ought to try to promote. . . . 'Ethical universalism, or what is usually called utilitarianism, takes the position that the ultimate end is the greatest general good. . . .' [as opposed to *ethical egoism*, which takes the position that the greatest good is that of the person choosing to act].

W. FRANKENA, *supra* note 8, at 15 (emphasis in original). For variations of this utilitarian idea, see, e.g., J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11-13 (J. Burns & H.L.A. Hart eds. 1970) (1st ed. Oxford 1789); J.S. MILL, *Utilitarianism*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 1, 8 (1951) (1st ed. London 1863). A variation mentioned before is rule-utilitarianism, see *supra* note 7, which may be distinguished from act-utilitarianism. Rule-utilitarianism "emphasizes the centrality of rules in morality and insists that we are generally, if not always, to tell what to do in particular situations by appeal to a rule That is, the question is not which action has the greatest utility, but which rule has." W. FRANKENA, *supra*, at 39 (emphasis in original). Rule-utilitarianism has been attributed to J.S. Mill. See *id.* For modern examples, see, e.g., R.M. HARE, *MORAL THINKING* (1981); S. TOULMIN, *supra* note 10, ch. 11. For a devastating attack on the distinction, see generally D. LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965).

12. For the advantages of this negative criterion over the positive ones, see S.I. BENN & R.S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 62-63 (1959).

13. See A.C. EWING, *ETHICS* 22 (1953). The distinctions among the "good" of utilitarian theories may be fuzzy. Harsanyi, for one, proposes the modern approach called "preference utilitarianism" which he dissociates from hedonistic utilitarianism. See Harsanyi, *Morality and the Theory of Rational Behaviour*, in *UTILITARIANISM AND BEYOND*, *supra* note 5, at 39, 54. Preferences may not be hedonistic because, for example, one may "prefer one thing to another where neither offers pleasure to anyone." Schick, *Under Which Descriptions?*, in *id.* at 251, 251. Even among hedonistic utilitarian theories, the views of the "good" may vary considerably. See generally R. BRANDT, *supra* note 9, at 300-31 (discussing theory of ethical hedonism, where "[a] thing is intrinsically desirable (undesirable) if and only if and to the degree that it is pleasant (unpleasant)").

weighed by the happiness (from deterred crime) of society.¹⁴ Another position is: of equal value to other sources of happiness is a person's malicious satisfaction at taking advantage of or harming another person, despite the social unacceptability of such an act.¹⁵ These examples show what most would call moral defects in purely consequentialist,¹⁶ utilitarian systems.¹⁷ To avoid these unsatisfactory examples, among other reasons, some teleologists have

14. See M. GOLDING, *PHILOSOPHY OF LAW* 75-76 (1975); W.D. ROSS, *supra* note 9, at 56-57. *But see* S.I. BENN & R.S. PETERS, *supra* note 12, at 216-21. Contented slavery is also defensible. See MacDonald, *The Language of Political Theory*, in *ESSAYS ON LOGIC AND LANGUAGE* 167, 182 (A. Flew ed. 1952 1st series). See also Harman, *Human Flourishing, Ethics, and Liberty*, 12 *PHIL. & PUB. AFF.* 307, 314 (1983) ("[Act utilitarianism] implies that a doctor is morally permitted, indeed required, to murder a relatively healthy patient (or hospital visitor) if the doctor can use that person's vital organs to save the lives of at least two people who would otherwise die.").

15. This conclusion has drawn fire from critics. See, e.g., G.E. MOORE, *ETHICS* 102 (1912); R. POSNER, *THE ECONOMICS OF JUSTICE* 83 (1981); see also Harsanyi, *Rule Utilitarianism, Equality, and Justice*, 2:2 *SOC. PHIL. & POL'Y* 115, 116 (Spring 1985) (moral problems posed by concept of social utility). For one utilitarian's unsatisfactory attempt to defuse this example, see Hare, *Ethical Theory and Utilitarianism*, in *UTILITARIANISM AND BEYOND*, *supra* note 5, at 30.

16. One of the leading modern utilitarians, J.J.C. Smart, begins an encyclopedic exposition: "U[tilitarianism] can most generally be described as the doctrine which states that the rightness or wrongness of actions is determined by the goodness and badness of their consequences." Smart, *Utilitarianism*, in 8 *ENCYCLOPEDIA OF PHILOSOPHY* 206, 206 (P. Edwards ed. 1967). See also Smart, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM: FOR AND AGAINST*, *supra* note 7, at 3, 9 ("Act-utilitarianism is the view that the rightness or wrongness of an action is to be judged by the consequences, good or bad, of the action itself."); Sen & Williams, *Introduction: Utilitarianism and Beyond*, in *UTILITARIANISM AND BEYOND*, *supra* note 5, at 1, 3-4 ("Utilitarianism, in its central forms, recommends a choice of actions on the basis of consequences, and an assessment of consequences in terms of welfare."). *But see* Schick, *Under Which Descriptions?*, in *id.* at 251, 251-54. The term "consequentialist" may be criticized for its ambiguity. See McCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 *N.Y.U. L. REV.* 239, 241 n.3 (1983) (with citations).

17. Furthermore, "[i]f the term 'pleasure' is used by definition as a general designation of all motive, the hedonistic principle is true by definition. And if this is not done, if it is admitted to be possible for men to desire anything else than pleasure, then the principle is axiomatically false, or incomplete." F. KNIGHT, *Ethics and Economic Reform*, in *FREEDOM AND REFORM*, *supra* note 6, at 45, 75 n.15. Or, "[i]f every individual universally and necessarily seeks his own maximum pleasure, it is hard to see sense in saying that he ought to do so." F. KNIGHT, *Freedom as Fact and Criterion*, in *id.* at 1, 2 n.1. See also H. ARENDT, *THE HUMAN CONDITION* 154-55 (1958) (utilitarianism suffers a dilemma of meaninglessness); R. BRANDT, *supra* note 9, at 314-15 (discusses, but rejects, proposition that ethical hedonism is true by definition).

For brief summaries of the modern criticisms of utilitarian theory, see generally H.L.A. HART, *Between Utility and Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 198, 200-02 (1983); Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 *HOFSTRA L. REV.* 509, 510-11 (1980). Rawls' well-known criticism of utilitarianism is that it "does not take seriously the distinction between persons." J. RAWLS, *supra* note 10, at 27.

adopted idealistic theories that advance nonhedonistic qualities as those of intrinsic worth to be promoted.¹⁸

18. *E.g.*, virtue, knowledge, life itself, aesthetic contemplation, friendship, traits of character, being loved. See generally R. BRANDT, *supra* note 9, ch. 13 (discussing "things worthwhile in themselves"). Brandt places Plato, Aristotle, Moore, Ross, and Rashdall, among others, as advocates. *Id.* Even Mill has been read as an ideal utilitarian, see Kilcullen, *Utilitarianism and Virtue*, 93 ETHICS 451 (1983), or at least as in an intermediate position, see Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST, *supra* note 7, at 3, 13. On the various interpretations of Mill, see generally Hoag, *Happiness and Freedom: Recent Work on John Stuart Mill*, 15 PHIL. & PUB. AFF. 188 (1986). Posner advances wealth as the good to be maximized, see *infra* note 50. For a more detailed taxonomy of teleological theories, see R. BRANDT, *supra* note 9, at 354-56.

Brandt's broad taxonomy distinguishes monistic from pluralistic theories. A monistic one posits one property as having intrinsic value (the "good") while a pluralistic one posits more than one property. *Id.* at 303. Hedonistic theories are basically monistic; idealistic ones are usually pluralistic. *Id.*

Idealistic utilitarianism has not escaped the general criticism and troubling examples leveled at all forms of consequentialist theories.

Undermined since 1951 by the disturbing consequences of Arrow's Theorem [*i.e.*, a paradox inheres in a social ordering of individual preferences], utilitarianism is felt by many to have been done in by body blows inflicted by Rawls and Nozick and Dworkin in the 1970s. At least in the United States philosophers have felt that the hard core of moral policy consists in respect for individual rights rather than pursuit of a (perhaps indefinable) general interest

Lackey, *A Modern Theory of Just War*, 92 ETHICS 533, 536 (1982). See also LIBERALISM AND ITS CRITICS 1, 4-5, 7 (M. Sandel ed. 1984) (introduction by editor) (noting recent "ascendance of the rights-based ethic over the utilitarian one" within academic philosophy). That there is life after death for utilitarianism, at least at the University of Michigan, see, *e.g.*, R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979); D. REGAN, *UTILITARIANISM AND CO-OPERATION* (1980). While some are incanting its last rites, a trend back towards utilitarian thought, or a synthesis with Kantianism, may be occurring. See R. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 15-17, 246 (1982).

To minimize the problems of settling upon the "good," "[w]riters in the liberal tradition, for example, Bruce Ackerman and Ronald Dworkin, argue persuasively that the political decisions of a good society are as neutral as possible among conceptions of the good life." Sagoff, *Values and Preferences*, 96 ETHICS 301, 310 (1986). See also M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 1 (1982) ("deontological liberalism"); Fishkin, *Can There Be a Neutral Theory of Justice?*, 93 ETHICS 348 (1983) (comparison of theories of Ackerman and Rawls); Rawls, *Social Unity and Primary Goods*, in UTILITARIANISM AND BEYOND, *supra* note 5, at 159, 160-61 (discussing conceptions of justice that "allow for a plurality of differing and opposing, and even incommensurable, conceptions of the good," and those that "hold that there is but one conception of the good"). This aim for neutrality has given rise to the procedure-oriented normative political theories of recent decades, including: B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1980); R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); J. RAWLS, *supra* note 10. "[T]he more a society is divided on substantive values the more precious as a means of preserving social peace is any agreement that can be reached on procedure." B. BARRY, *POLITICAL ARGUMENT* 105 (1965). The modern discipline of social choice theory attempts to cope with the openness of basic values. See generally, *e.g.*, D. BRAYBROOKE & C. LINDBLOM, *A STRATEGY OF DECISION* (1963). For criticism of "proceduralism," see S. GORDON, *WELFARE, JUSTICE, AND FREEDOM* 16-17 (1980).

Perhaps the apparent impossibility of reconciling atrocious cases of acceptable practices under common normative theories with intuitively satisfactory conclusions has further encouraged moral philosophers to attend to metaethics, the analysis of moral concepts and the method of justifying normative positions, rather than the normative content itself.¹⁹ Some conclude that ethical statements cannot be verified. Noncognitivists, for example, may contend that normative statements have no propositional content, no truth value; such statements may express only the feelings or attitudes of the speaker, or may be arguments or recommendations for action.²⁰

Still, the inquiry into normative ethics continues. It can hardly be avoided. Whether or not any normative theory is watertight, we mere mortals must nevertheless engage in morally loaded acts. Guidance from philosophers is welcome.²¹ Though both general categories of normative ethics may be, at least in the extreme, flawed, there are important lessons to be learned from them that must be incorporated into any justifiable decision to act, either as an individual or as a society. Surveying the ethical views of our problem will identify "good reasons," if not conclusive reasons,²² for the appro-

19. See generally W. FRANKENA, *supra* note 8, at 95-116 (discussion of metaethics and theories of justification).

20. See, e.g., A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* (2d ed. 1946) (ethical statements are expressions of emotion calculated to arouse feelings and stimulate action); C. STEVENSON, *ETHICS AND LANGUAGE* (1944) (ethical statements reflect speaker's attitude and are attempts to evoke similar attitude in listener); see generally R. BRANDT, *supra* note 9, at 203-40 (examines noncognitivist theories, that (1) assert that ethical utterances are best understood by likening them to some other functional speech-type different from fact statements, and (2) deny that ethical terms are property-referring).

21. Some philosophers deny they can guide us to a certain, moral destination, but believe only that the trip itself is worth taking. "The study of ethics, according to the classical conception, does not tell one what to do or furnish maxims for conduct; rather, it forms the kind of person that one is—making one, for instance, more reflective, more discriminating, more attentive—and it is only in this indirect way that it has an influence upon practice." R. BEINER, *POLITICAL JUDGMENT* 144 (1983) (footnote omitted). "But now it seems perfectly clear to me that the value of a moral philosophy lies less in the conclusions it reaches (and the logic by which it reaches them) than in something which it achieves as it goes along: something which I can only describe as illumination of moral life." Gallie, *Liberal Morality and Socialist Morality*, in *PHILOSOPHY, POLITICS AND SOCIETY* 116, 133 (P. Laslett ed. 1956 1st series). Yet, even a less sanguine opinion holds that for moral philosophy, "[i]ts primary value is the satisfaction of intellectual curiosity." E.F. CARRITT, *THE THEORY OF MORALS* 71 (1928).

22. The "good reasons" or "all things considered" approach to normative ethics and political theory is a twentieth century phenomenon stemming from the later Wittgenstein. In the preface to Dworkin's latest book, for example, he reports: "The distinctive structure and constraints of legal argument emerge, on this view, only when we identify and distinguish the diverse and often competitive dimensions of political value, the different strands woven together in the complex judgment that one interpretation makes law's story better on the whole, all things considered, than any

other can." R. DWORKIN, *LAW'S EMPIRE* vii (1986). For examples of other moral and political works that take this general approach, see K. BAIER, *THE MORAL POINT OF VIEW* (1958); J. RAWLS, *supra* note 10; M. SINGER, *GENERALIZATION IN ETHICS* (1961); S. TOULMIN, *supra* note 10. This task is not easy. "Moral problems are notoriously complex and difficult; and any philosophic theory that makes a serious attempt to come to grips with them cannot fail to reflect these complexities." Harsanyi, *supra* note 15, at 115.

The discussion in this article goes beyond what is narrowly denominated by "moral." It reflects this view:

If, on the other hand, we adopt a broader interpretation of 'morality,' such that the justification of our conventions and commitments is itself a moral issue, then we shall have great difficulty in marking off any set of considerations as distinctively moral. I am inclined to think that, if we abandon the restriction of 'morality' to the observance of commitments, we shall find ourselves obliged in ethical thinking to take account of *all* the reasons men may have for preferring one course of action to another.

Whiteley, *On Duties*, in *MORAL CONCEPTS* 53, 59 (J. Feinberg ed. 1969) (emphasis in original). For other examples of this inclusive notion of "moral," see Broad, *Conscience and Conscientious Action*, in *id.* at 74, 75; Davidson, *How Is Weakness of the Will Possible?*, in *id.* at 93, 112; Rawls, *Outline of a Decision Procedure for Ethics*, 60 *PHIL. REV.* 177, 187-90 (1951); Wiggins, *Deliberation and Practical Reason*, in *PRACTICAL REASONING* 144, 146-47 (J. Raz ed. 1978) ("The man of highest practical wisdom is the man who brings to bear upon a situation the greatest number of genuinely pertinent concerns and genuinely relevant considerations commensurate with the importance of the deliberative context."). Some philosophers, Kant and Sidgwick for example, equate morality to rationality. See Gibbard, *Moral Judgment and the Acceptance of Norms*, 96 *ETHICS* 5, 9 (1985). See generally *Symposium on Rationality and Morality*, 96 *ETHICS* 5 (1985) (characteristics of rationality and relationship of morality to rationality).

On the other hand, one must not pursue this search for "good reasons" too far: "There is a general belief that the having a reason for all your actions is pedantic and absurd. There is a general belief that to try to have reasons for all that you do is sometimes very dangerous. . . . First thoughts are often the best, and if once you begin to argue with the devil you are in a perilous state." F.H. Bradley, *My Station and Its Duties*, in *MORALS AND VALUES* 165, 168 (M. Singer ed. 1977). Moreover, "[t]he conditions for pure ends-means rationality never exist. The habit of mind that yearns for these methods and their certainties is bound to be delusive, and ultimately—despite its claims to superior rationality—to be irrational, because it will not be in accordance with the nature of our world and our experience." J.B. WHITE, *HERACLES' BOW* 24 (1985). Perhaps our problem will resist resolution by "good reasons":

Moral consistency, however, is not always easy to achieve In our private deliberations, reasons conflict, and there may be no simple procedure that will yield a unique determination of 'the thing to do.' . . . [T]here are situations in which not only are there reasons for and against all the alternative courses but also the reasons will not assume an ordering such that these clearly override those; consequently, while one must do something, whatever one does, one will simply have to disregard reasons against doing it, and so do wrong.

Benn, *Persons and Values: Reasons in Conflict and Moral Disagreement*, 95 *ETHICS* 20, 22 (1984). See also S. CAVELL, *THE CLAIM OF REASON* 251 (1979) ("We have seen . . . how different are the ways in which the ordinary conduct of the ordinary human being can be appealed to, or looked at, when one philosophizes about it; and how different the import of various examples will be.").

Finally, one must not lose sight of the limitations of the search for good reasons when judging others.

People come to accept certain rules and values in order to get along with each other. The moral reasons a particular person has to act in one or

priate public stance towards those who knowingly insert unenforceable terms.²³

another way depend ultimately on that person's values. To repeat, on *that person's* values. . . . Nothing prevents us from using our values to judge other people and other moralities. But we only fool ourselves if we think our values give *reasons* to others who do not accept those values.

Harman, *supra* note 14, at 321 (emphasis in original).

23. Cicero cut through theory with a metaphorical description of the nature of our problem. "Now wrongdoing originates in one of two ways: either by force or by deception; deception is like a little fox, force like the lion. Both are most uncharacteristic of man, but deception should arouse greater contempt." CICERO, *DE OFFICIIS* 22-23 (H. Edinger trans. 1974). Dante, in his *INFERNO*, agreed with Cicero. See S. BOK, *LYING* 43 (1978) ("But because fraud is an evil peculiar to man, it more displeases God [than force does], and therefore the fraudulent are the lower, and more pain assails them."); see also R. GOODIN, *supra* note 18, at 132-33 (fraud evokes more resentment in man than does force).

"The devil—you will need no reminding—is the Prince of Lies." H. MORRIS, *Lost Innocence*, in *ON GUILT AND INNOCENCE* 139, 160 (1976). But is the deception of knowingly unenforceable terms on a par with a direct lie?

The serpent's guile with Eve was no straightforward case of fraud. It is not as if he outright lied to her, promising her something he knew she would not get. He simply left out a few pertinent details of what she would get in addition to what he told her she would. He was a subtle salesman.

Id. at 161. For an inclusive definition of "lie," see Kupfer, *The Moral Presumption Against Lying*, 36 *REV. METAPHYSICS* 103, 104 n.3 (1982). But see *id.* at 114-15 ("non-lying linguistic deception"). McCormick analyzes in detail the eight "ingredients of a successful lie," lies being "one special case of deceit." McCormick, *What Is Wrong with Deceit?*, 10 *SYDNEY L. REV.* 5, 8-11 (1982). For an interesting typology of deceptive practices, see E. GOFFMAN, *FRAME ANALYSIS* 83-122 (1974).

The major religions have not been greatly concerned about the devil's claim to princesship:

It certainly is quite striking that not one of the major religions, with the exception of Zoroastrianism, has ever included lying as such among the mortal sins. Not only is there no commandment: Thou shalt not lie (for the commandment: Thou shalt not bear false witness against thy neighbor, is of course of a different nature), but it seems as though prior to puritan morality nobody ever considered lies to be serious offenses.

H. ARENDT, *supra* note 17, at 278 n.35.

Putting the concerns for veracity into a positive voice, Polanyi said:

In an ideal free society each person would have perfect access to the truth: to the truth in science, in art, religion and justice, both in public and private life. But this is not practicable; each person can know directly very little of truth and must trust others for the rest. Indeed, to assure this process of mutual reliance is one of the main functions of society.

M. POLANYI, *THE STUDY OF MAN* 68 (1959). "Life requires lowering one's guard." H. MORRIS, *supra*. "Especially in a modern highly specialised industrial or post-industrial society, we human beings as rational agents are continually having to act in reliance on the truth of information and advice we cannot directly check." McCormick, *supra*, at 17.

2. Deontology

Kant is the most famous espouser of deontology.²⁴ The supreme principle of morality, according to him, is the categorical imperative: one should act pursuant to a maxim that could be willed as a universal law. "For it is a formal property of moral as of scientific judgments, recognized in practice even by the unsophisticated, that they hold without distinction of persons; the result is that an action can be permissible for me only if it is permissible for anyone in my situation."²⁵ Thus all persons, having autonomy of the will, are entitled to equal rights. They must be treated as ends in themselves and not as means only to another's ends.²⁶

As applied to the knowing inclusion of unenforceable contract terms, the conclusion seems swift and irresistible. Purposely misleading another is using that person merely as a means for one's own end of increased wealth.²⁷ One could hardly will misrepresentation, express or implied, as a universal law, for then society would tend to degenerate into a Hobbesian jungle of deceit and mistrust in which promising would be meaningless.²⁸ This deception is similar

24. "The notion of duty does not play the central role in traditional that it plays in modern ethics and the notion of doing one's duty for duty's sake hardly appears before Kant." P.H. NOWELL-SMITH, *supra* note 8, at 13. Kant's main ethical texts are: I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (Riga 1785) [hereinafter I. KANT, *GROUNDWORK*] (Kant's second edition was translated by H. Paton also under the title *THE MORAL LAW* (3d ed. 1956)); I. KANT, *CRITIQUE OF PRACTICAL REASON* (Riga 1788); I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965) (1st ed. Konigsberg 1797).

25. Walsh, *IMMANUEL KANT*, in 4 *ENCYCLOPEDIA OF PHILOSOPHY* 305, 317 (P. Edwards ed. 1967). Walsh, a Kant scholar, provides no citation for this quote and I have not turned up the idea expressed so directly in Kant's works. "What Kant has to say about this [justification of the universalizability principle] is by no means as clear as one could wish, and what is clear is not very convincing." R. BRANDT *supra* note 9, at 29. Recall that one form of utilitarianism, rule-utilitarianism, also has a universalizability principle. For more discussion, see *supra* note 11.

26. Boiling Kant's reasoning down to a single paragraph is unavoidably simplistic. For greater refinement, see generally, R. BRANDT, *supra* note 9, at 27-35; W. FRANKENA, *supra* note 8, at 30-33; Riley, *On the "Kantian" Foundations of Robert Paul Wolff's Anarchism*, in *ANARCHISM* 294 (J. Pennock & J. Chapman eds. 1978).

27. I use the terms "mislead," "lie" and "deceit," and their cognates, interchangeably. One might distinguish them. See Van Horne, *Prolegomenon to a Theory of Deception*, 42 *PHIL. & PHENOMENOLOGICAL RES.* 171, 172-73, 175-76 (1981). Under Van Horne's distinctions, we are dealing with deliberate lies which are intended to, and which often succeed in, deceiving the offeree. Our offeror is not merely an innocent misleader.

28. "Lying is wrong because of what would happen if everyone lied." Singer, *Moral Rules and Principles*, in *ESSAYS IN MORAL PHILOSOPHY* 160, 185 (A.I. Melden ed. 1958). See also Gruzalski, *Parfit's Impact on Utilitarianism*, 96 *ETHICS* 760, 777 (1986) ("the Kantian Test, 'What if everyone did that?'"). The point is not merely that more bad than good would come from the universal maxim allowing lying, the teleological test, but rather

to coercion in that it deprives others of the information needed to exercise autonomous wills, to choose rationally for themselves.²⁹ One at least has a prima facie duty not to deceive another, virtually always controlling in this context.³⁰

that such a maxim would give rise to a contradiction of will, would be inconsistent, self-defeating. To put it in his own words:

'[C]ould I really say to myself that every one may make a false promise if he finds himself in a difficulty from which he can extricate himself in no other way?' I then become aware at once that I can indeed will to lie, but I can by no means will a universal law of lying; for by such a law there could properly be no promises at all, since it would be futile to profess a will for future action to others who would not believe my profession or who, if they did so over-hastily, would pay me back in like coin; and consequently my maxim, as soon as it was made a universal law, would be bound to annul itself.

I. KANT, *GROUNDWORK*, *supra* note 24, at 71 (footnote omitted).

29. "Deception, like coercion, is a form of manipulating the data on which a person counts, in order to make him do what the deceiver wants him to do. Where it is successful, the deceived becomes in the same manner the unwilling tool, serving another man's ends without advancing his own." F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 143-44 (1960).

When we accomplish our purposes through lies, it is not so much that among the consequences of our action must be counted the fact that another person entertains a false belief—after all, that may be trivial enough—but rather that we have asserted that the mind, the rationality of another, is available to us as the track on which the train of our purposes may run.

C. FRIED, *RIGHT AND WRONG* 29 (1978). Feinberg sees it as a form "of *exploitation*, of one party taking advantage of another, or promoting his own gain wrongfully at the expense of his victim." J. FEINBERG, *Noncomparative Justice*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 265, 269 (1980) (emphasis in original). Furthermore, "[e]xploitation leads necessarily to unequal results that are in a way doubly unjust: the exploiter gets more than he deserves and his victim less." *Id.* at 290-91. Fried puts the personhood of the victim at stake by deceit. See C. Fried, *supra*, at 29, 83; see also S. BOK, *supra* note 23, at 18-22 (discussing deceit and violence as "two forms of deliberate assault on human beings"); Kupfer, *supra* note 23, at 115 ("Lying is disrespectful to the deceived by being a kind of treachery."); MacCormick, *supra* note 23, at 15 ("disrespect"); O'Neill, *Between Consenting Adults*, 14 *PHIL. & PUB. AFF.* 252, 260-66 (1985) (discussing Kantian account of treating others as persons, as "ends in themselves"). Kant, on the other hand, was also concerned with the deceiver's own self-dignity and self-contempt and the wrong done to all of humanity. See Paton, *An Alleged Right to Lie: A Problem in Kantian Ethics*, 45 *KANT-STUDIEN* 190, 195-96 (1953-54).

30. Kant claims that one's duty to be truthful is absolute. Even if a murderer is seeking one's friend to kill him, one must truthfully respond to the question as to the friend's whereabouts. Otherwise, if by some quirk the benevolent lie causes the murderer to stumble upon and kill the friend, the liar is morally and legally(!) responsible, whereas by telling the truth he is not. See I. Kant, *On a Supposed Right to Lie from Altruistic Motives*, in *THE CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* 346 (L.W. Beck trans. 1949) (Berlin 1797). Other authors have been unimpressed with Kant's rationalization. See, e.g., S. BOK, *supra* note 23, at 39 ("obsessive"); Barry, *And Who Is My Neighbor?*, 88 *YALE L.J.* 629, 644-45 (1979) (no "soul" in this position of Kant and Fried). Perhaps, however, Kant was mistakenly and intemperately backed into this position during his declining years when he had a consistent way out. See Paton, *supra* note 29, at 193-98; see also W. FRANKENA, *supra* note

One deontological argument may be elicited to resist this hard and fast conclusion against misrepresenting by means of a misleading term. The offeree, as a rational person, by signing the contract without clearly understanding the purport and standing of each term, "consents" to the consequences.³¹ Against this it can be pointed out that it typically is rational to sign the agreement without full comprehension. As elaborated later,³² the information costs and the difficulty, even futility, of dickering over the take-it-or-leave-it contract often outweigh the advantage of the potential revision in light of the low probability of a future, relevant dispute. It would

8, at 32 ("Possibly Kant could argue . . . [that] one can will the maxim, 'When breaking a promise is required in order to help someone I will break it,' to be universally acted on in the situations specified, especially if it is also specified in the maxim that the promise is not crucially important and that the help is.").

Kant's argument is consequentialist, of a sort. Tell the truth because if you don't, and the fates are cruel, you must pay for what follows. Truth or consequences. It may seem strange to hear this defense from Kant, the classical deontologist. This is not the only place he takes notice of the results of doing one's duty or even the results in determining one's duty. See, e.g., I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 24, at 104. Kant did not entirely divorce his principles from consequentialism, see R. DWORKIN, *Is Wealth a Value?*, in *A MATTER OF PRINCIPLE* 237, 251, 411 n.10 (1985), or from utilitarian or teleological thinking, see H. ARENDT, *supra* note 17, at 155-56; Paton, *supra*, at 196. But see W. FRANKENA, *supra* note 8, at 31. Consequences may also come into a deontological position at another point, that is, in measuring degrees of wrongdoing: "by its [deceit's] ulterior consequences, especially those in the intention and foresight of the deceiver, shall we judge of its seriousness as a wrong." McCormick, *supra* note 23, at 19.

But ours is an easier problem. One must labor hard to imagine a situation in which there would be a duty that overrides the moral rule, *prima facie* at a minimum, that one must not mislead another by including knowingly an unenforceable contract term. Perhaps there might be a situation in which the life of one's mother depends upon gaining an advantage by this deception. I leave it to you to fill in the details. Kant, the absolutist, ignoring the arguments of Paton and Frankena, *supra*, would say good-bye to his mother. I believe mothers are not at stake in the example in the Appendix.

31. I use scare quotes to indicate my agreement with Llewellyn in nay-saying Holmes: "Here, however, one must dissent vigorously from Holmes' incautious dictum: 'As the relation of contractor and contractee is voluntary, the consequences attaching to that relation must be voluntary.' *THE COMMON LAW* 302 (1923)." Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *YALE L.J.* 704, 730 n.56 (1931).

An initial difficulty is that it is unclear what constitutes consent. In legal and institutional contexts the criteria are supposedly clearest. Here formal procedures supposedly show who consents to which actions by which others. But here too presumptions of consent are defeasible. Even the clearest formulas of consent, such as signatures and formal oaths, may not indicate consent when there is ignorance, duress, misrepresentation, pressure, or the like. Such circumstances may void contracts and even nullify marriages. Formal procedures for consenting may reveal only spurious consent. . . .

O'Neill, *supra* note 29, at 254-55 (footnote omitted); see also *id.* at 256-60 (discussing theories of actual consent, hypothetical consent, significant and spurious consent, and possible consent).

32. For further discussion, see "Economic Analysis" at 861-69 of text.

then be rational to "consent." For the law not to recognize this is to force the offeree either to act irrationally or to forego legal rights by default.³³ Even if the offeree "consents," the question remains whether it is just to allow the offeror to use the offeree, however unworthy of public protection he may be considered, as a means only to his end.³⁴ In resolving these conflicting universalized principles, the common law has favored the offeree on the grounds that it is better to protect the foolish than to encourage the unscrupulous.³⁵

33. Thus the usual consumer-merchant transaction does not involve the prototypical, arms-length bargaining often presumed to take place in the marketplace. If it did the moral stance would be affected. For in "fair" negotiations, a certain amount of "puffing and avoidance" is expected. See *infra* note 86. "The fact that such behavior is both expected and transparent seems to mitigate the moral wrong of lying." Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397, 406 (1985). But even for the prototype, "outcome fairness" is called for. *Id.* at 407-10. In our circumstances, that some offerors take undue advantage of their relative position of power is to be expected. That this expectation is to supply a moral warrant for the offeror's practice when it is irrational or inefficient for the offeree to resist is doubtful. No acceptable, universalizable maxim in support of the offeror comes to mind.

34. The fact of B's voluntary consent to the risk in these examples, however, does not automatically relieve A of all responsibility for subsequent harms to B. It is at least a somewhat disingenuous reply to criticism for A to say, 'B brought it all upon himself. I was a mere passive instrument of his will,' . . . [E]xploitation of another's rashness or foolishness is *wrong*, even when, because of prior voluntary consent, it does not violate the other's right, it does not wrong him, and it does not treat him unjustly. It is wrong because the actor (A) believes on good evidence that it will probably cause harm to B, and deliberately harming another to one's own gain is something we ought not to do, even though the other can have no grievance against us.

Feinberg, *Noncoercive Exploitation*, in PATERNALISM 201, 205 (R. Sartorius ed. 1983) (emphasis in original). Feinberg develops this argument at length and the rationale for government intervention, *id.* at 219-32.

35. See, e.g., *Chamberlin v. Fuller*, 59 Vt. 247, 256, 9 A. 832, 836 (1887) ("No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."); *Kendall v. Wilson*, 41 Vt. 567, 571 (1869) ("[T]he law will afford relief even to the simple and credulous who have been duped by art and falsehood."); RESTATEMENT OF CONTRACTS § 471 comment i (1932); see also RESTATEMENT (SECOND) OF CONTRACTS § 162 comment c (1979) ("One who preys upon another's idiosyncrasies cannot complain if the contract is held voidable when he succeeds in what he is endeavoring to accomplish."). Even that rugged individualist, Richard Epstein, notes that "the carelessness of a victim does not excuse, much less justify, the perpetration of fraud." Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 298 (1975). See also Johnson, *The Idea of Autonomy and the Foundations of Contractual Liability*, 2 LAW & PHIL. 271, 299-300 (1983) (ways in which "strings" are attached to legal enforcement of promises).

One other deontological argument supporting deceit might be mentioned in passing. A product of a deontological orientation is the natural rights theories that have been so influential in political theory. Starting from a natural rights position in the Hobbesian

3. Teleology

Deriving conclusions from teleological theories regarding the virtues of providing relief from unenforceable terms is not as quick as from deontological theories.³⁶ For if the good of the offeror and others outweighs the bad of the offeree and others, the balance is struck in favor of this form of misrepresentation.³⁷ How does one measure this relative good? Most commentators, especially economists, argue that one cannot make these interpersonal utility comparisons.³⁸

jungle, one may find a right to deceive. Spinoza did. Discussing Spinoza's contention, Friedrich stated:

Spinoza is relentless in this respect: Everyone has by nature a right to act deceitfully (*dolo*) nor is he bound to observe a contract, except by the hope of a greater good or the fear of a greater evil than would result from the breaking of the contract! This follows inexorably from the premise that everyone's right extends as far as his power.

C.J. FRIEDRICH, *CONSTITUTIONAL REASON OF STATE* 43 (1957). Spinoza thought that by surrendering their power to a democracy, the form of government most consonant with individual liberty, people become obligated to fulfill the commands of the state, and thus may be prohibited from deceitful actions. *Id.*

36. Mr. Utilitarian, in his uniquely infelicitous manner, said: "Falsehood, take it by itself, consider it as not being accompanied by any other material circumstances, nor therefore productive of any material effects, can never, upon the principle of utility, constitute any offense at all." J. BENTHAM, *supra* note 11 (quoted in S. BOK, *supra* note 23, at 47). See generally S. BOK, *id.* at 47-56 (with citations) (discussing role of weighing consequences to justify falsehoods in various systems of ethics).

37. This may be true even if we were to ignore the offeror's malicious satisfaction. For more discussion of this point, see *supra* note 15. Egoistic theories may be considered briefly. According to Brandt the egoistic principle is: "A person is obligated over all to perform an action *A* if and only if *A* is, among all the actions he can perform, the one that will produce states of himself of maximum intrinsic worth." R. BRANDT, *supra* note 9, at 369. Brandt concludes that the egoistic theory is mistaken even though Plato and Hobbes were among its subscribers. *Id.* at 369-75; see also W. FRANKENA, *supra* note 8, at 17-23 (discussing contradictions and difficulties of egoism); Gauthier, *The Incomplete Egoist*, in 5 *THE TANNER LECTURES ON HUMAN VALUES* 65, 119 (S.M. McMurrin ed. 1984) (direct application of egoistic moral choice theory without appreciation of value of social cooperation is self-defeating). Rawls believes rational egoism "is really not a moral conception at all, but rather a challenge to all such conceptions." Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 556 (1980). Western civilization has generally embraced altruism as opposed to egoism. See K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 99-101 (1950). If egoism is adopted, it is clear that from the offeror's viewpoint, unenforceable terms are defensible (so long as the negative repercussions to him are not offsetting).

For a discussion of the traps for utilitarians in weighing the consequences of lies, see S. BOK, *supra* note 23, at 47-56.

38. How can one person know and value the mental state of another? See, e.g., K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 9 (2d ed. 1963) ("[i]nterpersonal comparison of utilities has no meaning and, in fact, . . . there is no meaning relevant to welfare comparisons in the measurability of individual utility"). But see P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 132 (1981); B. BARRY, *supra* note 18, at 44-52; R. GOODIN, *supra* note 18, at 15-18, 247; Harsanyi, *Morality and the Theory of Rational Behaviour*, in *UTILITARIANISM AND BEYOND*, *supra* note 5, at 39, 49-52; Mirrlees, *The Economic Uses of*

From even this brief exposition of teleology, it should be clear that one cannot deduce from the premises of most versions any irrefutable conclusions regarding the social desirability of knowingly including unenforceable terms. To the extent the good is, say, an idealistic trait of character such as "virtue" or "benevolence," one might indeed conclude that unenforceable terms are improper. But when the good is hedonistic or is such as "knowledge" or "friendship," no conclusion is self-evident.³⁹ Similarly, there is no obvious conclusion when the "good" is pluralistic. Even if one found a concrete yardstick by which to measure the "good," the tradeoffs are an empirical matter.⁴⁰ Thus the ultimate teleological conclusion is in-

Utilitarianism, in *id.* at 63, 70-74; Pennock, *Epilogue: Some Perplexities Further Considered*, in LIBERAL DEMOCRACY 408, 414-15 (J. Pennock & J. Chapman eds. 1983). Hence the fashion of such theories as Paretianism which finesse the need for interpersonal utility comparisons. See A. BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 7-8 (1985). But see Coleman, *The Economic Analysis of Law*, in ETHICS, ECONOMICS, AND THE LAW 83, 85 (J. Pennock & J. Chapman eds. 1982). Compare Rawls' "difference principle" which rules out the gambit of making the least advantaged persons worse off by a rule change. See J. Rawls, *supra* note 10, at 75-83.

39. "In ethical statements we never get beyond relative, vague, qualitative comparisons." M. SCHLICK, PROBLEMS OF ETHICS 76 (1939). "Another problem is the lack of a method for calculating the effect of a decision or policy on the total happiness of the relevant population." R. POSNER, *supra* note 15, at 54 (footnote omitted).

40. Bok discusses a range of situations of lying in general with actual and hypothetical examples. Still, her conclusions are empirical and conjectural. Throughout her work she relies extensively on these consequentialist arguments. For example, no matter how confident the liar is that the deceit, benevolent or malicious, will be undetected, to the regret of the liar the lie may become known, or, the effect of the practice of deceit on the liar's personality or identity may be deleterious. See, e.g., S. Bok, *supra* note 23, at 24-28, 60-61, 63-65, 79, 119-21, 127, 132, 195-97. Kupfer also worries about harmful effects, including the threat to "the integration of the liar's personality." Kupfer, *supra* note 23, at 103. This concern

is not obviously of the utilitarian stripe. . . . Character is not a momentary plus or minus to be weighed against other moments of positive or negative interest. Rather, considerations of character illuminate what we are as people; they penetrate to the level of identity. We might say that they unite the ontological and moral realms by taking a stand on what way of being is itself good.

Id. at 113. "In Kantian language, loss of personality integration makes one less a member of the Kingdom of Ends: less able to originate his own ends and share in those of others; less able to formulate principles and then act on them." *Id.* at 124.

None of this is to say there isn't the "truth which is of Satan." S. Bok, *supra*, at 284. Lies, some white ones, for example, have their place. See *id.* at 57-72; Kupfer, *supra* at 113-14. Perhaps a white lie isn't even a "lie." See *id.* at 109. When the truth may hurt another, it may be one's duty not to tell it. See Olson, *Sincerity and the Moral Life*, 68 ETHICS 260, 274-75 (1958). Is this the reasoning that led the Emperor Frederick Barbarossa to his maxim: "He that knows not how to dissemble knows not how to live"? See R. BURTON, THE ANATOMY OF MELANCHOLY 272 (F. Dell & P. Jordan-Smith eds. 1927) (1st ed. Oxford 1621).

determinate by thought experiment alone.⁴¹ Although one would expect (and hope) teleologists to disfavor the dishonest aspects of the knowing inclusion of unenforceable terms, some may coherently conclude there are net advantages to the contrary.

There is one fashionable body of knowledge, akin to utilitarianism, in which guidance may be found: the microeconomic analysis of law and economics.⁴² Although economists historically have backed away from normative arguments, today's best known legally-oriented spokesperson, Richard Posner, has embraced the notion that the legal system ought to aim at maximizing wealth.⁴³ The teleological "good," in other words, is wealth. Even without this normative leap of faith, microeconomic analysis can put into sharper focus the values and tradeoffs at stake when deciding whether to proscribe the practice in question.⁴⁴

B. Economic Analysis

An economic analysis of transactions of the type here considered in which unenforceable terms are knowingly included in contracts,

41. This is true of rule-utilitarianism as well as act-utilitarianism. See *supra* note 11. Whether, for the former, the universalization of the rule against knowingly including unenforceable terms will maximize the "good" remains an empirical question subject, in principle, to debate. The analysis that follows supports (nonconclusively) the rule.

42. "[U]tilitarianism . . . virtually reduce[s] all ethics to economics." F. Knight, *Some Notes on the Economic Interpretation of History*, in FREEDOM AND REFORM, *supra* note 6, at 246, 251 n.4. "Bentham's utilitarianism, in its aspect as a positive theory of human behavior, is another name for economic theory." R. POSNER, *ECONOMIC ANALYSIS OF LAW* 357 (1972). See also Lyons, *Utility and Rights*, in ETHICS, ECONOMICS, AND THE LAW, *supra* note 38, at 107-08 (normative positions of economists are similar to those found within utilitarian tradition). But see Coleman, *The Economic Analysis of Law*, in *id.* at 83; Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105, 1110 (1982); Rothbard, *Comment: The Myth of Efficiency*, in TIME, UNCERTAINTY, AND DISEQUILIBRIUM 90, 95 (M.J. Rizzo ed. 1979) ("Efficiency can never serve as the basis for ethics; on the contrary, ethics must be the guide and touchstone for any consideration of efficiency. Ethics is the primary.').

43. See R. POSNER, *supra* note 15, at 60-115; Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). Posner has been extensively criticized for his normative position. See, e.g., Coleman, *supra* note 42, at 1105 (criticism of Posner's views); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) (justifying and criticizing economic approach to legal and social decision making).

44. Yet caution is required, for economism, in light of its imperfections and simplifications, "simply ignores the most important facts about its material." F. KNIGHT, *Fact and Value in Social Science*, in FREEDOM AND REFORM, *supra* note 6, at 225, 237. The justification of cost-benefit analysis is in doubt. See Copp, *Morality, Reason, and Management Science: The Rationale of Cost-Benefit Analysis*, 2:2 SOC. PHIL. & POL'Y 128 (Spring 1985). Nonetheless, it (they?) remains in fashion. For an interesting discussion of the economics of deceit in the political context, see G. TULLOCK, *TOWARD A MATHEMATICS OF POLITICS* 133-43 (1967).

argues generally for providing legal relief. The practice is inefficient.

Among the givens for an ideally efficient market is that the parties have perfect information.⁴⁵ That, by supposition, does not exist in the paradigmatic circumstance. Although both sides may be imperfectly informed, one side knows more about the contract terms than the other and exploits this differential. The offeror who regularly engages in similar transactions knows or has reason to know the applicable law while the offeree, an occasional consumer of the offeror's goods, presumably does not. It is the suspicion that the offeree is ignorant that would seem to induce the offeror to include the term. And it is the offeree's knowledge that he is ignorant and his belief that the offeror is not that inclines the offeree to rely upon the implicit assertion of the enforceability of the term.⁴⁶

Perfect information supports the economic goal of Pareto optimality. The Pareto optimal condition exists when resources are allocated efficiently, that is, in such a manner that no person can enter a transaction which will make him better off without making some other person worse off.⁴⁷ Each person is the best judge of what makes himself better off.⁴⁸ To judge, one must be informed of the true costs of each choice. That is likely to happen most cheaply if the price of the goods being considered accurately reflects their costs. In the usual case of an unenforceable term, accurate pricing will not occur.

If the offeree is disinclined to rely upon the offeror's implied assertion of law, he may either undertake to obtain the information, decline the transaction, or, despite the disinclination, assume the

45. Along with zero transaction costs, Buchanan includes in the "description of the conditions that define the ideal market and that ensure that exchanges result in a Pareto Optimal equilibrium state": "1. Full information is available about the performance and quality of goods and services and the costs of all alternative ways of producing them, and the cost of this information is zero." A. BUCHANAN, *supra* note 38, at 14.

46. The sixth of MacCormick's eight ingredients for a successful lie, *see* MacCormick, *supra* note 23, "follows from the fact that different people have different ranges of information and expertise available to them. . . . One condition of a hearer taking seriously and deciding to believe what a speaker says to him is that he believes the speaker has this authority of superior knowledge." *Id.* at 10 ("authority condition").

47. For discussions of Pareto optimality and how it differs from the various meanings of efficiency, Pareto superiority, and related concepts, *see* A. BUCHANAN, *supra* note 38, at 4-13; Coleman, *Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 226-31 (1980); Coleman, *supra* note 17, at 512-13.

48. *See, e.g.*, B. SPINOZA, *ETHICS* Part IV, Prop. XXXVII, Note II, at 213 (R.H.M. Elwes trans. 1883) (1st ed. Amsterdam 1677) ("by sovereign natural right every man judges what is good and what is bad, [and] takes care of his own advantage according to his own disposition"). This supposition as incorporated into Pareto optimality supposedly avoids the difficulties of interpersonal utility comparison. *See supra* note 38.

risk of his ignorance. The investment to obtain the information increases the transaction costs.⁴⁹ The refusal to transact is nonoptimal if the offeree, when fully informed, would prefer to purchase the goods.⁵⁰ The assumption of risk is inefficient *ex post* to the extent that the risk proves more costly than the cost of obtaining the information before making the initial choice whether to purchase.⁵¹ Unless there is a fortuitous congruence of reactions and counter-reactions, the market operates less ideally than it would if the practice in question is disallowed.⁵²

49. Transaction costs are the costs of effecting a transfer of rights from one party to another. See A. BUCHANAN, *supra* note 38, at 126. Since, as pointed out in the next paragraph, the offeror can obtain the information more cheaply than the offeree, the additional transaction costs can be reduced by disallowing the offeror from inserting misleading terms.

50. Most of the conventional pieties—keeping promises, telling the truth, and the like—can also be derived from the wealth-maximization principle. Adherence to these virtues facilitates transactions and so promotes trade and hence wealth by reducing the costs of policing markets through self-protection, detailed contracts, litigation, and so on.

R. POSNER, *supra* note 15, at 67 (footnote omitted).

51. If the unenforceable term does not come into operation and thereby proves irrelevant to the offeree, assuming the risk of ignorance regarding the enforceability turns out to be efficient *ex post*. The information, costly to obtain, has no payoff (for this transaction). The more the offeree can reasonably rely upon the offeror not to include unenforceable terms, the lower is the cost *ex ante* of assuming the risk of such terms; there is less risk. When offerees are ignorant of particular unenforceable terms, their relative optimism or pessimism as a class about the risks allocated by whatever unenforceable terms there may be will affect the offerors' decisions as to pricing and whether to include such terms. See Schwartz & Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1390-91 (1983).

52. In one sense, the market operates nonideally by definition whenever one of the parties is not fully informed or must assume costs to become informed. For further discussion, see *supra* note 45. On the other hand, the transaction may still be Pareto superior if the offeree chooses correctly based upon the eventualities. For example, if one buys "a pig in the poke" and it turns out that if fully informed of the contents one would have made the same purchase, then the transaction is Pareto superior though it occurs in a nonideal market; the offeree is better off, as is the offeror by supposition, and no one is worse off. See *supra* note 47.

Imperfect information that may affect contract terms occurs in three forms. First, consumers may be uninformed about the risks that these terms allocate, making them unable to choose terms that correctly reflect their preferences. Firms are said to exploit this ignorance by degrading contract quality. . . . Second, consumers may be unaware of the array of prices and terms that the firms in a market can offer. Consumers who lack this information may accept poor bargains because they do not know that better ones exist, and firms consequently will have little incentive to offer better deals because these will not increase sales. Third, consumers may not understand the legal relationships that their purchase contracts create because they do not read the language in those contracts. Firms have an incentive to exploit this ignorance by using 'hidden' terms that

Even if the offeror himself is originally uninformed of the relevant law, it is often efficient to impose upon him the legal duty to obtain the information and pass it along to the offeree.⁵³ He is typically a professional businessperson regularly entering into similar contracts.⁵⁴ Hence, he may well need the information for himself,

will disadvantage consumers if circumstances cause these terms to be invoked.

Schwartz & Wilde, *supra* note 51, at 1389. The authors doubt the third problem is as bad as it might first seem since "if consumers who care enough about purchase choices to shop for favorable deals know the term at issue and if there are enough such consumers, markets will respond as if all consumers were aware of that term." *Id.* at 1390 n.1. First, are there enough of such consumers? If there are, one might suppose our problem of unenforceable terms would not exist. That the problem does exist implies that there are not enough these consumers, and that there is not the fortuitous congruence of events necessary to make the market efficient by eliminating the practice. Second, the markets for particular goods may be sharply separated; the market appealing to the educated consumer may hardly overlap the one appealing to the uneducated.

As Adam Smith and David Hume pointed out 200 years ago, there is a strong rule utilitarian argument for this configuration of the law [regarding deceit], peculiarly adapted to commercial as distinct from pastoral or agrarian societies. Market economies involve large scale and impersonal transactions between relative strangers. It is therefore especially important that the law provide some guarantee of, and some incentive to, trustworthiness in commercial dealings.

MacCormick, *supra* note 23, at 16 (footnotes omitted).

53. We need not worry about the "shrewd bargainer" who, if he must disclose information, would be discouraged from investing resources into acquiring it. See R. POSNER, *supra* note 15, at 234-44; see also Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 13-14 (1978) ("deliberately acquired information," unlike "casually acquired information," will be produced less if possessor is denied benefits of using it). Posner worries about cases of the ilk of the land purchaser who alone knows of the minerals hidden beneath the surface. If he can not exploit that knowledge as against the seller, he will not bother to gain it and wealth may be lost to society. In our case there is no social wealth to be lost by forbidding unenforceable terms. Quite to the contrary.

For the reasons that follow in the text, the merchant will not be discouraged from developing the informational resource. Kronman goes further to argue that one may exploit private information if that would make the class of the uninformed better off in the long run. See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 492 (1980). Analysis of our situation supports disclosure on this ground. Criticizing this analysis of Kronman's as contradictory (while pointing to resolutions) is Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 969-70 (1980).

Even Fried, the Kantian, worries about protecting the shrewd bargainer. See Fried, *Correspondence*, 11 PHIL. & PUB. AFF. 265 (1982) (approving a case which upheld a purchase for \$18,000 of mining rights worth \$100,000,000). "So long as both parties are aware of this availability [of expensive geological surveys], this aspect of 'caveat emptor' (or vendor) is not only efficient, it is fair and thus in accordance with any reasonably common morality. . . . What is not covered are cases in which the convention favors disclosure . . ." *Id.* at 266. The convention today seems not to favor the disclosure of unenforceable terms. Still, ought it?

54. These efficiency arguments exclude the cases in which the offeror and offeree are equally uninformed and the offeror is not in the usual business of the particular transaction. On the other hand, these and the other arguments apply when it is the

whether or not he must reveal it to the consumer, to make his own rational business choices. Upon once learning the applicable law he can pass along this information to all his offerees and thereby amortize the cost of the information among many transactions. The offeree, by supposition, enters few comparable transactions over which to amortize his information costs.⁵⁵

Initially obtaining the information regarding the unenforceable term may usually be done more cheaply by the offeror than the offeree. The offeror may have an attorney on retainer or as an employee. He may be a member of a trade association or other business group that makes this information readily available. The first dispute over the term will make the status of it clear to the offeror. The offeree, on the other hand, will have none of these conveniences and must make a more concerted effort to become properly informed.⁵⁶

businessperson-offeree who supplies the form document to the occasional, uninformed offeror. The labels "offeror" and "offeree" here are expository conventions only.

55. A consumer makes many transactions over the course of a life and is on close terms with others who engage in commercial activity. Hence, consumers can develop considerable knowledge about contract content if there is overlap in the legal substance of the contracts that these consumers make. Such overlap seemingly exists. For example, purchase money security interests and repair and replacement warranty clauses assume similar forms in both sales of cars and sales of refrigerators. It therefore seems plausible to suppose that most consumers know what the important terms in their contracts achieve.

Schwartz & Wilde, *supra* note 51, at 1390 n.1; see also *id.* at 1431-34 (discussing ability of consumers to obtain information regarding goods). In my forty-five years I have purchased (a doubtlessly below-average) three new cars and one new refrigerator. As I faintly recall, none of the three cars had similar warranties. Though there must have been one, I have no idea what my refrigerator warranty was like. Furthermore, although I suppose I have done it, I have no recollection of speaking to my friends or colleagues about car or refrigerator warranties. What's been your experience? How many years (of purchases in ignorance?) did it take you to achieve it?

56. "Legal rules that facilitate bargaining, or that reduce the cost of drafting agreements [here, reduced information costs], would also be recommended by allocative efficiency as both parties to the contract benefit from the reduced transaction costs." Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 608 (1980). In our case this presumably is not true, or the offeror does not benefit as much as he can by inserting an unenforceable term, otherwise, why would the offeror insert it? Let us change the presumed facts slightly. If offerees are so skeptical about the offerors' terms that they regularly make the expenditures to obtain accurate information, then the rational offeror, in the absence of a freerider-type problem, would stop the practice in order to lower overall transaction costs. The "freerider" problem arises since some offerors would refrain from revising their practice to take advantage of the higher credibility established by the other offerors who alter their practice of inserting unenforceable terms. Hence the "freeriders" would inhibit the revision of the practice in question.

The reasoning of the misleading offeror in pricing his goods will lead to cost inaccuracies. On the one hand, the offeror may pass along to the offeree some or all of the payoffs from including the unenforceable term. He will estimate the proportion of offerees who will be misled by and rely upon the unenforceable term to the advantage of the offeror. The detrimental reliance will lower his costs. This allows him to reduce the price of the goods. The deceptively low price when compared to substitute goods will increase his sales volume.⁵⁷ By this means his profit increases.

On the other hand, the offeror may choose not to lower the price of the goods even though some offerees will be misled into foregoing rights. Additional profit to the offeror then comes from the value to him of the foregone rights rather than from increased volume.

The end result of the offeror's pricing choice depends upon the ultimate knowledge of the offerees. There are several possibilities. The least complicated cases occur where the offerees are either initially knowledgeable regarding the law or, unbeknownst to them, remain ignorant of the law throughout the interaction with the offeror. There are also instances in which the offerees deliberately assume the risk of their known ignorance or in which they obtain the knowledge of unenforceability sometime during a dispute. Depending upon the circumstances and the strategies of the parties, the allocative impact is manifold. The simplest two cases will serve as examples.

First, when the offeror lowers the price to reflect partially his expected savings from foregone rights, those offerees who costlessly know of their rights will purchase too many of the goods. The reason for lowering the price does not apply to them and thus the goods are cheaper to them than is their true cost. At the same time, the offerees who remain unconsciously ignorant throughout will purchase fewer of the goods than their true value with the unenforceable term would dictate, but nevertheless will purchase more of these goods than of substitute goods otherwise competitively priced. Resources are misallocated. Furthermore, there are distributive consequences. The ignorant purchasers effectively subsidize the knowledgeable ones. Wealth is also shifted from the ignorant purchasers and from sellers of substitute goods to the offeror.

57. A substitute good is a commodity that is related to the primary good and can be used as an alternative to the primary good. See E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 107-10 (shorter 3d ed. 1979). Here the substitute goods include the identical goods available elsewhere without a contract including the unenforceable term.

In the second case, where the offeror does not lower the price of the goods to reflect anticipated savings, the knowledgeable offerees will purchase the proper amount of goods whereas the offerees who remain unconsciously ignorant throughout will purchase even fewer of the goods than in the first case above. They still fail to add into the net cost of the goods the value to them of the unknown rights. Some of these latter offerees will purchase substitute goods instead, for they misperceive the actual value of the offeror's goods. Again, resources are misallocated. Distributively, wealth is shifted from the ignorant purchasers to the offerors and to the sellers of substitute goods. In this case and all others it is far from clear that the distributive consequences are socially desirable.⁵⁸

The reputable offeror, in a market otherwise ideal, for at least one reason would prefer to assume the legal duty to inform the offeree of the legal status of the contract terms.⁵⁹ He wants the offeree to be confident he can rely upon the implicit assertions of the offeror. Then the offeree knows he need not go to the expense of checking. The decrease in transaction costs will make the offeror's goods relatively less costly as against known substitute goods.⁶⁰ The reputable offeror newly in the business would reason similarly. Customer confidence in the validity of the offeror's contract terms is an aspect of goodwill that takes time and money to instill. The knowledge of the potential customers of the legal duty not to mislead offerees would abbreviate this process and more quickly bring additional business to the new merchant. In this regard, the established, reputable merchant will dislike one result of the adoption of the legal duty not

58. For a discussion of these sociological consequences, see "Sociological Analysis" at 869-85 of text.

59. Information generally is valuable to consumers. "Increases in the efficiency of purchase decisions made are equivalent to increases in real income, and, given the diversity of choices available in a modern economy, improved choices can lead to a large gain." Beales, Craswell & Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 502 (1981). "At the same time, sellers have a substantial economic incentive to disseminate information to consumers. Indeed, if information dissemination were costless to sellers, theory suggests that disclosure would be complete." *Id.* For why the theory may not work in practice, see *id.* at 503-13.

60. It might seem that the transaction costs of all goods would be reduced by a comparable amount and thus there would be no competitive advantage to the offeror from the duty of informing the offeree. Information costs cut across all markets. One instance of this being not the case is where the offeree is already fully informed of the substitute goods and therefore need not incur information costs for this competitive purchase. The long-term renter who is considering buying his first house is illustrative. He knows much landlord-tenant law but little of the law of real estate transactions. With the buyer able to rely upon the seller's legal assertions, the relative cost of the house purchase decreases.

to mislead. His hard-earned goodwill will be less valuable since the risk of being misled by other merchants will decrease.⁶¹

There are administrative costs of relief from the problem considered. Now, generally, the offeree has no remedy in the usual case other than to exercise his rights contrary to the unenforceable term, if he learns of them in time. A more comprehensive remedy is here being urged for consideration. That entails legal action with additional expenditures both private and public. Only the private costs enter the calculus of prospective plaintiffs and resisting defendants. The public will subsidize the suit by supplying the judicial machinery. Inasmuch as there are more lawsuits under a regime that prohibits the inclusion of knowingly unenforceable terms than under one that does not, the public coffers are decreased.⁶² This also leads to an inefficient level of litigation.⁶³

The private costs of enforcing relief from this deceptive practice enter the calculations of the parties as a transaction cost that raises the cost of doing business. For any transaction the costs are higher in proportion to the sharp business practices of the merchant but some lie on all merchants of the particular goods however forthright they are.⁶⁴ The merchant will include the pro rata costs in the price of the goods. Substitute goods, depending upon the nature of the concomitant contract, have a differing "transaction tax" which af-

61. All these calculations are highly refined. That is why a merchant serving a sophisticated clientele can charge more for his "reputability." The clientele will perceive that the higher price tag does not necessarily mean a higher cost of goods. They are aware of the hidden costs including those from misleadingly unenforceable terms. The forthright merchant will only lose to the less reputable competition the business of less sophisticated clientele. Whether the merchant dislikes this is a question of personal preference and the goods he sells. Those who deal in luxury goods may not object.

62. This assumes all lawsuits are similarly costly.

63. This inefficiency must be put against any efficiencies that are achieved by imposing the duty to inform on the offeror. Some of these judicial costs are transitional: "Once potential defendants learned that they would be more likely to be taken to court and assessed higher damages if they did not perform their contractual obligations, they would become substantially more willing to perform them. It seems reasonable to expect that potential defendants would learn this lesson quickly." Slawson, *supra* note 4, at 36.

The public has not been reluctant in the past to operate the judicial machinery to maintain its notions of a fair marketplace. See J.W. HURST, *LAW AND MARKETS IN UNITED STATES HISTORY* 66-90 (1982). Efficiency obviously is not the only grounds for this.

64. Even the merchant who fully satisfies the duty to inform will meet with nuisance suits, the costs of which must be built into the price of the goods. If the merchant is in a line of business with a particularly bad reputation for credibility, there will probably be more nuisance suits, his own veracity notwithstanding.

fects their competitive position.⁶⁵ Resources are accordingly reallocated.

Greater efficiency is not indisputably the overall allocative consequence of a rule against known unenforceable terms.⁶⁶ There are factors pointing in both directions. The answer is empirical, not deductive, and awaits field study.⁶⁷

Distributive consequences have also been mentioned. There are others. The well-informed consumer, without need of protection, subsidizes the less well-informed. The risk preferrer subsidizes the risk averter. The nonlitigious subsidizes the litigious. These distributive effects and others must be put into the balance. Reasonable people will differ on whether these consequences are debits or credits. As a spillover, the distributive effects also have sociological impacts that must be considered.

C. Sociological Analysis

The effects of interfering with the status quo are difficult to predict. For alterations of no larger compass than those here being considered, the conceivable reverberations through business and

65. The "transaction tax" may be defined as the cost to merchants of assuming, or being assigned, the duty not to include unenforceable terms. The costs of producing new form contracts and, to some extent, the litigation expenses of working out in the courts the parameters of this new duty are transitional items in the tax. Some of this tax will remain after the transition as part of the overhead. The amount depends not only upon the merchant's reputability and that of his line of business but also upon the nature of the goods he sells. For example, the use of public transportation is a substitute for an automobile purchase. Unenforceable terms are not likely to appear in this first option. Thus the ongoing transaction tax for public transportation will not be as high nor will it increase upon the implementation of the new legal duty to inform, unlike for the second option. Probably all the transaction taxes, nevertheless, are ultimately lower than the costs to the offerees of obtaining accurate information.

66. Rawls seems to have little doubt: "[M]arket failures and imperfections are often serious, and compensating adjustments must be made. . . . [L]ack of information . . . and the like must be recognized and corrected." J. RAWLS, *supra* note 10, at 272. Gordon also raises the flag of freedom: "Most people would grant that fraudulent claims reduce the welfare of consumers by making their allocation of income less efficient than it might be. I would go further and argue that such practices constrict economic freedom by reducing one's ability to act purposively." S. GORDON, *supra* note 18, at 167.

67. Even if perfect information supports the most efficient marketplace, it may have disadvantages from a utilitarian viewpoint, notwithstanding the kinship between utilitarianism and economics. For example, ignorance may be bliss: "somebody who is universally regarded as ugly may prefer not to be told it." Hammond, *Utilitarianism, Uncertainty and Information*, in *UTILITARIANISM AND BEYOND*, *supra* note 5, at 85, 102. For our problem, the offeree for whom the unenforceable term proves irrelevant may prefer not to know that the offeror was trying to take advantage of him. Which is not to say that the offeree is not still "harmed" as a matter of principle: "even an undetected lie is abusive of the trust of one's hearer." MacCormick, *supra* note 23, at 15 (disrespectful and "a standing risk of actual harm").

social relationships, and to persons individually, are extensive. Ideal "social engineering" requires a synoptic or comprehensive vision of repercussions far beyond that realistically possible for all but the simplest public choice. Potential consequences are not to be derived deductively. Practice, or empirical fact, often stands in stark contrast to the predictions of theory. Information is limited.⁶⁸ A broad approach may, nevertheless, narrow the uncertainty of projections.⁶⁹ Yet even with the most diligent attempt, today one is sure to fall far short and thus, in the view of some, one must make significant public choices cautiously and incrementally.⁷⁰

This section attempts to broaden the study of the prohibition of unenforceable terms beyond the normative and ethical discussions above.⁷¹ The label "sociological" is a catch-all meant to encompass individual personality traits as well as broader societal characteristics.⁷² The topical divisions overlap. Some may be merely different vantage points for a single consideration. The discussion, it must be emphasized, is far from complete, far less even than the discussions of ethics and economics, but is undertaken to highlight some of the

68. Personal experience offers the lesson that a particular influence on a person appears to have the potential of resulting in opposite reactions. For example, a highly affectionate parent may raise a child similarly affectionate or coldly distant. See J.Q. WILSON & R.J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 259 (1985). Action on humans, when seen from afar, produces two possible polar reactions. Although a close examination of the factors may allow for an accurate prediction of reactions, *cf. id.* at 238, public choice, in practice, is made at such a distance as to preclude refined anticipations.

69. See G. MYRDAL, *OBJECTIVITY IN SOCIAL RESEARCH* 10-12 (1969).

70. In a leading work on social choice theory, Braybrooke and Lindblom conclude that the synoptic approach to policy analysis must be abandoned in favor of trial-and-error incrementalism. D. BRAYBROOKE & C. LINDBLOM, *supra* note 18, at 37-57; see also K. POPPER, *THE POVERTY OF HISTORICISM* 64-70 (3d ed. 1961) ("piecemeal social engineering"). A major criticism of incrementalism is that some goals cannot be achieved without giant steps, see J. ELSTER, *ULYSSES AND THE SIRENS* 9-18 (rev. ed. 1984). For a general critique, see R. GOODIN, *supra* note 18, at 19-56. Solutions to our problem of knowingly unenforceable terms do not involve, in Popper's and Elster's terms, "Utopian engineering" of "global" magnitude. Mini-steps will do.

71. The economic analysis above may be properly fit in here instead. Marx, for one, conflated economics and sociology. See J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 45 (3d ed. 1950); see also G. MYRDAL, *supra* note 69, at 10 (benefits of synthesized methodology). Parsons, on the other hand, explicitly contrasted the approaches. See B. BARRY, *SOCIOLOGISTS, ECONOMISTS AND DEMOCRACY* 75 (1970).

72. Raz refers to this impact as the indirect social functions of the law. They "are those the fulfilment of which consists in attitudes, feelings, opinions and modes of behaviour which are not obedience to laws or the application of laws, but which result from the knowledge of the existence of the laws or from compliance with and application of laws." Raz, *On the Functions of Law*, in *OXFORD ESSAYS IN JURISPRUDENCE* 278, 289 (A.W.B. Simpson ed. 2d series 1973). See *id.* at 299.

trailmarkers along the path to a fully synoptic vision of our problem.⁷³

1. "Rugged Individualism"

Government intervention is accused of being destructive to public and private goals when it is improperly paternalistic.⁷⁴ Such intervention undermines the modern version of the rugged individualism characteristic of the brave pioneers who settled this country and the great entrepreneurs who industrialized it.⁷⁵ Without this warp in the fabric of the citizenry, the moral courage needed to face and conquer the tribulations of the day and epoch will be diminished. Indeed, although one easily slips into righteous flag-waving in expressing this idea, it is undeniable that society, collectively and individually, gains from appropriate self-reliance and related traits. Whether relief for unenforceable terms will frustrate this goal warrants scrutiny.

Hobbes instructs us that even the most rugged individuals barely endure, bloody and enervated, in the depths of the jungle.⁷⁶ Fang and claw are there supreme. This form of society, or lack thereof, obviously is undesirable. The virtues of social order need not be iterated. The cost of maintaining social order is some loss in this degree of rugged individualism. Although the proper line between individual liberty and government regulation is clearly unsettled,⁷⁷

73. Many of the points made are frightfully "soft," especially those regarding surmised individual and societal psychological reactions. See MacCormick, *supra* note 16, at 251-52. These traits, however, cannot be ignored if one takes seriously the "good reasons" approach to moral questions. See *supra* note 22. As an example of this "soft" technique, Feinberg, in arguing against nonintervention when a person sells himself into slavery, stated:

But this would be to render the whole national character cold and hard. It would encourage a general insensitivity and impose an unfair economic penalty on those who possess the socially useful virtue of benevolence. Realistically, we just can't let people wither and die right in front of our eyes; and if we intervene to help, as we inevitably must, it will cost us a lot of money.

Feinberg, *Legal Paternalism*, in *PATERNALISM*, *supra* note 34, at 3, 13. For another, extended example, see Wasserstrom, *Privacy: Some Arguments and Assumptions*, in *PHILOSOPHICAL LAW* 148 (R. Bronaugh ed. 1978).

74. Not all intervention is unduly paternalistic. Some areas of intervention are necessary, as on behalf of the legally incompetent, and even beyond this obvious case, as pointed out below, others would be agreed upon by rational persons.

75. Cf. J. SCHUMPETER, *supra* note 71, at 132-33 (entrepreneurs analogized to armored knights of Middle Ages).

76. See T. HOBBS, *LEVIATHAN* 96-97 (1909) (1st ed. London 1651) ("the life of man [is], solitary, poore, nasty, brutish, and short").

77. The most famous line is Mill's "harm" principle. See J.S. MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT*, *supra* note 11, at 81, 176-200. As an example of the struggle to find a workable test, one might look to Hayek

nearly no one doubts that physical threat and injury are appropriate subjects of government control, even though paternalistic.⁷⁸ Still, the existence of a police force will undermine rugged individualism.⁷⁹ And this weakened physical and mental ruggedness is of real concern, especially in time of war.⁸⁰ There is not, nevertheless, an outcry for a return of the law of the jungle. The tradeoff is not worthwhile. What of the tradeoff for solving the problem in question?⁸¹

If relief from unenforceable terms were granted, eventually there would be more confidence in the contractual assertions of others. One could trust more one's business adversaries. The general level of trustfulness would rise incrementally.⁸² The general level of trustworthiness would rise as well, for the offeror would be so conditioned by a judicial stick.⁸³ These changes would also reinforce in

who, after criticizing Mill's test as not very useful, draws his line: "In determining where the boundaries of the protected sphere ought to be drawn, the important question is whether the actions of other people that we wish to see prevented would actually interfere with the reasonable expectations of the protected person." F.A. HAYEK, *supra* note 29, at 145. And what are "reasonable expectations"? Feinberg defines ten liberty-limiting principles. See J. FEINBERG, HARM TO OTHERS 26-27 (1984).

78. The anarchists are excepted. Some libertarians (if they are not anarchists) are too. Nozick will go so far as to allow "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on." R. NOZICK, *supra* note 18, at ix. With Nozick's predisposition clear, whether he would include knowingly unenforceable terms within "fraud" is to be doubted.

79. Poignant evidence of this comes from the public reaction to what appears to be a breakdown of law and order. Self-defense training and weapons purchases may be symptomatic of this social entropy.

80. From about the end of World War II through the early years of the Vietnam war, nearly 40% of the draftees were found to be disqualified in the preinduction examination, half of these for medical reasons. See Karpinos, *Mental Test Failures*, in THE DRAFT 35, 42 (S. Tax ed. 1967).

81. What are the ultimate consequences of the rippling effects accompanying any adjustment to the social fabric? Help is needed from the social scientists. See RAZ, *supra* note 72, at 299. In the meantime, brace for "soft," speculative psychology. As stated for a related issue, "[i]n practical cases the possibility of factual disagreement about what causes produce what effects is likely to be overwhelmingly more important than disagreement in ultimate ends between hedonistic and ideal utilitarians." Smart, *supra* note 7, at 26.

82. "Reliance on promises, like reliance on anything else, is in good part a function of usage and familiarity." Llewellyn, *supra* note 31, at 709.

83. "The law is a public statement of societal norms; and societal (and subgroup) norms quite clearly influence the individual's preferences or values." Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 487 (1978). See also *id.* at 488, 490-93 (effects of legal rules on preference formation); Morris, *A Paternalistic Theory of Punishment*, in PATERNALISM *supra* note 34, at 139, 147 ("law plays an indispensable role in our knowing what is good and evil for society").

Atiyah seems begrudging about these virtues:

At one time it was widely thought desirable that buyers should be encouraged to stand on their own feet, examine the goods they bought

everyone, other related character traits.⁸⁴ Presumably this would spill over into interactions beyond the commercial setting.⁸⁵

The increased trust in the marketplace raises hazards for those interactions in which there are no judicial sanctions to deter those who take advantage of the spillover effects of generally improved veracity. By being less suspicious, one might be lulled into assuming risks where, for example, one can be taken in by the puffing and avoidance tactics considered acceptable in negotiation.⁸⁶ This

themselves, rely on their own judgment. This led naturally to the doctrine of *caveat emptor* which was widely enforced in the Courts (though never as widely as commonly believed) between about 1830 and 1870. But today there is very little left of this doctrine because Courts (and the public) no longer believe that there is anything wrong or unreasonable in buyers relying upon the reputation and competence of manufacturers and sellers rather than on themselves.

P.S. ATIYAH, *supra* note 38, at 172.

84. "Sincerity therefore, once introduced into the manners of mankind, would necessarily bring every other virtue in its train." W. GODWIN, AN ENQUIRY CONCERNING POLITICAL JUSTICE 152 (K. Carter ed. 1971) (1st ed. n.p. 1793). Among the virtues may be self-respect and respect for others. See Kupfer, *supra* note 23, at 115-16.

85. "[I]n a society whose public morality and political institutions could be collectively or impartially adopted by all rational persons, there can be a quality of life that cannot exist in a society without such morality or institutions. There can be relaxed mutual trust, openness, absence of need for being on one's guard, friendly warmth among persons, a cooperative spirit, the freedom with others that derives from knowledge that one is not prospering at their expense." Brandt, *The Concept of Rationality in Ethical and Political Theory*, in HUMAN NATURE IN POLITICS 265, 274-75 (J. Pennock & J. Chapman eds. 1977).

To put it in the negative: "Here, the importance of practices would be stressed, and the harm to persons quite outside the deceptive situation considered. Spread multiplies the harm resulting from lies; abuse increases the damage for each and every instance." S. Bok, *supra* note 23, at 104 (later quoting Augustine to similar effect); see also *id.* at 182, 195-97 (secondary effects of deceptive practices in social science research). More to the point, in discussing the mutual deceptions of bargainers in the marketplace, Bok says of those who regularly participate:

They may then lose some ability to discriminate among kinds and degrees of falsehood; and unless the lines between circumstances where the rules allowing deception do and do not apply are very clear, the deceptive tactics may spill over into other relationships. In the end, the participants in deception they take to be mutually understood may end up with coarsened judgment and diminished credibility, even though the original bargaining practice seemed harmless in its own right.

Id. at 132.

Even when one is most inclined to decry markets as encouraging cut-throat competitive individualism, one must remind oneself of the *extended* range of mutual trust which a market both generates and requires. [J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 139-41 (1980)] reminds us of the Aristotelian point that the relationships of mutual utility involved in business dealings are a kind of friendship, albeit in a weak sense.

MacCormick, *supra* note 23, at 16 n.36 (emphasis in original).

86. See Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 113-16 (1982); Luban, *supra* note 33, at 406-07.

downside, however, is not a precipitous slope. People are accustomed to compartmentalizing their attitudes of trust towards others.⁸⁷ Among family and friends the standards of veracity are different from those in the marketplace. Even within the marketplace one differentiates regularly among products and merchants on grounds of trustworthiness. "Brand names" and "goodwill" are not meaningless notions. A departure from the most rugged individualism does not necessitate spinelessness.⁸⁸

One consequence of the proposed relief might actually lead to an increase in some aspects of rugged individualism. Now, if one learns that one has been deceived by reliance upon an unenforceable term, one is usually helpless. Permissible self-help is not likely to be efficacious and legal remedies are few. Refusing to contract further with the offeror is a hollow vindication against the rational offeror who considered that possibility and determined it was a risk worth assuming. The offeree is consigned to swallowing the harm, dignitary or monetary. The painful reactions to this are not publicly or privately desirable.⁸⁹ But with a legal remedy available, one is provided a weapon with which to assert and defend oneself.⁹⁰ Character traits, akin to rugged individualism, would be reinforced in the relatively benign formalized structure of the judicial arena where "low blows" are prohibited (if not prevented).⁹¹

87. See G.J. WARNOCK, *THE OBJECT OF MORALITY* 80-86 (1971). *But see supra* note 85.

88. This assumption bottoms various legal principles. "[M]any legal protections are due as much to those who will not look out for themselves as to those who do. . . ." Vlastos, *Human Worth, Merit, and Equality*, in *MORAL CONCEPTS*, *supra* note 22, at 141, 145 n.1.

89. Unless, that is, they would generate enough steam to propel the offeree into utilizing the governmental processes for institutionalized relief. Or the offeree may decide to become as "rugged" as the offeror and "get" the next person as he was gotten. The possibilities are myriad.

90. "This is the role of the tort law in providing the prospect of monetary redress for the victim of an outrageous indignity in order to channel the instinct for retribution into acceptable channels." Sax & Hiestand, *Slumlordism as a Tort*, 65 *MICH. L. REV.* 869, 888 (1967). "Outrageous" may be too strong for our problem. Yet even for Sax and Hiestand's problem, "[w]e do not characterize the slum landlord as a conscious or willing evildoer; we agree that he is probably doing precisely what a rational profit-seeking businessman in his circumstances would feel required to do." *Id.* at 892. He "has no intent—in the sense of desire—to harm the plaintiff. His only interest is an economic one, and the damage incurred by the plaintiff may be viewed by him not only as undesired, but also as unfortunate and regrettable." *Id.* at 899.

91. Litigiousness is the danger here. It seems, unfortunately, that the extreme of all virtues is a vice. Aristotle thought virtue, being a middle way, is subject to two extremes, both of which are vices. See A. MACINTYRE, *AFTER VIRTUE* 144-45 (1981). This one can be capped somewhat by actions such as wrongful civil proceedings and abuse of process. *But see infra* discussion at notes 105-09.

2. Educated Citizenry

A general presumption within the legal system is that each citizen is fully aware of the law.⁹² One effect in principle of this presumption is to increase the level of knowledge of the law. By remaining ignorant of the law, one may forego valuable rights; consequently, one is induced to learn it. A citizenry well educated in the law is also to be encouraged for the public goal of producing a more sophisticated electorate. A negative consequence, then, of increasing the justifiable reliance on another's assertions of law is a reduction of the incentive to acquaint oneself with the law.⁹³

Beyond merely reducing an important inducement to learn the law, the remedy considered here actually might encourage ignorance of it. For if relief is granted to one ignorant of the law but not to one who is knowledgeable of the term's unenforceability, there is an advantage to remaining ignorant, at least until the contract has been signed. This undesirable inducement can be countered by providing relief to offerees who already know at the time of contracting that the term is unenforceable.⁹⁴ The informed offeree who brings suit would then be acting purely as a private attorney-general. This engenders compunctions paralleling the doctrines of "clean hands" or *in pari delicto*.⁹⁵ Should one be allowed to recover

92. See, e.g., E.A. FARNSWORTH, *CONTRACTS* § 9.2 (1982) (discussing mistake); W. PROSSER & W. KEETON, *THE LAW OF TORTS* 759 (5th ed. 1984) (discussing misrepresentations of law). "Legal fiction" may be a proper epithet for this presumption. For more, see discussion of "Reasonable Citizenry" at 876-79 of text. "It has, of course, been pointed out many times that there is never a 'presumption' that any man knows the law. The proper statement is that, in many situations, ignorance of the law is no excuse—a very different thing." W. PROSSER & W. KEETON, *supra*, at 759 n.44.

93. But, as a counterpoint: "The case against fraudulent misrepresentation is easy to make out. . . . [A]s a general matter, no social good can derive from the systematic production of misinformation." Epstein, *supra* note 35, at 298 (footnote omitted). For those familiar with Epstein's work, it will come as no surprise to learn that he does not favor duties to disclose. *Id.* at 298-300.

Irrespective of the legal duty to exclude knowingly unenforceable terms, it is often economically rational (read, "efficient") for the offeree to assume that the offeror's assertions are correct, at least for the time being. See *infra* notes 99-100 for a discussion of why this is reasonable. By prohibiting knowingly unenforceable terms, the implicit assertions will indeed be correct more often. Insofar as the offeree relies upon the proper assertions that would have been incorrect but for the legal duty not to mislead, he will "know" the law more, not less, often.

94. If, as suggested in the discussion at 892-95 of text, punitive damages are recoverable against the offeror, then the offeree will have the additional inducement of this extraordinary recovery to learn whether terms are enforceable. Depending upon how the question is resolved of whether to be actionable the offeree must be ignorant of the nonenforceability at the time of contracting, the net effect of the judicial relief may be a general increase in the public's knowledge of the law.

95. In *Pearlstein v. Scudder & German*, 429 F.2d 1136 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971), an attorney who was also an experienced investor was allowed to

damages even though he has not been misled and, to the contrary, may have deceived the offeror into believing that he has been misled? Something can be said for adopting a good faith principle. All preventatives seem to encourage dissembling by the knowing offeree, the offeror,⁹⁶ or both. This potential maneuvering further complicates the good reasons for granting a remedy.

3. Reasonable Citizenry

The legal system treats parties as rational and thus responsible for their actions. Some defenses, such as incapacity and duress, presuppose actions not reflecting this quality, but these are exceptions to the legal standards based upon the Everyman known as the "reasonable person." As was true regarding an educated citizenry, so also the legal rules ought to put pressure on parties to conform to the standard of reasonableness.⁹⁷ One might think that offering relief

recover under the securities laws against a broker for an illegal extension of credit from the broker which both parties presumably knew to be illegal. For other similar cases in the securities field, see generally Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) (*in pari delicto* defense not applicable in private damages action for violation of federal securities laws where plaintiff-investors relied on false information furnished by defendants-corporate insiders and broker dealer which defendants represented to be accurate inside information); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (doctrine of *in pari delicto* did not bar recovery in private antitrust action where plaintiff-dealers were aware of illegal arrangements formulated by defendant-parent corporation). See generally Crumplar, *An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. ON LEGIS. 76, 83-87 (1975) (use of private compensatory action as deterrent in anti-trust security actions whether or not plaintiff is at "fault"). Furthermore, if the informed offeree's recovery is based upon, say, a multiple of his damages, perhaps under a statute or the rules of punitive damages, then he has the perverse incentive to run up the extent of his injury. *Id.* at 89-91. Finally, it has been debated whether in common circumstances the private enforcement of the law, relative to optimal public enforcement, leads to overenforcement. Compare Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975) (over) and Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982) (over) with Becker & Stigler, *Law Enforcement, Malfeasance, and the Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974) (equal) and Menell, *A Note on Private Versus Social Incentives to Sue in a Costly Legal System*, 12 J. LEGAL STUD. 41 (1983) (equal) and Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980) (under).

96. Were the offeror liable only if he has actual knowledge of the unenforceability, rather than merely reason to know of it, then he also has an incentive to remain ignorant of the law. Or even, by means of self-deception or cognitive dissonance, the offeror may be "unaware" of that which he has reason to know. See J. ELSTER, *supra* note 70, at 178-79.

97. "[R]ationality should be thought of as a human good and a social goal. . . . [An implication of this idea is] that moral, social, and political theories should treat rationality as a value to be promoted rather than as a property automatically attributed to all normal persons." Gibson, *Rationality*, 6 PHIL. & PUB. AFF. 193, 193 (1977).

from unenforceable terms will vent the pressure to conform to proper legal standards.

A look at a typical case of a sale between merchant and consumer reveals that it is often rational to accept the merchant's contract offer without scrutinizing the terms for enforceability. First, the agent of the merchant consummating the sale is probably not authorized to agree to changes in the terms. Negotiation over a term will require the offeree to wend his way through the corporate bureaucracy to reach a person sufficiently high in the management structure to have the authority. Second, when dealing with an authorized agent, the offeree will often discover that either the authorized agent is not legally sophisticated regarding the enforceability and therefore is not in a position to dicker over the term or, even if he were, the contract is on a take-it-or-leave-it basis. It has been well worked out by the company lawyers, and the managers have neither the time nor inclination to revise it.⁹⁸ Third, merely reading the boilerplate and satisfying questions about its meaning will be time consuming. The offeror will be far from eager to grant the time to the offeree. Fourth, many terms address problems that rarely arise. Because there is little risk to the offeree that such terms will become operable, the discounted value of the negotiation is quite low.

It is unnecessary to detail the scenarios involved in dickering over the terms in the typical consumer contract. Do you, the reader, an infinitely reasonable person, bother to read the (uninitialed) boilerplate? Of course not, because it is everyday knowledge that the costs of such an endeavor outweigh the payoff.⁹⁹ A reasonable person assumes the risk of signing the unread, or at least not fully un-

98. One of the two basic guises under which abuses of power may be unconscionable under UCC § 2-302 is "the refusal of the professional to bargain over a disclosed, material term." Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 359 (1970). See also J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 4-3 (2d ed. 1980) (discussing procedural unconscionability); Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983) (ubiquity of contracts of adhesion is consequence of economic forces; treatment of them is issue regarding allocation of power and freedom between commercial organizations and individuals); Slawson, *The New Meaning of Contract: The Transformation of Contract Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984) (new meaning of contract includes parties' reasonable expectations formed prior to signing form contracts).

99. See Slawson, *supra* note 4, at 16-17.

Note the following observation concerning the 'ticket' cases by a prominent Canadian judge, Justice Riddell, in *Spencer v. Canadian Pac. Ry.*, 13 D.L.R. 836, 843 (1913): 'We were told that everyone should be held to have read his railway [baggage] check—that people generally did read their checks. Speaking for myself, I never read a check in my life till

derstood, contract in the belief that it will be easier (less costly) to resolve difficulties once they arise. This is a rational economic decision that holds for all but the everyday or relatively large transactions.¹⁰⁰ In these circumstances for the law to impose upon the offeree the duty to master the contract terms is to require the offeree to be unreasonable.¹⁰¹

Once a dispute relating to a contract term arises, the economic calculation changes. The discounting for the improbability of a relevant dispute is cancelled. It is now more worthwhile for the offeree to determine the enforceability of the term. But it may still not be worthwhile enough. Resisting the assertions of the offeror may require the retention of legal or other assistance. These transaction costs, including the offeree's opportunity costs, may exceed the expected benefits rationally based upon the likelihood that the crucial term is unenforceable. It may yet be reasonable for the offeree to

this one and never saw one read—nay, further, I have never heard of one being read until the argument of this case.'

Mueller, *supra* note 3, at 249 n.4. Even if the term must be initialed or is otherwise highlighted, with the usual faceless institution the attempt to have it fully explained or to negotiate over it would be Kafkaesque.

[I]t is not worth it to invest time or money in the obviously futile enterprise of fighting over contract language. It is more rational simply to ignore the terms and hope that you have happened on an honest seller who is more interested in building a reputation for fair dealing than in extracting the maximum possible gain from each individual transaction.

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, 600 (1982).

100. This is because the offeree understands the offeror's reasoning, the general idea being expressed by Adam Smith at a time before the modern marketplace separated merchants from neighbors:

When a person makes perhaps 20 contracts in a day, he cannot gain so much by endeavouring to impose on his neighbours, as the very appearance of a cheat would make him lose. Where people seldom deal with one another, we find that they are somewhat disposed to cheat, because they can gain more by a smart trick than they can lose by the injury which it does their character.

A. SMITH, LECTURES ON JURISPRUDENCE 538-39 (1978) (quoted in Stigler, *Economics or Ethics?*, in 2 THE TANNER LECTURES ON HUMAN VALUES 143, 172 (S. McMurrin ed. 1981)).

Though a rational economic decision, it may not be an entirely moral one when the offeree, despite the ostensible contractual "promise," leaves open the possibility of later challenging an "agreed upon" term. See P.S. ATIYAH, *supra* note 38, at 148-49. *But see id.* at 169. Then again, the knowing offeror is not in a moral position to complain. Do two wrongs make a right, or, may one fight fire with fire? Arguably so, in this case. See Kupfer, *supra* note 23, at 110-11.

101. By having judicial relief from unenforceable terms, the reasonable risk assumed by the offeree is lessened. As a result the transaction sufficiently large to warrant the mastering of the boilerplate increases.

capitulate without putting up resistance.¹⁰² The law ought not to demand more.

4. Growth of the Law

The common law is not static. Over the centuries it has undergone significant change. Progress, if indeed it is progress, has not been linear. The primary means for this growth is the give and take in the courtroom. One of the parties to a controversy, dissatisfied with the state of the law, argues for the reconsideration of an old doctrine or the consideration of a new one. The court agrees and a step, forwards or backwards, is taken. Perhaps the legislature gets into the act and implements a tentative judicial innovation or institutionalizes its own. This legislation may be subject to constitutional challenge. Or, the new legislative policy may encourage the court to concretize it elsewhere by adopting related common law principles. In this general manner, yesterday's unenforceable contract term is today's enforceable one, and vice versa.

Any remedy aimed at deterring one party from including unenforceable terms as a means of exploiting another's ignorance must not interfere unduly with this dynamic process of legal growth by unfairly hindering those who fuel it. The unenforceable term may be inserted in the legitimate belief that the rule is ripe for change.¹⁰³ Or there may be reasonable doubt as to the legal status of the term. The case for penalizing this offeror is weak.

In accommodating this legal process, the solution to our problem becomes further complicated. The offeror, in defending his inclusion of the unenforceable term, will be tempted to allege, truly or falsely, that he was serving the larger good by laying the groundwork for a reasonable challenge of the status or meaning of the term.¹⁰⁴ His intention was not (just) to mislead the offeree. He is not using the offeree as a means only to his ends. Is he to blame for misperceiving the readiness for change or degree of legal uncertainty?

The courts are familiar with the problem of discerning whether a doubtful claim is made for legitimate or illegitimate purposes. A

102. The more ubiquitous the practice of knowingly including unenforceable terms, the more worthwhile it is statistically for the offeree to challenge the offeror. The same reasoning applies when the offeror or his line of business is known to be less reputable.

103. "Today's frivolity may be tomorrow's law." Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 57 (1976). "Suddenly what seemed unchallengeable is challenged . . ." R. DWORKIN, *supra* note 22, at 89.

104. See *infra* note 108.

similar factual question arises, for example, in the law of the wrongful use of civil proceedings.¹⁰⁵ In deciding the propriety of the purpose of the proceedings by the defendant, "[t]he question is not whether he is correct in believing that the court would sustain the claim, but whether his opinion that there was a sound chance that the claim might be sustained was a reasonable one."¹⁰⁶ The defendant's attorney may also be liable.¹⁰⁷ Although this problem is not new to the courts, it is doubtful that it has been resolved very well, especially in the context of knowingly unenforceable terms where the offeror can claim that the purpose for the inclusion of the term was to challenge in the courts its legal status.¹⁰⁸ The tort of the wrongful use of civil proceedings and other potential remedies have been criticized as being insufficient deterrents to improper suits.¹⁰⁹

105. See RESTATEMENT (SECOND) OF TORTS § 674 (1965); W. PROSSER & W. KEETON, *supra* note 92, § 120. The proceedings are wrongful when they "have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." RESTATEMENT (SECOND) OF TORTS § 676 (1965).

106. RESTATEMENT (SECOND) OF TORTS § 675 comment f (1965). The purpose of bringing a "nuisance suit" to provide leverage for a settlement is wrongful. *Id.* § 676 comment c. To be taken into account in deciding reasonableness is whether the defendant obtained advice from counsel after full disclosure and whether the attorney giving advice had an interest in the conclusion. *Id.* comment h.

107. The attorney may be liable for wrongful use of civil proceedings when he or she brings or continues an action "without probable cause and for an improper purpose other than the fee." RESTATEMENT (SECOND) OF TORTS § 674 comment d (1965). See also Note, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897, 904-06 (1977) (lack of probable cause for bringing suit as evidence of malice in action for malicious prosecution). But the action is disfavored by the courts, and recoveries against attorneys are rare. See Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 646 (1983); Note, *Attorneys' Liability to Clients' Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values*, 53 ST. JOHN'S L. REV. 775, 781 (1979).

108. "One may believe that his claim is meritorious even though he knows that the decisions in the state do not sustain it if he believes that the law is potentially subject to modification and that this case may be a suitable vehicle for producing further development or change." RESTATEMENT (SECOND) OF TORTS § 676 comment c (1965). And how does the offeree demonstrate the lack or insincerity of this belief?

109. For a critical survey of the remedies, see Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743 (1980) [hereinafter cited as Note, *Unfounded Litigation*]. See also Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979) [hereinafter cited as Note, *Groundless Litigation*] (history of Anglo-American attempts to discourage malicious prosecution suits in civil actions). In the context of the granting of punitive attorneys' fees,

[A]lthough courts apply an objective standard for the bad faith exception to defendants' prelitigation conduct, they require much more to establish bad faith on the part of a party (usually a plaintiff) for his assertion of a substantive claim or defense. Although there is a mountain of authority supporting the power of courts to impose attorneys' fees for substantive bad faith, there is a veritable dearth of appellate cases in which fees have actually been imposed on a party for his assertion of a groundless claim.

An adequate balance between encouraging the forthright and discouraging the dissemblers will not be struck easily.

One solution is to reduce or eliminate the liability of an offeror who indicates to the offeree that the enforceability or meaning of the term is questionable.¹¹⁰ The Uniform Commercial Code permits a seller of goods to disclaim certain warranties by using flag words such as "as is."¹¹¹ A comparable disclaimer may be permitted by a label such as "enforceability uncertain."¹¹²

Mallor, *supra* note 107, at 639 (footnotes omitted). "The operation of the subjective standard has restricted the application of the bad faith exception for substantive bad faith to 'nut cases.'" *Id.* at 642-43.

110. Another solution in principle is to grant relief once the offeree has proven the offeror's *male fides* by a preponderance of the evidence but to discount the damages by the plausibility of the offeror's defense. If, say, the factfinder is only 75% certain of the offeror's blameworthiness, the award may be three-fourths of one in which there is complete certainty. Under this proposal greater than 50% certainty is presumed to equate with a preponderance of the evidence. Thus a mere preponderance of the evidence would support a recovery of one-half of certainty. If the discounting were more rapid, for example, zero recovery at the level of greater than 50% certainty, the offeree's incentive to bring suit would often dissipate. However, these refined calculations that discount the recovery for uncertainty may be overly-refined in practice.

111. U.C.C. § 2-316 (1978). Whether disclaimers work adequately has been doubted. In discussing declarations of intent to perform an act with an explicit disclaimer of the intention to be contractually bound, Atiyah states:

However, I do not accept, and the law today does not accept, the notion that this sort of disclaimer is always conclusive. No doubt there are circumstances in which such a disclaimer may be legitimate, but there are also many circumstances in which it is not. The putative promisor may well be attempting to have things both ways in speaking thus: on the one hand, he wants to raise expectations in the minds of his hearers—what, indeed, is the purpose of making statements of this kind if he does not want them to raise expectations? And on the other hand, he wants to reserve complete freedom of action. In some circumstances this sort of disclaimer is thus a disreputable attempt to obtain the benefit of raising expectations and inducing actions in reliance without accepting the corresponding obligations.

P.S. ATIYAH, *supra* note 38, at 168 (footnote omitted).

112. If this solution is adopted, there are a few gambits by the offeror that must be prevented. One is where he makes in the boilerplate a general disclaimer of "enforceability uncertain" for all terms. The significance will be lost to the offeree either from failure to see it or from conditioned callousness. The particular term must include the flag words. Another gambit is where the offeror flags every individual term, settled or not. The flags will pale into mere background noise. *See* Beales, Craswell & Salop, *supra* note 59, at 530 ("When the exact language of a disclosure is specified, as it often is, its effectiveness may decline over time because consumers learn to tune it out, a phenomenon known as 'wear-out.'"). A countermove would be to grant a remedy for unreasonably disclaiming enforceability on the grounds that the offeree is thereby induced to seek legal counsel, *i.e.*, incur costs, for no justifiable reason. To mark a term with "enforceability uncertain" when the unenforceability is certain is itself like the very problem in issue, the knowing inclusion of unenforceable terms.

In the Appendix is discussed the practice of including in securities brokerage contracts with customers a partially unenforceable term that requires the arbitration of

5. Governmental Power

Government intervention increases the power of the government. This may threaten the liberty of the citizenry.¹¹³ Power corrupts.¹¹⁴ Power attracts power.¹¹⁵ As an institution grows stronger, its agents tend to seek self-aggrandizement through the enlargement of their sphere of influence. Controlling key sources of information and the resources for political impact, the institution is alive with potential growth.¹¹⁶ A second aspect of this power flows from the discretion granted the institution. A mere glance at history will demonstrate that discretion is abused. Even if not abused, the exercise of discretion is subject to the fallibilities of the human agents.¹¹⁷ In the words of Coke, it is better "to leave all causes to be measured by the golden and straight mete-wand of the law, and not to the uncertain and crooked cord of discretion."¹¹⁸

all disputes. Some firms had attempted to avoid the misleading nature of the term by adding a phrase such as "unless unenforceable due to state or federal law," or "to the extent consistent with federal law." The SEC took the position that "such language does not with sufficient clarity and specificity address the issue of recourse to the federal courts for claims arising under the federal securities law and, accordingly, would not satisfy" the proposed rule requiring firms to divulge to customers their right to litigate. See Karmel, *Securities Regulation*, 190 N.Y.L.J. 1, 2 (Oct. 20, 1983) (with citations). This, together with the other problems mentioned, sheds doubt on the efficacy of disclaimers.

113. Being ignored here is the hardly disputable proposition that the government, by its protections through intervention, also enlarges the sphere of individual liberty. See, e.g., T. HOBBS, *supra* note 76, at 128 ("And Covenants, without the Sword, are but Words, and of no strength to secure a man at all. Therefore . . . if there be no Power erected, or not great enough for our security; every man will, and may lawfully rely on his own strength and art, for caution against all other men."); J. RAWLS, *supra* note 10, at 239-43 (rule of law expands liberty by removing suspicion that others are not playing by the rules). For dispute, see R. NOZICK, *supra* note 18.

114. J. ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (G. Himmelfarb ed. 1948). For cites to similar ideas from Herodotus, Milton, Montesquieu, Kant, Burke, John Adams, and Madison, with quotes, see F.A. HAYEK, *supra* note 29, at 449 n.4.

115. "[A] power vacuum is always filled by a power holder . . ." A. BERLE, *POWER* 39 (1969).

116. See F.A. HAYEK, *supra* note 29, at 290-93. One theory purports to explain bureaucratic behavior . . . on the basis of a very small number of behavioral axioms, the most important of which is that bureaucrats tend to act so as to maximize the 'budget' of their bureau—where 'budget' includes not only salaries but also fringe benefits, perquisites, and so forth.

A. BUCHANAN, *supra* note 38, at 21 (footnote omitted).

117. See, e.g., A. BUCHANAN, *supra* note 38, at 25-26 (despite fallibilities, human discretion is integral part of functioning of governmental institutions).

118. E. COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 51 (1642) (quoted in F.A. HAYEK, *supra* note 29, at 168). For an interesting appeal for official discretion, see Kearns, *On De-Moralizing Due Process*, in *DUE PROCESS* 229, 240 (J. Pennock & J. Chapman eds. 1977).

Remedies here considered for unenforceable terms minimize these concerns. The governmental institution involved is the court system; common law rather than administrative law is the implement. Enforcement is left to the initiative of the offeree. The judicial apparatus and enforcement mechanisms are called for, but these institutions have been relatively free of corruption in recent times. At least they do not seem to be any more corrupt than the private individuals and institutions that would be regulated by the intervention.¹¹⁹ Nor is there reason for alarm about the self-aggrandizing growth of these public institutions in carrying out this function.¹²⁰ If anything, the judiciary seems to desire less power.¹²¹

Worries have been expressed regarding the judicial system where the courts exercise broad discretionary powers, as in constitutional decision-making.¹²² And "discretion" is needed here. Not in choosing ends, nor means to ends, or, in modern terms, policies or principles, but rather in discerning the facts and applying the law to them. The factfinder, for example, must decide whether the contract term was knowingly unenforceable and the decision will be influenced, no doubt, by improper factors which include the personal characteristics of the parties. The question of punitive damages may be raised, and that also will be subject to improper influences on factfinding "discretion." The discretion at hand, nevertheless, is limited by the "mete-wand of the law" and involves no more open-endedness than is necessarily part of many other questions of fact

119. Is this damning with faint praise? On the other hand, depending upon the relative interests, a slightly corrupt institution controlling a very corrupt one may lead to an increase rather than a reduction in the overall corruption.

120. The complaints, other than in constitutional decision-making, have been leveled at areas such as school integration and statutory civil rights where the courts are left with (have assumed) much discretion as to proper means to given ends. Here the means as well as ends are pretty much given.

121. The desire is ambiguous; it may be for less work, not less power. For more on this contention, see generally C. WRIGHT, *THE LAW OF FEDERAL COURTS* 7 (4th ed. 1983); Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983); *Four Supreme Court Justices Speak Out*, 70 A.B.A. J. 40 (Sept. 1984); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Feinberg, *Constraining "The Least Dangerous Branch": The Tradition of Attacks on Judicial Power*, 59 N.Y.U. L. REV. 252 (1984); Handberg & Hill, *Judicial Activism and Restraint on the United States Supreme Court: A Political-Behavioral Analysis*, 20 CAL. W.L. REV. 173 (1984). The same may not be said for the public institutions that enforce judicial rulings, such as the marshal's office.

122. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (discussing counter-majoritarian tendencies of Supreme Court); J. ELY, *supra* note 18 (proposing third theory of judicial review to accommodate assumptions of original intent theory and opposing theory that judiciary has broad powers to define society's substantive values).

and law.¹²³ Still, these social costs are not to be written off completely.

6. Uncertainty Costs

Irrespective of how narrowly circumscribed is the judicial discretion, as noted above there still remain questions of fact and law that are not quickly resolved. To the extent they are complicated and otherwise uncertain, they will cause inaccuracies in predicting beforehand the courtroom outcome. This is costly.¹²⁴ Nuisance suits are facilitated. Defensive activities occur. Questions of fairness aside, the consequence, according to one line of analysis, is that offerors will be deterred from legitimate practices near the margin. Generally, uncertainty creates inefficiency.¹²⁵ Remedies for the practice may then be disadvantageous from a utilitarian perspective.¹²⁶

123. Hayek, certainly no welfare state interventionist, asserts that intervention is particularly appropriate to prevent deceit. F.A. HAYEK, *supra* note 29, at 143-44. See quote at note 29, *supra*. But Hayek may go too far in defending government intervention. "A more extreme view still, attributable to Hayek, is that legal rules do not restrict freedom, since freedom consists in the absence of *arbitrary* coercion. This is gilding the capitalist lily." Miller, *Constraints on Freedom*, 94 ETHICS 66, 66 n.1 (1983) (emphasis in original) (citing Gray, *Hayek on Liberty, Rights, and Justice*, 92 ETHICS 73 (1981)). On the other hand, one must not go too far in the opposite direction:

The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best a great deal must be trusted to the discretion of those who administer it.

Sharpless v. Mayor of Philadelphia, 21 Pa. Stat. 147, 161-62 (1853) (quoted in Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 352 n.416 (1973)):

124. For the proposition that certainty is a most important feature of a legal system, see F.A. HAYEK, *supra* note 29, at 208-09; cf. McCormick, *supra* note 23, at 16 (need for law to provide some guarantee of trustworthiness in commercial dealings). Furthermore, "[m]any authors from Leibniz onwards have observed that the formal requirements of unambiguous and constant laws are in many respects more important than the need for just laws, because if you can predict the decisions of the court you can take precautionary measures that will protect you from unjust laws." J. ELSTER, *supra* note 70, at 93 (footnote omitted).

125. For discussions of how uncertainty may create inefficiency, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 424-25 (2d. ed. 1977); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 262-71 (1974); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 45-57 (1982); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 402-06 (1973).

126. Kennedy and Michelman argue that it is an empirical question whether insecurity and uncertainty undermine the incentives to produce goods. The mental experiments forwarded by most economists are not sufficient proof. Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 759-62 (1980).

Some of the uncertainty is transitional. Once the new doctrine is refined by a series of cases, parties are able to narrow the range of unpredictability. The offeror will know what practices are unacceptable and thereby be able to reduce the risk of nuisance suits and expenditures for defensive tactics. Should the offeror still choose to include unenforceable terms (without disclaimer), he will be in a position to predict better the potential judgments against him.

By way of summary of these ethical, economic and sociological considerations, it seems that the case for relief from knowingly included unenforceable terms is far from beyond debate. My own perception (prejudice?) is, nevertheless, that the pros amply outweigh the cons.¹²⁷ If this is correct, it is natural to ask why the common law has failed to develop a general remedy. If you believe this is not correct, I will ask anyway.

II. REMEDY

There is a peculiar twist to our problem that comes into sharp focus when contemplating a remedy for the offeree. The paradigm case is one in which the offeree obtains, as a consequence of the misleading term, rights of greater value than he, from one viewpoint, had reason to expect. A reading of the term would lead him to believe that certain rights were contracted away when it turns out that they were not. He received more than he bargained for. What are the damages and, with or without them, what is the relief? This peculiarity calls for a close look at damages. A few of the more promising common law forms of action, deceit and prima facie tort, will then be examined.

A. Damages

1. Damages in Contract

The unenforceable term is part of a contract (or lease). The discussion must begin with contract damages. In going back to basics, it is noted that the purpose of contract remedies is mainly to protect three interests of the promisee: the expectation, reliance, and resti-

127. In discussing private choices, Nozick observes that "[t]he reasons do not come with previously given precisely specified weights; the decision process is not one of discovering such precise weights but of assigning them. The process not only weighs reasons, it (also) weights them. At least, so it sometimes feels." R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 294 (1981) (footnote omitted). "I think that the whole issue of objectivity [in legal or moral opinions] . . . is a kind of fake. We should stick to our knitting. We should account to ourselves for our own convictions as best we can, standing ready to abandon those that do not survive reflective inspection." R. DWORKIN, *On Interpretation and Objectivity*, in *A MATTER OF PRINCIPLE*, *supra* note 30, at 167, 172.

tution interests.¹²⁸ From this is seen the primarily utilitarian, rather than deontological, orientation of contract law. Although nominal damages are sometimes granted in the name of vindicating principle,¹²⁹ actual damages give rise more regularly to relief. Society is reluctant to subsidize the costs of litigation for the assertion of principle alone.

The expectation of the promisee is satisfied by giving him the "benefit of the bargain." Here he received more than he bargained for in the form of unexpected rights.¹³⁰ There are no dashed expectations.¹³¹

The reliance of the promisee is protected when he changes his position by, say, commitments in anticipation of performing the contract. It is conceivable that for a particular unenforceable term the promisee would incur expenses for his promised performance not necessary in light of the unenforceability. But much more often the term becomes relevant when the promisee fails to perform or wishes to modify his performance.¹³² There usually is no relevant reliance.

Nor, finally, is the promisee's restitution interest likely to be affected. The typical term will not cause the promisor to be unjustly enriched in the usual manner.¹³³ There is, however, a subtle argu-

128. See generally RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979) (three interests protected by contract remedies); E.A. FARNSWORTH, *supra* note 92, §§ 2.1, 12.1 (general purposes of contract remedies); Fuller & Perdue, *The Reliance Interest in Contract Damages* (Parts 1 & 2), 46 YALE L.J. 52, 373 (1936, 1937) (analysis of purposes pursued in awarding contract damages).

129. See RESTATEMENT (SECOND) OF CONTRACTS § 346 (1979); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 191-94 (1973).

130. An intriguing question is raised by the fact that the benefit-of-bargain damages are negative, that is, the offeree receives more than he bargained for. Is it fair to allow the offeror credit for the benefit unexpected by the offeree? Recall that the offeror, as a rational economic person, would calculate the savings from inserting the unenforceable term and perhaps pass along some of it to the offeree in order to make the contract appear as a more attractive package. For further discussion, see *supra* note 57. One viscerally balks at the idea that the offeror can institute a suit against the offeree in, say, quasicontract, to recover the benefit conferred. There are theoretical problems with this legal theory anyway. It is less clear whether the offeror ought to be able to use the benefit conferred as an offset in a suit brought by the offeree. The principle of "clean hands" and, perhaps, the policies of deterrence argue "no."

131. Other than, that is, the expectation that there are no unenforceable terms. See S. Bok, *supra* note 23, at 87 ("How much truthfulness were they expecting?"); see also *id.* at 130-32 (expected deception in certain bargaining situations).

132. Such as for an unenforceable *cognovit* provision or prohibition against assigning (or subletting). The point of when the typical unenforceable term is operable is impressionistic. A counterexample is where a landlord with a nonwaivable duty to repair inserts a lease term transferring this duty to the tenant. Then the tenant's repair expenditures are pursuant to his promised (but unenforceable) performance.

133. *But see* the counterexample in the note immediately above.

ment for quasicontractual relief. The offeree, despite the appearance that he was enriched by getting more than he had reason to expect, actually enriched the offeror. This expectation of enrichment was the inducement to the offeror for including the unenforceable term; it is the value of the offeree's foregone right as anticipated and calculated at the time of contracting.¹³⁴ This may be too attenuated to receive judicial recognition.¹³⁵

Even if the interests protected by contract law did bear on the particular unenforceable term under the circumstances, they are not in issue unless the offeror breaches the contract. The problem of concern arises irrespective of the offeror's breaches. More often it will be the offeree who breaches or anticipates breaching the contract.¹³⁶ Contract remedies are not the general answer.

One contract remedy not mentioned above may aid on occasion—rescission.¹³⁷ If, for example, the offeree would have sought or obtained a release from the contract but for reliance upon the unen-

134. See *supra* text accompanying note 57.

135. Moreover, "[i]f the cheat can anticipate that the worst that can happen is that he shall be called upon to pay back his profit upon the trade, he may be encouraged to defraud." McCormick, *Damages in Actions for Fraud and Deceit*, 28 ILL. L. REV. 1050, 1055 (1933). McCormick then points out that punitive damages may furnish an adequate deterrent. *Id.* For discussion of this extraordinary remedy, see "Extraordinary Damages" at 892-95 of text.

136. There is an approach to the problem that may result in the offeror being found in breach of contract for inserting a knowingly unenforceable term. The court may find appurtenant to the inserted term, an implied term in the form of a warranty that the implicit assertion of law is accurately stated. A misstatement of law would then be a contractual breach of the warranty irrespective of the offeror's state of knowledge regarding the enforceability. Indeed, in providing relief for the nondisclosure of material facts, modern courts, to overcome precedential and remedial hurdles, are likely to take the tack of finding an implied contract term rather than resorting to a tort duty of disclosure. See P.S. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 218-20 (3d ed. 1981). I pursue no further this tack of finding an implied term because it is my hunch that courts will not resort to it here. Whereas the incipient duty of disclosure of material facts is a recent judicial innovation that must overcome much precedent against the recognition of affirmative duties, *i.e.*, liability for nonfeasance, the (implicit) misrepresentation of a knowingly unenforceable term is closely akin to the historical action of deceit based upon the common implementation of a negative duty (not to deceive), *i.e.*, liability for misfeasance. Furthermore, in our context the tort remedies for misrepresentation seem generally to be as flexible as the contract remedies for breach of warranty. Thus the incentives for courts to innovate by finding an implied warranty are less. Deceit and, perhaps, *prima facie* tort will do. See *infra* note 252. If, however, a court does find a breach of an implied warranty, some of the damages discussed below in the section on Damages in Tort may be applicable, for example, contract damages for attorneys' fees and for mitigation.

137. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 359 comment c (1979) (availability of equitable relief may be considered when choosing remedy best suited to circumstances of case); D. DOBBS, *supra* note 129, at 254-56 (rescission as restitutionary remedy).

forceable term, rescission may be fitting relief along with, perhaps, damages.¹³⁸ When the offeree who relies agrees to a disadvantageous settlement, rescission of the settlement agreement as well as the original one may be appropriate. Rescission alone is better than nothing.¹³⁹

2. Damages in Tort

Tort damages may provide the answer that contract damages typically cannot.¹⁴⁰ Their purpose is: "(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help."¹⁴¹ At least three of these four are relevant. This holds partially because the purpose appears to include deontological considerations independent of the particular consequential tradeoffs.¹⁴² Thus the fact that actual damages may be difficult to find may not be a hindrance to a cause of action. The following examination of the tort doctrines re-

138. See D. DOBBS, *supra* note 129, §§ 12.1, 12.17. That punitive damages have been attached to rescission, see J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 19.17 (1981). The issue of damages from foregone opportunities is discussed *infra* at notes 150-55 and accompanying text.

139. Though there is rescission and there is rescission. The former one is of little use: Once unconscionability has been shown, courts may refuse to enforce not only the objectionable clause, but the entire agreement as well. The prevalent response however, has been to refuse enforcement of only the offensive clause; thus, the landlord loses nothing by the inclusion of an objectionable clause. Consequently, this use of the doctrine affords little preventative aid for an unwary tenant and limits relief to an after-the-fact lawsuit applicable only to the parties before the court.

Note, *Unconscionability: A New Helping Hand to Residential Tenants*, 1979 WASH. U.L.Q. 993, 1027 (footnotes omitted).

140. It will be noticed in this section on tort damages that most of the damages would not exist but for the contract or lease term in question. That the right at stake is created by a contract does not mean that interference with the right can give rise only to contractual damages. Torts also can be based upon the invasion of or interference with contractual rights and relationships. See D. DOBBS, *supra* note 129, § 6.4; W. PROSSER & W. KEETON, *supra* note 92, §§ 92, 129.

141. RESTATEMENT (SECOND) OF TORTS § 901 (1965).

142. The punishment of wrongdoers and the vindication of parties may be justified in deontological terms alone. See, e.g., I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 24, at xviii-xxii, 51-72, 99-108. The determination of rights may also be justified on grounds independent of particular consequences, cf. discussion *supra* at notes 25-26. The same can be said regarding compensation for harms. See, e.g., R.A. EPSTEIN, A THEORY OF STRICT LIABILITY (1980) (argument for compensation not based on consequentialism). See generally Coleman, *Moral Theories of Torts: Their Scope and Limits* (pts. 1 & 2), 1 LAW & PHIL. 371 (1982) (law of torts cannot be understood under any one principle of morality), 2 LAW & PHIL. 5 (1983) (tort law as not rooted entirely in principles of corrective justice).

lated to our problem shows that this appearance turns out to be somewhat misleading.

Compensatory damages are general or special. " 'General damages' are compensatory damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved. 'Special damages' are compensatory damages for a harm other than one for which general damages are given."¹⁴³ It is not obvious whether the damages suffered by the offeree are general or special. The reaction of the offeree often expected (hoped for) by the offeror is that upon a dispute the offeree will read the unenforceable term and then quietly capitulate without challenge, or if with challenge, that a beneficial settlement may follow. That there is a harm "is normally to be anticipated" but I suspect that the nature of the harm is so variable as not to fall within the ordinary range of general damages. The harm is not as obvious or usual as the general damages for, say, defamation or battery. This issue, moreover, is a pleading and evidentiary problem that need detain us no longer. I will treat the types of injuries in broad terms without regard to whether they elicit general or special damages.

Attorneys' fees are a form of damages that can often be expected. The offeree who suspects he is foregoing or has foregone rights in reliance upon an unenforceable term will, perhaps, seek legal advice. Or he might be dissatisfied with the direction of negotiations over a dispute with the offeror and, without suspecting the improper term, seek advice. This fee expenditure incurred before litigation may be recoverable.¹⁴⁴ Though the general rule is that attorneys' fees are recoverable only if there is express statutory or contractual authorization,¹⁴⁵ if the dispute has gone beyond the debate stage and a legal proceeding has been instituted by the offeror, then the costs of defending this action based upon an unenforceable term may be recoverable. The offeror may have acted upon an improper

143. RESTATEMENT (SECOND) OF TORTS § 904 (1965).

144. The prelitigation conduct that traditionally has given rise to an award of attorneys' fees is obstinacy in the face of a clearly valid claim. When the defendant resists the plaintiff's clearly established right without justification for doing so, his obstinacy gives the plaintiff no choice but to seek judicial assistance in enforcing his right. In such cases, shifting fees 'recognizes the unfairness of imposing the costs of litigation on the party who should have freely enjoyed his rights.'

Mallor, *supra* note 107, at 632 (footnotes omitted) (quoting Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 661 (1974)).

145. See D. DOBBS, *supra* note 129, at 194-200.

cognovit provision, for example, or a purported contractual right to a lien, in which cases the offeree can argue that the legal fees necessary to respond to these acts are compensable as a punitive measure.¹⁴⁶ If instead the scenario results in the institution of litigation by the offeree, there is authority for the recovery of legal fees.¹⁴⁷ Compensation for legal fees is considered by some courts to be an element of punitive damages, should they be appropriate.¹⁴⁸

Another possible basis for tort damages is the costs of opportunities foregone in reliance upon the term. An improper nonassignment or nonsublet clause is illustrative.¹⁴⁹ The offeree who considers assigning or subletting may be deterred upon reading the clause denying the right. Whatever advantage is lost to the offeree by not pursuing the transfer is a harm to him.¹⁵⁰ The opportunity foregone may, on the other hand, arise from decreased bargaining leverage with the offeror. The offeree, for example, in attempting to resolve a dispute with the offeror, or to seek a release from his con-

146. "Deterrence of frivolous litigation, compensation of litigants who have been wrongfully subjected to litigation, and punishment of abusive litigation practices can be accomplished through the principled use of the punitive exceptions to the American rule [which generally denies reimbursement of attorneys' fees]." Mallor, *supra* note 107, at 619. Reimbursement may be particularly useful socially when the party is acting as a private attorney general. *See id.* at 622; *see also* J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 54.78[3] (2d ed. 1985) ("in suits against private parties to vindicate important public rights, the court could award attorney's fees against the losing defendant, the plaintiff being viewed as a 'private attorney general' who should be reimbursed for his expenses"); Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 *LAW & CONTEMP. PROBS.* 187, 190-91 (1984) (fee shifting as deterrent to frivolous suits, punishment for actually bringing such suits, or method of increasing judicial efficacy). For the view that the assessment of attorneys' fees to deter frivolous lawsuits is a good idea, see the comments of the former Chief Justice in Burger, *The State of Justice*, 70 *A.B.A. J.* 62, 65 (April 1984).

147. *See* Mallor, *supra* note 107, at 632-35; Zemans, *supra* note 146, at 191 (for dilatory actions).

148. *See* D. DOBBS, *supra* note 129, at 197; J. GHIARDI & J. KIRCHER, *supra* note 138, § 2.11; K. REDDEN, *PUNITIVE DAMAGES* § 3.5(B) (1980); *see also* "Extraordinary Damages" at 892-95 of text.

149. Perhaps the clause gave the offeror an absolute right of refusal when the law disallows refusals unreasonably withheld. *See, e.g.*, *N.Y. REAL PROP. LAW* § 226-b (McKinney 1986).

150. Proving the form of lost opportunity is often an insuperable problem for the offeree. If the offeree merely contemplated an action contrary to the unenforceable term, objective proof may not be forthcoming. In the words of one court: "We think, therefore, that this case falls within the policy of our consistent refusal to allow damages for fraud based on the loss of a contractual bargain, the extent, and, indeed, in this case, the very existence of which is completely undeterminable and speculative." *Dress Shirt Sales Inc. v. Hotel Martinique Assocs.*, 12 *N.Y.2d* 339, 344, 190 *N.E.2d* 10, 12-13, 239 *N.Y.S.2d* 660, 664 (1963).

tractual duties, may enter into a settlement contract at objectively disadvantageous terms.¹⁵¹

There is authority for the recovery of damages for injuries in the form of opportunity costs that result from the loss of time or interference with the business, work, trade, or profession of the injured party.¹⁵² Conceivably the offeree's mental distress is compensable.¹⁵³ The loss of the use of property is also a cognizable harm. An unenforceable self-help provision, for example, may trigger this. "If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and (b) harm to the subject matter or other harm of which the detention is the legal cause."¹⁵⁴

The most common form of damages may result from a general duty to mitigate damages. Once learning of the improper assertion of rights by the offeror, the offeree with a cause of action will typically have the duty to mitigate damages.¹⁵⁵ The expenses incurred are recoverable.¹⁵⁶ But the problem here for the offeree is to find something to grab other than this boot-strapping loop. The duty to mitigate arises if there is a cause of action, but because most relevant causes of action require there to be actual damages,¹⁵⁷ the offeree must first find a compensable injury other than those stemming from the duty to mitigate.

151. See discussion at notes 137-39, *supra*. The problem is evidence and the speculative nature of this injury.

152. See, e.g., *Conder v. Rowley*, 109 Ind. App. 268, 272, 34 N.E.2d 162, 164 (1941) (court noted that in negligence cases, "the rule is well settled" that where injury results in loss of time or interference with business, work, trade or profession of injured party, resulting damages may be recovered as special damages).

153. It is fair to include emotional distress as an element of damages in an ordinary consumer contract claim, because the ordinary seller of products or services to consumers knows that freedom from emotional distress, including substantial inconvenience, is a major element in what he is selling. It is an important part of the bargain-and-sale which he makes with the consumer.

Slawson, *supra* note 4, at 38. Fairness notwithstanding, progress on this front has been slow. See W. PROSSER & W. KEETON, *supra* note 92, § 12. Adjectives such as "outrageous," "severe" or "extreme" usually appear in successful actions. See *id.*; RESTATEMENT (SECOND) OF TORTS § 46 (1965).

154. RESTATEMENT (SECOND) OF TORTS § 931 (1965).

155. In tort law this doctrine is known as the rule of "avoidable consequences." See W. PROSSER & W. KEETON, *supra* note 92, at 458-59. The doctrine of mitigation of damages holds in contract law as well. See RESTATEMENT (SECOND) OF CONTRACTS § 350 (1979).

156. See D. DOBBS, *supra* note 129, § 3.7.

157. See *infra* text accompanying notes 219, 231.

This discussion of possible compensatory damages is not meant to be exhaustive. Nor need it be exhaustive to show that no applicable, broad theory of ordinary damages is apparent. The particular circumstances ultimately control. Because of the unusual nature of the problem, creative lawyering at uncovering damages will be especially useful.¹⁵⁸

3. Extraordinary Damages

None of the damage recoveries discussed above will cope adequately with the general problem of unenforceable terms because, even if there is a recognizable injury, its extent, in the absence of unusual circumstances, is probably insufficient to warrant a suit by the offeree in light of the high costs of judicial proceedings and typical inadequacy of damage recoveries. From the point of view of the offeror, the practice is rather safe. The likelihood and the magnitude of the ordinary sanctions are often too slight to deter.¹⁵⁹

Both of these intertwined consequences—the lack of incentive by the offeree and the lack of deterrence of the offeror—would be overcome if punitive, or exemplary, damages were commonly available.¹⁶⁰ This remedy is the crux of a general solution.

The extraordinary nature of punitive damages is evident from their doctrinal limitations. They do not provide an independent ground for recovery but must attach to an underlying cause of action. A contract action will not suffice; a tort action will.¹⁶¹ Nominal

158. The courts may be inclined to help: "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights." *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 265-66 (1946). See also *Samuels*, *supra* note 123, at 283 n.86 (social effects change perception of injury). But here again the offeree must avoid the bootstrap. If there is no right without a (previously recognized?) compensable injury, there is no invasion that can be proved. The court must unravel the problem carefully. This way may not do it: "The offeror committed a wrong giving rise to (not, "because there is") a right in the offeree. Whatever harm arose from this wrong is compensable." The circle is hard to avoid. Loose reasoning, however, does not keep a court from arriving at its conclusion. For legal rules, like ideas, "should be judged by their descendants, not by their ancestors." J. ELSTER, *supra* note 70, at 4.

159. See *Slawson*, *supra* note 4, at 6; Note, *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 *Nw. U.L. REV.* 413, 416-17 (1972).

160. See *Slawson*, *supra* note 4, at 42. The assessment of punitive damages aimed at deterrence must be at a level high enough to make it clear to the rational defendant that the occasional recovery will offset any gains from the illicit practice for which actions are not brought.

161. See *RESTATEMENT (SECOND) OF CONTRACTS* § 355 (1979); *RESTATEMENT (SECOND) OF TORTS* § 908 comment c (1965); W. PROSSER & W. KEETON, *supra* note 92, at 9-11. But see D. DOBBS, *supra* note 129, § 3.9, at 207. See generally J. GHIARDI & J. KIRCHER,

damages, it is said by some, will not support them.¹⁶² Their purpose is primarily to punish, an aspect of which is to deter socially unacceptable acts.¹⁶³ "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."¹⁶⁴

Some doctrinal restrictions on punitive damages stem from the fear of judges that passion will distort the jury's judgment.¹⁶⁵ Evidence of this is the rule, arguably indefensible in principle, that extraordinary damages must bear a fixed or reasonable relationship to actual damages.¹⁶⁶

supra note 138, §§ 5.16-19 (discusses when, generally, punitive damages are available in tort and contract actions); K. REDDEN, *supra* note 148, §§ 4.2-3 (same).

162. See RESTATEMENT (SECOND) OF TORTS § 908 comment f (1965); D. DOBBS, *supra* note 129, § 3.9, at 208-10. Although this assertion is often made by primary authorities, only two jurisdictions have been found to have firm holdings in support. See D. DOBBS, *supra*, § 3.9, at 209; J. GHIARDI & J. KIRCHER, *supra* note 138, at § 5.37.

McCormick believed that nominal damages ought to be sufficient, the requirement of actual damages being perhaps a blurring of the doctrine that there must be an underlying cause of action with the fact that most causes of action themselves require pecuniary damage or bodily harm. See McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L. REV. 129, 149-50 (1929).

163. Atiyah even suggests that, "[i]n effect, the avoidance of liability on a fraudulently induced contract is [in itself] a penal process." P.S. ATIYAH, *supra* note 38, at 24.

Exemplary damages are more likely to serve their desired purpose of deterring similar conduct in a fraud case . . . than in any other area of tort. . . . An occasional award of compensatory damages . . . would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961).

164. RESTATEMENT (SECOND) OF TORTS § 908(2) (1965); see also C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79, at 280-82 (1935) ("defendant's conduct must have been willful or wanton"); W. PROSSER & W. KEETON, *supra* note 92, at 9-10 (discussing punitive damages).

165. See D. DOBBS, *supra* note 129, at 211; K. REDDEN, *supra* note 148, § 3.6.

166. See RESTATEMENT (SECOND) OF TORTS § 908 comment f (1965); J. GHIARDI & J. KIRCHER, *supra* note 138, §§ 5.39; K. REDDEN, *supra* note 148, § 3.6C. There seems to be in principle no reason to relate directly punitive damages to the measure of actual damages. The purposes of the two forms of damages are different; they are measured from varying perspectives. Actual damages are plaintiff-regarding. They are to compensate the plaintiff for injuries he has suffered. Punitive damages, insofar as they are for deterrence, are defendant-regarding. They are to be set at a level which would admonish a rational person at the time of his contemplated act that it will not pay. There is no necessarily direct, one-to-one correlation between these two perspectives.

The knowing inclusion of unenforceable terms seems to demonstrate the offeror's "reckless indifference to the rights of others."¹⁶⁷ There is no evil motive or malice in the sense of a desire by the offeror spitefully to injure the offeree without the thought of reaping personal gain; instead, the offeror disregards rights to make a profit.¹⁶⁸ This is enough.¹⁶⁹

One controversial facet of punitive damages is whether they may properly be granted for vicarious liability.¹⁷⁰ The American Law Institute takes the position that a defendant is not insulated from liability simply because the conduct was that of an agent.¹⁷¹ This principle bears on our problem. For one, the offeror may be a corporation that acts only through agents. For two, the form agree-

167. The question remains whether the offeree has a general right to be free of unenforceable terms knowingly inserted. This is discussed in the next section.

Owen, while discussing the nature of civilly punishable misconduct, stated:

As in much of tort law, the proscribed behavior that will support a punitive award involves at bottom an abuse of power, particularly one which is extreme. . . . The abuse of power in many cases . . . involves the abuse of information vital to the plaintiff—the deliberate misstatement of information, the failure to convey the information to the plaintiff, the defendant's failure to act properly upon it, or in some cases the defendant's failure to acquire it. Whether the cases are considered in terms of information costs, cost avoidance, fairness, or efficiency, the law does have some appropriate role to play—quite possibly more than simply assigning compensatory damages responsibility, yet sometimes less than imposing criminal responsibility

Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 104-05 (1982).

168. See *supra* note 90.

169. See D. DOBBS, *supra* note 129, at 204-08; J. GHIARDI & J. KIRCHER, *supra* note 138, § 19.19; K. REDDEN, *supra* note 148, §§ 3.1-.2. That disinterested malice may be required for the action of prima facie tort, see *infra* note 248.

170. For glimpses of the controversy, see, e.g., DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 12-13 (1969); J. GHIARDI & J. KIRCHER, *supra* note 138, §§ 5.05-.14; K. REDDEN, *supra* note 148, § 2.4(B); Ellis, *supra* note 125, at 63-71.

171. In their words:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

This section is duplicated in two restatements: RESTATEMENT (SECOND) OF TORTS § 909 (1965); RESTATEMENT (SECOND) OF AGENCY § 217C (1958). It appears that this test (the "complicity rule") for vicarious liability is recognized by, depending upon who counts, a slight majority of jurisdictions, J. GHIARDI & J. KIRCHER, *supra* note 138, § 5.06, or half of them, ELLIS, *supra* note 125, at 63. The other half grant vicarious liability more expansively whenever the agent's act is in the course of employment. *Id.*

ment may be prepared by an attorney serving as an agent of the offeror whether or not the offeror is a corporation.¹⁷² The form agreement may also be prepared by an attorney acting on behalf of a trade association or retail publisher of legal documents.¹⁷³ The trade association or publisher are not usually agents of the offeror who uses the form; instead, they are independent contractors. The publisher, trade association or their attorneys may be directly liable to the offeree for an underlying cause of action, but the independent status precludes vicarious liability of the offeror unless he satisfies the requisites for punitive damages by ratification or approval of the term. If a cause of action does lie against these independent contractors, they, as any other tortfeasors, are subject to liability for punitive damages.

To summarize, there are several stumbling blocks to the use of punitive damages as a deterrent of unenforceable terms. Perhaps the most formidable one is that there must be an underlying cause of action. This element can be put off no longer.

B. Causes of Action

Throughout the discussion thus far, the action of the offeror has been characterized by terms such as "misleading" and "deceptive."¹⁷⁴ Immediately raised by this labeling is the prospect of relief by the common law action of deceit. Indeed it is available on occasion. In other, probably most, instances, the consequences of the term do not wholly satisfy the elements of deceit. This section will point to the trouble spots, a main one being the nature of the injury or harm.

The second most apparent common law cause of action is *prima facie* tort. It also is considered at length. A few other potential theories of recovery are mentioned briefly. All of the mentioned remedies for our problem fit roughly. Some of the rough edges are being rubbed off by judicial developments. Increasingly, if not extensively,

172. See RESTATEMENT (SECOND) OF AGENCY § 1 comment e (1958). I ignore the next level of complexity: the attorney may be an agent of an incorporated law firm.

173. In New York, for example, standard legal (Blumberg) forms are ubiquitous.

174. Two commentators find there to be eight basic ways in which a person may deceive another. See Chisholm & Feehan, *The Intent to Deceive*, 74 J. PHIL. 143, 143-45 (1977). Our problem may verge upon "lying": "What distinguishes lying as such from the other types of intended deception is the fact that, in telling the lie, the liar 'gives an indication that he is expressing his own opinion.' And he does this in a special way—by getting his victim to place his faith in him." *Id.* at 149; see Linehan, *Ignorance, Self-Deception and Moral Accountability*, 16 J. VALUE INQUIRY 101, 103 (1982). Lying is "thought to be worse, other things being equal, than other types of intended deception." Chisholm & Feehan, *supra*, at 153 (emphasis in original).

relief may become available. The peculiarities of each case are determinative. There is little indication, however, that any of the traditional forms of action are verging on modifications sufficient to meet the general problem.

1. Deceit

The traditional definition of the action of deceit is: a fraudulent or deceptive misrepresentation of fact made with an intent to deceive or mislead another, with that other acting in reliance upon the misrepresentation to his detriment.¹⁷⁵ Courts and scholars, particularly those of the American Law Institute, have progressed beyond this timeworn concept of deceit that first emerged as an independent tort in the late eighteenth century.¹⁷⁶ The direction of this progression leads towards a solution of our problem.¹⁷⁷

The elements of the action of deceit as characterized by the separate titles of the Restatement (Second) of Torts are: fraudulent character of misrepresentation; expectation of influencing conduct; justifiable reliance; causation; and damages for fraudulent misrepresentation.¹⁷⁸

a. Fraudulent Character of Misrepresentation

The inclusion of a term in a contract is a representation. Although it is not a direct, explicit statement as to the belief or knowledge of the offeror in the enforceability of the provision, it "amounts to an assertion not in accordance with the truth."¹⁷⁹ At least it implies the

175. See W. PROSSER & W. KEETON, *supra* note 92, § 105. The RESTATEMENT (SECOND) OF TORTS § 525 (1965) expresses the general rule:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

176. "[D]eceit at first had the peculiar narrow signification of cozening a court in some way and was really one of the forms of abusing legal procedure. It developed through the law of sale in particular and the law of contract in general, but did not appear as an independent tort until 1789 in *Pasley v. Freeman*," 100 Eng. Rep. 450 (1789). Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1, 6 (1927) (footnotes omitted). The penal aspect of liability of deceit, noted by P.S. ATIYAH, *supra* note 38, at 24, is supported by Blackstone: "[A]ny deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise . . . is punishable with fine, imprisonment, and pillory." 4 W. BLACKSTONE, Commentaries *158 (footnote omitted).

177. Cf. RESTATEMENT (SECOND) OF TORTS § 551 comment 1 (1965).

178. RESTATEMENT (SECOND) OF TORTS ch. 22 (1965).

179. RESTATEMENT (SECOND) OF TORTS § 525 comment b (1965). Even if the term is held not to be a representation, the law of deceit may require the offeror to disclose the unenforceability of the term.

offeror's "judgment as to the legal consequences that would be attached to the particular state of facts if the question were litigated."¹⁸⁰

The representation typically is, *ex hypothesis*, fraudulent. The offeror knows the term is unenforceable and desires to take advantage of the offeree's ignorance.¹⁸¹ The offeror, on the other hand, may be uncertain or have no basis for knowing of the term's legal status. Under the modern tests, this lack of certainty will not preclude liability.¹⁸² The economic arguments support this.¹⁸³ The evidentiary hurdles do too. Otherwise the offeror can place before the offeree the oftentimes insuperable burden of proving the offeror's actual knowledge.

The offeror who is an attorney, or who is represented by an attorney, cannot normally argue that he was ignorant of the law. The offeror is liable if the attorney is an employee under the doctrine of *respondeat superior*, or, if not an employee, the offeror ratifies or approves the term.¹⁸⁴ Should the attorney fail to inform his client of the unenforceability of the term, in a suit against the offeror the attorney may ultimately be liable.¹⁸⁵ The offeree may be able to sue the attorney directly for deceit or other torts whether he is an

One of the oldest and most prevalent methods of regulating consumer transactions has been to require the seller to disclose to his consumer buyer various types of information about their contractual transaction. . . . The common law of misrepresentation and public law concerning deceptive advertising, although usually concerned with preventing the dissemination of misleading information, at times have been interpreted to require the disclosure of contractual information.

Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 400-01 (footnotes omitted). Under federal regulations, "the law of deception has now developed to the point of virtually eliminating any line between advertisements which are deceptive and advertisements which simply fail to inform." Beales, Craswell & Salop, *supra* note 59, at 495. For various definitions of deceptive advertisements, see *id.* at 496-501.

180. RESTATEMENT (SECOND) OF TORTS § 525 comment d (1965).

181. In an early attack on the doctrine of *caveat emptor* newly recognized by the United States Supreme Court, Verplanck claimed "it should be fraudulent to withhold 'any fact . . . necessarily and materially affecting the common estimate which fixes the present market value of the thing sold.'" Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 948 (1974) (quoting G. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS 125-26 (1825)). His view was shouted down.

182. See RESTATEMENT (SECOND) OF TORTS § 526 (1965).

183. It will be recalled that the strongest point is that the usual offeror can gain this information on enforceability relatively more cheaply than the offeree and spread the costs of obtaining it among many transactions. See *supra* text accompanying notes 53-55.

184. See *infra* note 191.

185. See RESTATEMENT (SECOND) OF AGENCY § 379 (1958). But "an attorney is not necessarily subject to liability for an error of law . . . which, in view of the state of the science, it is not unreasonable for him to make." *Id.* comment c.

agent,¹⁸⁶ or an independent contractor.¹⁸⁷ The attorney's liability, direct or indirect, is not unfairly burdensome. Already he or she is held to high standards in advising clients of the law;¹⁸⁸ the legal "advice" to the client's adversary requires no additional knowledge by the attorney. It is simply a matter of expressing that knowledge nonfraudulently.¹⁸⁹

186. See, e.g., RESTATEMENT (SECOND) OF AGENCY §§ 343, 344, 348, 350, 360 (1958) (discussing liability of agent for torts such as fraud and negligence).

187. Notice, for example, that the general rule for deceit of the RESTATEMENT (SECOND) OF TORTS § 525 (1965) makes no reference to the need for the misrepresenter to be a party to the victim's act in reliance. See *supra* note 175. Similarly, the general rule for prima facie tort of the RESTATEMENT (SECOND) OF TORTS § 870 (1965) is open with respect to the relationship of the plaintiff and defendant. See *infra* note 226.

188. But, in England at least, not to the highest standards. Atiyah observes that misrepresentations are often enforced strictly, irrespective of the fault of the misrepresenter. In other circumstances, particularly involving professional services such as legal advice, negligence is required. Commenting on the distinctions, "not always easy to understand," Atiyah surmises that "[t]hey are probably due in part to a reluctance to impose liability on professional men in the absence of fault because of the great importance of reputation to the professions. But there is perhaps also the feeling that a professional client is more likely to appreciate that he is buying advice which may be right or may be wrong." P.S. ATIYAH, *supra* note 136, at 189. Does the client's offeree have the same appreciation?

189. The duty of care of the attorney to a client's adversary is well established. Although the primary responsibility is to the client and only secondarily to the adversary, still the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1979) states: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." More specifically,

In his representation of a client, a lawyer shall not: . . . (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. . . . (5) Knowingly make a false statement of law or fact. . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Id. DR 7-102. "A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* DR 1-102.

Perhaps this demands too much of the attorney.

A lawyer can scarcely fail to be a dishonest man. This is less a subject for censure, than for regret. Men are, in an eminent degree, the creatures of the circumstances under which they are placed. He that is habitually goaded by the incentives of vice, will not fail to be vicious. He that is perpetually conversant in quibbles, false colours and sophistry, cannot equally cultivate the generous emotions of the soul, and the nice discernment of rectitude.

W. GODWIN, *supra* note 84, at 275. For a Roman view of the lawyer's privileged tactics, see Golding, *On the Adversary System and Justice*, in PHILOSOPHICAL LAW, *supra* note 73, at 98, 120 n.13 ("crafty, deceptive and sophistical").

A similar analysis applies to the trade association and publisher of legal forms.¹⁹⁰ Both doubtlessly have obtained legal advice from an attorney and have every reason to believe that inaccuracies will be relied upon by the offeree and even an unknowledgeable offeror. As for the publisher, presumably offerors purchase the forms more commonly than offerees, and thus the publisher is motivated to increase marketability by "stacking the deck" in favor of the offeror. For the trade association, the motivation to slant the form is obvious. The publisher or trade association, being independent contractors, would not subject an ignorant offeror to liability under the doctrine of *respondeat superior*,¹⁹¹ but either, or their attorneys, might be liable directly to the relying offeree.¹⁹² The lack of privity of contract is not preclusionary.¹⁹³

A comprehensive understanding of the law is not easily obtained. Many areas are unsettled, or become unsettled. To impose liability on a party who makes assertions of law that are reasonably defensible at the time, but later become indefensible, would miss the mark aimed at here. It is the overreaching offeror who takes advantage of another's ignorance of the law who is to be deterred, not the businessperson who desires reasonable doubt to be resolved in his favor.¹⁹⁴

Once a rule becomes settled, or clearly changed, the duty arises not to mislead the offeree. Later contract or lease extensions, or renewals, would then need revision to reflect the legal development. When a dispute arises under a term enforceable when agreed upon but since declared unenforceable, the knowing offeror should not be entitled to make false assertions, explicit or implicit, about the term's continued validity. Allowance is appropriate for a reasonable period to disseminate information on a new precedent or statute.¹⁹⁵ But when a statute has been enacted which will not become effective

190. The example in the Appendix of the securities customer agreement with a partially unenforceable arbitration clause was included in a form produced by a trade association, the Securities Industry Association.

191. For more information on *respondeat superior* and vicarious liability of independent contractors, see generally RESTATEMENT (SECOND) OF AGENCY §§ 1 comment c, 2, 14N, 219, 220, 257 (1958); W. PROSSER & W. KEETON, *supra* note 92, §§ 69, 71. As for vicarious liability for punitive damages, see the discussion at note 170, *supra*. When there is some doubt whether the offeror is aware of the unenforceability, a fair solution may be to grant rescission but not damages, or actual damages but not punitive damages.

192. See *supra* discussion following note 173.

193. See RESTATEMENT (SECOND) OF TORTS § 531 (1965).

194. Reasonable doubt may call for a disclaimer to put the offeree on notice. See *supra* discussion at note 110.

195. See *infra* the discussion in the Appendix.

until a later date, no generosity need be extended to the knowing offeror who includes before the effective date a contrary term in an ongoing contract. Nor need generosity be extended to the trade association or publisher that leaves outdated forms in circulation beyond a reasonable time.

b. Expectation of Influencing Conduct

This element poses no problem. The very purpose of the offeror in including the unenforceable term is by supposition to influence the offeree to forego his rights. Otherwise the inclusion of the term is a waste of ink. Most contract terms are inserted to influence conduct.

c. Justifiable Reliance

For the offeree to obtain damage relief in tort, rather than merely rescission in contract, he must demonstrate that the misrepresentation was material.¹⁹⁶ Since the misrepresentation typically relates to significant legal rights, there is little doubt as to its materiality. Two other stumbling blocks within the element of justifiable reliance must be addressed. First, the representation being one of law rather than fact, the offeree must cope with the precedent that limits actions of deceit to misrepresentations of fact. Second, he must show that his reliance upon the offeror, or the offeror's attorney, trade association or publisher, was justifiable despite the circumstance that they are considered adverse parties.¹⁹⁷

There is no "liability for an opinion on a question of law, or for a misrepresentation or misunderstanding as to law, as to which both parties are presumed to have equal knowledge."¹⁹⁸ This summarizes the historical limitation of the action of deceit to misrepresentations of fact, not law. The standard reason is that "statements of law . . . are commonly said to be mere assertions of opinion, which

196. Compare RESTATEMENT (SECOND) OF TORTS § 538 (1965), to RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (1979) ("A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.").

197. Perhaps I have passed too quickly over the requirement that the plaintiff demonstrate that indeed he did rely upon the misrepresentation. Owing to the twist in our situation of the contract's unexpected value to the offeree, this element ties in closely to the element of damages, discussed at 885-95 of text. The subjective aspect of the offeree's reliance, as with all questions of mental states, is difficult to demonstrate. The courts are slowly, perhaps too slowly, lowering this and other hurdles for consumers. See Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831, 862-63, 874; Note, *Consumer Protection in Florida: Inadequate Legislative Treatment of Consumer Frauds*, 23 U. FLA. L. REV. 528, 534-35 (1971).

198. JOYCE, DAMAGES § 2215, at 2280 (1904) (footnotes omitted).

are insufficient as a basis for deceit, estoppel, or equitable relief."¹⁹⁹ More specifically and quite contradictorily, first, every person is presumed to know the law already,²⁰⁰ and second, since special training is required to learn the law, the assertion of law must reasonably be assumed to be merely opinion.²⁰¹ Additional warrant for this may be found in the public policies favoring an educated and reasonable citizenry and, perhaps, rugged individualism.²⁰²

The rule and its reasons immediately suggest exceptions for the situation here being treated. First, the presumption of equal knowledge of the law is problematic when one party, the offeror, is in a business for which the misrepresented law is important enough to be included in standard contracts while the other party may enter into few related transactions.²⁰³

Second, the reason that assertions of law are ordinarily regarded as expressions of opinion would not apply here. The businessperson-offeror who produces a written contract, often a printed form on a take-it-or-leave-it basis, is not regarded by a reasonable offeree as merely opining about the enforceability of the terms. One naturally assumes that the offeror has substantial reason to be fully aware of the relevant law and, though the offeror himself may not be trained in the law, he would go to the trouble to find out from one who is if there is any significant doubt. One cannot survive in a business by guessing about the controlling law. At the very least the offeror is misrepresenting his state of mind. The term is spelled out without qualification and it is probably interpreted by the offeree as believed by the offeror to be enforceable without qualification.²⁰⁴

That misrepresentations of law are not actionable is a proposition not today in favor.²⁰⁵ Courts generally allow relief for mixed ques-

199. W. PROSSER & W. KEETON, *supra* note 92, at 758.

200. *See supra* note 92.

201. *See* W. PROSSER & W. KEETON, *supra* note 92, at 759.

202. After noting the contradiction above, Prosser and Keeton opine: "The general rule seems to have arisen rather out of a deliberate policy requiring the parties to a bargain to deal at arm's length with respect to the law, and not to rely upon one another." W. PROSSER & W. KEETON, *supra* note 92, at 759.

203. This point is questionable when the offeror is involved in a mom and pop operation. The presumption of superior knowledge is then weaker. Perhaps in this circumstance the offeree ought to demonstrate that the offeror had knowledge, or actually had reason to know, of the unenforceability. *See* Note, *Residential Leases*, *supra* note 1, at 534 n.73. Disparate knowledge is also doubtful when the offeree is in the same business as the offeror or is in a related business.

204. Even if this is not the case, something can be said for legally presuming the offeree's faith in the offeror's inferred belief. A contrary assumption implies a distrusting, cynical view of the marketplace that ought not to be reinforced by legal doctrine. *See supra* the discussion at notes 82-85.

205. *See* W. PROSSER & W. KEETON, *supra* note 92, at 759.

tions of law and fact.²⁰⁶ The analysis of representations as mixed ones of law and fact often smacks of legal fiction.²⁰⁷ The proposition seems ripe for legal fiction or other judicial tricks, because the contradictory rationales for it are a signal that something is amiss. One may well wonder if this isn't a step towards complete abolition of the distinction between assertions of law and fact.²⁰⁸

The American Law Institute has already taken its final step in abolishing the distinction. "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."²⁰⁹

In proving justifiable reliance, the offeree must get over the second hurdle which exists because the assertion has come from an adversary party or that party's agent. Rugged individualism favors this doctrine.

The recipient is not justified in accepting the opinion of a known adversary on the law and is expected to draw his own conclusions or to seek his own independent legal advice. On the other hand, if the maker of the representation purports to have special knowledge of the law that the recipient does not have, reliance upon the opinion may be justified.²¹⁰

If the offeror is known to be an attorney, special knowledge is, of course, implicitly purported. And if the unenforceable term is known or reasonably presumed to be inserted by the offeror's attorney, the offeree again may assume special knowledge and professional honesty.²¹¹ Similarly, if the term appears in a form contract or lease prepared by a trade association or publisher, a reasonable

206. See W. PROSSER & W. KEETON, *supra* note 92, at 759-60 (with citations).

207. For brief discussion of some exemplary cases, see W. PROSSER & W. KEETON, *supra* note 92, at 759-60.

208. "Since it is obvious that representations of law almost never are made in such a vacuum that supporting facts are to be 'implied,' it would seem that very little can be left of the 'general rule' in the face of a series of such decisions." W. PROSSER & W. KEETON, *supra* note 92, at 760. The British developments have been similar. See P.S. ATIYAH, *supra* note 136, at 224.

209. RESTATEMENT (SECOND) OF TORTS § 525 (1965). Even in the first Restatement the American Law Institute took this position. See RESTATEMENT OF TORTS § 525 (1938).

210. RESTATEMENT (SECOND) OF TORTS § 545 comment d (1965). See also RESTATEMENT (SECOND) OF CONTRACTS § 170 comment b (1979) (reliance on opinion may be justified if maker of misrepresentation purports to have legal expertise). For a related issue, compare the discussion *supra* at notes 33 and 86 which discuss the effect of the "puffing and avoidance" tactics acceptable in negotiations.

211. *Id.*; see *supra* note 189.

assumption is that the form was prepared with professional, legal guidance.²¹²

When the offeror is not an attorney, or has not received legal advice either directly or indirectly, little guidance can be found in the comments to the Restatement regarding the circumstances under which the misrepresenter is treated as purporting to have special knowledge or superior information about the law. At the one extreme an ordinary layperson is justified in relying upon a legal opinion from a real estate or insurance agent on simple questions.²¹³ At the other, one real estate agent may not justifiably rely upon another agent's legal opinion.²¹⁴ The gap is enormous and unnarrowed by the Restatement. The courts must be guided by their own lights.

d. Causation

For the misrepresentation to be actionable, the offeree must rely upon it when entering into the transaction.²¹⁵ This element severely hinders the usefulness of the action of deceit for many fact patterns. Oftentimes, perhaps most times, the unenforceable term appears in a form contract as boilerplate and receives no particular attention at the time of contracting. The offeror will make no oral statement regarding the subject of the term and the offeree will sign the document without reading it beyond a summary glance to check the handwritten parts and, maybe, any prominently displayed printed clauses. The offeree will not attend to the provision until sometime after the contract has been signed. A conflict arises between the parties, or the offeree considers an action pursuant to the contract (for example, assignment of a leasehold), and then the form will be perused for pertinent terms. At this point reliance occurs, foreseeably so.²¹⁶ Apparently, it is too late.²¹⁷

212. A more difficult question in this context is whether the offeror who relies upon such store-bought forms ought to be liable along with the publisher. If the offeror knows or has reason to know that the form includes an unenforceable term the answer would seem to be yes—even liable for punitive damages. See discussions *supra* at notes 173, 191.

213. RESTATEMENT (SECOND) OF TORTS § 545 comment d (1965).

214. *Id.*

215. See RESTATEMENT (SECOND) OF TORTS § 546 comment a (1965). Without reliance the offeree's expectations at the time of entering the contract will not be disappointed, thereby undermining the justification for relief: "fraud may be considered as unfair because it leads to the disappointment of legitimate expectations." S. GORDON, *supra* note 18, at 91. But Atiyah stresses the distinction between protecting reliance and expectations. See P.S. ATIYAH, *supra* note 38, at 42-44, 163-64.

216. See RESTATEMENT (SECOND) OF TORTS § 548A (1965).

Sometimes it will not be too late. When the offeree, relying upon the misrepresentation, disadvantageously settles a dispute with the offeror, there is the necessary causation. The misrepresentation in the first contract foreseeably carries over to the second. For example, if a tenant, when paying off the landlord to be released from a lease, relies upon the validity of an unenforceable clause such as a nonassignment provision, the misrepresented term causes the offeree to be damaged when entering into the settlement contract. Another example is where the contract or lease is void or voidable because of the inclusion of the unenforceable term. Performance pursuant to the abortive contract or lease after reliance upon the term may be considered part of a new contract or lease, the mutual assent being manifested by the actions of the parties. The offeree's actions then satisfy the causation element. Generally, whenever the offeree enters into a second contract with the offeror in reliance upon the unenforceable term in the first contract, causation may be fulfilled.

The second contract entered into in reliance upon the unenforceable term in the first contract may be with a third person rather than with the original offeror. Instead of settling with the landlord, the tenant might, for example, in the face of an unenforceable provision that the landlord will not paint the apartment, contract with a third person to have the unit painted. The reliance causes damages.²¹⁸

217. There is an ambiguity in the black letter test of the Restatement which can be read as avoiding this reliance problem and permitting broad recovery in the paradigmatic cases. RESTATEMENT (SECOND) OF TORTS § 546 (1965), Causation in Fact, states: "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss." The course of conduct here is refraining from exercising rights legally not to be denied by contract. The offeree relies upon the assertion of law in the contract in deciding this course of action. Yet all this arises after the contract has been signed, a point not specifically alluded to in the statement above although it is raised in one of the comments and the illustrations. *See id.* comment a and illustrations 1, 2 & 3 for illustrations of the reliance requirement.

218. The contract with the third person resulting from reliance on the unenforceable term in the prior, offending contract may be identical to a contract that would be entered into with that third person even in the absence of the reliance. Assume the term is an invalid disclaimer of liability for property damage. The offeree, after being damaged by the offeror, enters into a contract of repair with the third person. Assume also that the standard procedure for making a claim against one in the position of the offeror is to repair the goods elsewhere and then submit the bill to the offeror. Then the situation is one in which, at the time of disputing the term with the offeror, the offeree's prior contract in reliance is indistinguishable from one not in reliance. It would be difficult for the offeree to prove that the contract with the third person was in justifiable reliance.

e. Damages

The last element of deceit, damages, owing to the peculiarities of the stock case, will often be difficult to find.²¹⁹ It has been discussed above.²²⁰ That damages are required at all for the action to lie shows, the express purpose of tort damages notwithstanding,²²¹ that deontological considerations are not controlling. Principle alone is not enough.²²²

2. Prima Facie Tort

Much of the law of torts evolved from the ancient common law form of action of trespass on the case.²²³ Modern tort forms reflect this history in their elements. In the earliest centuries trespass on the case seems to have been an open-ended writ that allowed the courts to supply a remedy for whatever appeared to be a wrong not otherwise actionable.²²⁴ With the passage of time, case rigidified along with the other forms of action. Today it is debated whether there is any flexibility left in the body of tort law.²²⁵

219. The damage oddities of our case aside for a moment, half a century ago McCormick pointed out the importance of deterrence to the remedies for deceit. He noted the trend in deceit actions away from granting only out-of-pocket losses in favor of loss-of-bargain losses and attributed the more liberal recovery to the purpose of deterring intentional acts by deceivers. McCormick, *supra* note 135, at 1055.

220. See *supra* text accompanying notes 140-58.

221. See *supra* discussion at note 142.

222. The Scots, in their public law at least, may be more principled: "the Scots common law crime of simple fraud . . . does not require success. It is sufficient that the accused has acted deceitfully with the intent either to make some gain from, or to cause some detriment to, the victim." MacCormick, *supra* note 23, at 15. Recall that despite the lack of success, the victim is still "harmed." See *supra* note 67.

223. For the history of this form of action, see generally C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT ch. 4 (1949); Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563 (1959); Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142 (1937); Plucknett, *Case and the Statute of Westminster II*, 31 COLUM. L. REV. 778 (1931); Winfield, *supra* note 176, at 5-6.

224. See 3 W. BLACKSTONE, COMMENTARIES *122-23; 4 *id.* at *442; F.W. MAITLAND, FORMS OF ACTION AT COMMON LAW 66-67 (1936); Dix, *supra* note 223, at 1142; Winfield, *supra* note 176, at 2, 5-6.

225. Some courts and commentators insist that the field of torts is closed. See, e.g., Ward, *The Tort Cause of Action*, 42 CORNELL L.Q. 28, 28 (1956) (quoting Landon, editor of F. POLLOCK, TORTS 45 (15th ed. 1951)). Others disagree. See, e.g., Brown, *supra* note 223, at 573 (prima facie tort principle still useful); Halpern, *Intentional Torts and the Restatement: A Petition for Rehearing*, 7 BUFFALO L. REV. 7, 12 (1957) (prima facie tort doctrine gives policy-making functions to courts); Winfield, *supra* note 176, at 5 (elasticity of action on the case). "[T]he law of Torts is based on the principle that one who harms another has a duty of compensation whenever it is just that he should pay; . . . that although justice may be colored with expediency, it always involves current ideas of economics and morality . . ." W. SEAVEY, COGITATIONS ON TORTS 3 (1954).

The cohesiveness of torts is also questioned. At one extreme it is believed that torts can be unified under the general elements of duty, breach, causation, and damages. See,

The authors of the Restatement (Second) of Torts fall within the group of commentators who believe that the range of tortious injuries is not foreclosed. The Restatement's general principle for intentional torts is: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."²²⁶

The drafters point out that this principle has been called the innominate form of the action of trespass on the case of prima facie tort.²²⁷ That it might be very similar to an established tort does not preclude application, even if the result is to avoid a restrictive rule of a traditional tort.²²⁸

The essence of this intentional tort, as with all torts, is a balancing of conflicting interests. The terms "injury," "culpable," and "justifiable" in the general principle above reflect the need for this balance.²²⁹ More specifically, four factors must be evaluated: "(1) the

e.g., Ward, *supra* at 44 (common denominators of all torts). Under this unifying description there may be room as the need arises for new torts, or harms newly recognizable as actionable under old labels. While others have found some unity in torts, though not quite this much, *see, e.g.*, F. HARPER, TORTS v-vi (1933); F. POLLOCK, *supra*, ch. 1; still others have contended that individual torts developed independently over the centuries and are now loosely connected and encompassed by the title "torts" for heuristic reasons, *see, e.g.*, SALMOND ON THE LAW OF TORTS § 3 (16th ed. R.F.V. Heuston ed. 1973). *See generally* W. PROSSER & W. KEETON, *supra* note 92, § 1; WINFIELD AND JOLOWICZ ON TORT 13-15 (12th ed. W.V.H. Rogers ed. 1984).

226. RESTATEMENT (SECOND) OF TORTS § 870 (1965). Note the affinity of this standard to the general requirement for the recovery of punitive damages, *supra* note 164. Also note the affinity to the "good reasons" approach to ethics, *supra* note 22. Is prima facie tort a broad judicial instrument to keep conduct from falling too far below moral minimums? *See Note, The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503, 504 (1952).

227. RESTATEMENT (SECOND) OF TORTS § 870 comment a (1965); *see* Friedmann, *Modern Trends in the Law of Torts*, 1 MOD. L. REV. 39 (1937); Halpern, *supra* note 225, at 13. The first enunciation of the doctrine of prima facie tort is attributed to Lord Bowen in *Mogul S.S. Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598, 613 (1889), *aff'd*, [1892] A.C. 25, and the first American adoption was by Justice Holmes in *Aikens v. Wisconsin*, 195 U.S. 194 (1904), although he signaled his approval a decade earlier in *Holmes, Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

228. RESTATEMENT (SECOND) OF TORTS § 870 comment j (1965). *But see, e.g.*, *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 383 (S.D.N.Y. 1980) ("a prima facie tort may not rest upon conduct that is well within the area of activity meant to be regulated by a traditional tort, and which is insufficient to establish that tort"). The legal process facilitates evolution largely by adopting such arcane techniques as legal fiction and specious reasoning as a means of bypassing stare decisis. This often creates transitional inconsistencies and implausible distortions. Much can be said for unpacking these covert means by the open directness of prima facie tort. Historic baggage can more easily be discarded. Yet the balancing process built into the doctrine is a proper retardant to the overly eager court.

229. *See* RESTATEMENT (SECOND) OF TORTS § 870 comment e (1965).

nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive."²³⁰ These factors will be examined individually in the light of our problem.

a. *The Nature and Seriousness of the Harm to the Injured Party*²³¹

Physical harm to the offeree or his property, the harms protected most extensively by the common law, are not likely to occur. One can imagine cases where they would, as where the offeree and his property are injured as a consequence of the offeror exercising his claim under an unenforceable self-help provision. To rectify these wrongs, however, the offeree will probably avail himself of better established remedies; for this example come to mind the common law actions of trespass *d.b.a.* or trespass *q.c.f.* and the statutory action of forcible entry and wrongful detainer. Types of harm other than physical are more probable.

"Harm to existing advantageous relations weigh less heavily than physical harm, and harm to prospective pecuniary interests, less heavily still."²³² Though these are not the weightiest harms according to the Restatement, they and related ones are the ones most often, perhaps usually, protected by courts in those jurisdictions that have recognized *prima facie* tort.²³³ One might speculate that the reason for this is that the more undeniable, immediate harms are already adequately protected by other tort actions. The economic harms may not be as direct as the physical harms to person and property but they are real ones that are fully measurable in dollars and cents.

Emotional harms are less easily monetized. Nevertheless, they deserve protection under the Restatement if they are more severe than merely the hurt feelings that often ensue from the interactions

230. *Id.*

231. See generally RESTATEMENT (SECOND) OF TORTS § 870 comment f (1965) (discussing nature and seriousness of harm to injured party).

232. RESTATEMENT (SECOND) OF TORTS § 870 comment f (1965).

233. See, e.g., *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350 (1921) (lawful act done with purpose of forcing another to join defendant or cease to do business); *American Guild of Musical Artists v. Petrillo*, 286 N.Y. 226, 36 N.E.2d 123 (1941) (plaintiffs forced to join labor union or not be permitted to fulfill their professional engagements). For additional citations, see RESTATEMENT (SECOND) OF TORTS § 870 Reporter's Note (1965). See also Note, *Prima Facie Tort Recognized in Missouri*, 47 Mo. L. Rev. 553, 553 n.5 (1982) (citations to U.S. *prima facie* tort cases).

of daily life.²³⁴ Severity, in fact, is an important aspect of all the protected interests, for a severe harm to a less significant interest may warrant relief more than a slight harm to a more significant interest.²³⁵

One of the interests treated by the Restatement as of little significance, that is, not worthy of much independent protection, is dignitary harm.²³⁶ This depreciation reveals a utilitarian orientation by the drafters.²³⁷ A strict Kantian would dissent.²³⁸ Dignitary harm might cause a party sufficient emotional harm to deserve protection, according to the Restatement, but by itself falls outside the ambit of prima facie tort.²³⁹ Support for this comes from the historical interpretation of the damage element of trespass on the case. It requires pecuniary injury.²⁴⁰

The interest often most directly affected by the inclusion of an unenforceable term is, arguably, the interest in one's dignity. The offeror is encroaching upon the offeree's autonomy, his freedom of

234. For citations of the articles in the first half of this century that paved the way for the modern recognition of liability for mental distress, see W. PROSSER AND W. KEETON, *supra* note 92, at 55 n.1. See generally *id.* § 12 (discussing infliction of mental distress).

235. See RESTATEMENT (SECOND) OF TORTS § 870 comment f (1965).

236. See Halpern, *supra* note 225; RESTATEMENT (SECOND) OF TORTS § 870 comment f (1965). A dignitary harm is one "based upon the protection of interest in 'personality.'" D. DOBBS, *supra* note 129, at 528. An interesting case in which relief was denied for a harm that seems essentially dignitary is *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949), in which music in the public domain composed by a Soviet was used in the soundtrack of an anti-Soviet film.

It is noteworthy that the English historically had a different view of the need to grant relief for dignitary harms. A strong impetus behind the recognition of punitive damages, also known as "smart damages" for the smart to the plaintiff, was to protect against insult. See J. GHIARDI & J. KIRCHER, *supra* note 138, §§ 1.02-.03; K. REDDEN, *supra* note 148, § 2.2(C). Some commentators believe that American courts hold the same position of protecting against insult with punitive damages. See *Symposium Discussion*, 56 S. CAL. L. REV. 155, 155-56, 158 (1982) (Ellis & Wheeler). It seems strange that punitive damages may be given for insult, but ordinary damages, under prima facie tort, may not. Especially since the malice requirement for the two are nearly identical.

237. Perhaps it reveals a fear of the untoward growth of suits for nominal damages, not a current favorite of the law. See Brown, *supra* note 223, at 573. After discussion Brown concludes: "the prima facie tort principle need be neither feared nor thwarted on account of the fear of suits for nominal damages." *Id.* Perhaps there is a general fear of unpredictable consequences. *Id.* at 571. Evidentiary problems are also in the wings.

238. See *supra* discussion at notes 27-30.

239. Dobbs characterizes "dignitary interest" expansively to include interests protected by many well-established torts, including assault, battery, false imprisonment, malicious prosecution, and intentional infliction of mental distress. See D. DOBBS, *supra* note 129, § 7.3. As suggested below, the Restatement seems to have a more restrictive view of it.

240. See Brown, *supra* note 223, at 573; Halpern, *supra* note 225, at 13.

will, his existence as an independent ethical being.²⁴¹ Yet the law traditionally has all but closed its eyes to this type of incursion and the influential drafters of the Restatement did not help to open them. In the absence of an adventuresome court, we must look for protection to the other interests that are also invaded by the inclusion of unenforceable terms.²⁴²

*b. The Nature and Significance of the Interests Promoted
by the Actor's Conduct*²⁴³

The parties are involved in a business transaction. The offeree has contracted with the offeror who may have been assisted by an attorney, a trade association, or a publisher of the contract form. These latter parties know on which side their bread is buttered. It is in their business interests to make the contract appealing to the offeror. All the interests, then, seem to be commercial.²⁴⁴

Commercial interests are certainly generally deserving of comprehensive legal protection. But not all aspects of them are deserving. Deterring the offeror and those who assist him from this particular activity will not place them at a competitive disadvantage. There is no competition, by legal definition, for unenforceable contract terms. On the contrary, the offeror's acts hinder legitimate competition for enforceable terms by misleading those in the marketplace as to the true qualities of the goods they seek. Nor is there a recognized interest, commercial or otherwise, in being able to take advantage of another's ignorance, actively induced. The marketplace may be far from ideal, but the gap is to be narrowed by legal doctrine, not widened.

241. *See supra* note 29.

242. Some cases may be read as establishing the precedent. For example, in *Tully v. Pate*, 372 F. Supp. 1064 (D.S.C. 1973) (applying Georgia law), a prima facie tort claim was upheld where the defendant-mother interfered with the father's burial rights regarding his deceased children.

243. *See generally* RESTATEMENT (SECOND) OF TORTS § 870 comment g (1965) (discussing interests promoted by actor's conduct).

244. The assertions of law that are misrepresentations are a form of speech, but hardly the type of speech that has received protection under the first amendment. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact").

c. *The Character of the Means Used by the Actor*²⁴⁵

"If the means is illegal or unfair or immoral according to the common understanding of society this constitutes a factor favoring liability."²⁴⁶ Let him step forward who would defend the morality of this practice of deliberately misleading another. Or even the practice of asserting untruths convenient though not studied owing to self-serving ignorance. Society may choose to countenance the practice, but if so, not because it commonly understands it to be inherently acceptable behavior, but rather because the negative spillover of plausible remedies is perceived to be of greater moment. Defenders must sidle through a side door.

d. *The Actor's Motive*²⁴⁷

A disinterested malevolence or pure desire to harm the offeree is clearly to be discouraged. Some courts hold it essential for prima facie tort; when the malevolence is combined with any other motive, no action in prima facie tort will lie.²⁴⁸ Others will grant this remedy

245. See generally RESTATEMENT (SECOND) OF TORTS § 870 comment h (1965) (discussing character of means used by actor).

246. *Id.*

247. See generally RESTATEMENT (SECOND) OF TORTS § 870 comment i (1965) (discussing actor's motive).

248. There is much authority in New York, the state historically with the most prima facie tort cases, which states that disinterested malevolence is a requisite. See, e.g., *Reinforce, Inc. v. Birney*, 308 N.Y. 164, 169, 124 N.E.2d 104, 106 (1954) (complaint dismissed where plaintiffs failed to prove defendants' refusal to permit members to work for plaintiff union was purely malicious and done with no legal or social justification); *Beardsley v. Kilmer*, 236 N.Y. 80, 90, 140 N.E. 203, 206 (1923) (no cause of action stated where defendants' motives were not purely malicious, but included self-protection and desire to establish legitimate business). A momentary pointing towards general liberalization of prima facie tort was *Board of Educ. v. Farmingdale Classroom Teachers Ass'n, Local 1889*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975) (complaint stated cause of action where defendant utilized legal procedure to harass plaintiff and intentionally to inflict economic harm by compelling 87 teachers to attend hearing on same day thereby forcing plaintiff to hire 77 substitutes), but upon second thought, "New York's courts have consistently limited the [prima facie] tort to such an extent that most of the reported cases were dismissals for failure to state a cause of action." Leitner, *Torts*, 31 SYRACUSE L. REV. 433, 462 (1980). See also Forkosch, *An Analysis of the 'Prima Facie Tort' Cause of Action*, 42 CORNELL L.Q. 465, 475-79 (1957) (New York requisites for prima facie tort).

This requisite stems from the view that when the ends are legitimate, e.g., profits, the means need not be justified. The dissenting courts subscribe to the view that proper ends do not themselves justify the means. See Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196, 196-97 (1946).

Surely this motivation of disinterested malevolence is antisocial and not sufficiently deterred by the usual remedies. Punitive damages would help. These extraordinary damages are most widely granted to combat malice. See *supra* note 164. Be that as it may and notwithstanding judicial statements to the contrary, the earlier New York authority has been read as recognizing prima facie tort even when the motive is not purely to

even when the entire motive of the actor is to increase his profits.²⁴⁹ Our problem falls within this latter category.

Once the court evaluates these four factors and finds the offeree's interest worthy of protection, more must be done. The first step gives rise to the offeror's duty; still must be found breach, causation, and damages.²⁵⁰ Breach and causation will be fairly easy to demonstrate. The question of damages must confront the twist to our problem extensively dealt with above.²⁵¹ On the bottom line, if the morality of the marketplace is to be raised, in our context as well as many others, prima facie tort is probably the most powerful, expeditious vehicle of the common law—if the courts will unbrake it.²⁵²

3. Other Common Law Theories

The presence of an unenforceable term may harm the offeree in ways other than those discussed above. Even without further speculation to support this proposition, the general scope of the problem is manifest by now. Deceit and prima facie tort are the common law causes of action which first come to mind, but without unduly exercising the imagination other doctrines can be seen to be relevant under differing scenarios. Among them are wrongful civil proceed-

injure the plaintiff but also, or even exclusively, economic. See Note, *Abstaining from Willful Injury—The Prima Facie Tort Doctrine*, 10 SYRACUSE L. REV. 53, 57-59 (1958); see also Note, *supra* note 226, at 505-07 (nature of defendant's motive requisite to relief under prima facie tort); Note, *supra* note 233, at 557-58 (motive required of defendant under N.Y. court's interpretation of 'intent to injure' is uncertain).

249. The Restatement falls within this camp. See RESTATEMENT (SECOND) OF TORTS § 870 comment i (1965).

250. See *supra* note 225.

251. See *supra* text accompanying notes beginning at 128. The finding of damages for prima facie tort may be less troublesome than for the action of deceit. Unlike for deceit it need not depend upon the presence of a second contract. See *supra* discussion at note 215. On the other hand, the modern recognition of the duty of disclosure of material facts of a contract seems to fall within the prima facie tort doctrine. But breach of this duty usually gives rise only to the remedy of rescission. See P.S. ATIYAH, *supra* note 136, at 219. This relief inadequately admonishes the offeror. See *supra* note 139. For cases of nondisclosure, modern courts therefore favor reading into the contract an implied term such as a warranty, the breach of which supports more flexible contractual remedies. See P.S. ATIYAH, *supra*, at 219-20. I surmise that this gambit of finding an implied contractual term will not be taken by the courts here where the circumstances are closer to misdisclosure, and therefore deceit, than to nondisclosure. See *supra* note 136. But if the courts articulate a theory of prima facie tort, the inadequate remedy of rescission, as in nondisclosure, must be avoided as the only relief if the doctrine is to be useful.

252. Irrespective of the theory, if the offeror is found liable for the unenforceable term, he may look to his attorney or the publisher of the form contract for recompense under the doctrine of prima facie tort. There are suggestions that the giving of bad advice, if malicious, may be actionable. See *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U.S. 350, 358 (1921); *Musso v. Miller*, 265 A.D. 57, 58-59, 38 N.Y.S.2d 51, 53 (App. Div. 1942).

ings,²⁵³ abuse of process,²⁵⁴ the intentional infliction of emotional distress,²⁵⁵ negligence,²⁵⁶ and even defamation.²⁵⁷ Some of these may avoid the special twist in finding compensable damages but offer no relief in an action directly against the silent partners of the offeror, *viz.*, his attorney, trade association or the publisher of the form contract.

One other theory ought to be mentioned briefly. It ultimately may turn out to be the primary remedial instrument if the purely common law ones stumble on the mentioned hurdles and the legislatures and administrative tribunals make proper overtures. This is the doctrine of implied rights, a hybrid of common law actions and statutory remedies.²⁵⁸ It arises when a legislative enactment or administrative regulation creates a standard of conduct without providing an applicable remedy for dereliction. A court, under the proper circumstances, will supply an appropriate remedy.²⁵⁹ Essential to the implication of rights "is whether this remedy is consistent with the legislative provision, appropriate for promoting its policy and needed to assure its effectiveness."²⁶⁰ Without further discussion it will be noted in passing that there are already many legisla-

253. Compare RESTATEMENT (SECOND) OF TORTS § 653 (1965) with *id.* § 674; see W. PROSSER & W. KEETON, *supra* note 92, §§ 119-20; Note, *Unfounded Litigation*, *supra* note 109, at 743; Note, *Groundless Litigation*, *supra* note 109. The offeror may, for example, bring an action in bad faith against the offeree on the basis of an unenforceable term.

254. See RESTATEMENT (SECOND) OF TORTS § 682 (1965); W. PROSSER & W. KEETON, *supra* note 92, § 121.

255. See RESTATEMENT (SECOND) OF TORTS § 46 (1965); W. PROSSER & W. KEETON, *supra* note 92, §§ 12, 54.

256. See RESTATEMENT (SECOND) OF TORTS §§ 281-284 (1965); W. PROSSER & W. KEETON, *supra* note 92, §§ 28, 30.

257. Not only personal defamation but also the related tort known by various titles, including "slander of title," "disparagement of property," "slander of goods," or "injurious falsehood." See RESTATEMENT (SECOND) OF TORTS §§ 558, 623A (1965); W. PROSSER & W. KEETON, *supra* note 92, §§ 111, 128.

258. Among its other labels are "implied cause of action" and "statutory tort." See RESTATEMENT (SECOND) OF TORTS § 874A (1965); S. MERMIN, LAW AND THE LEGAL SYSTEM 271-74 (2d ed. 1982); W. PROSSER & W. KEETON, *supra* note 92, § 36; Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167, 168-87 (1976). Deterrence of improper behavior by means of the plaintiff's role as private attorney general is one justification for implying rights. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-34 (1964).

259. For the test of these circumstances, see RESTATEMENT (SECOND) OF TORTS § 874A (1965).

260. *Id.* § 874A comment h.

tive and quasilegislativ standards that are ripe for application to the problem of unenforceable terms.²⁶¹

III. CONCLUSION

The practice of knowingly including unenforceable contract or lease terms has gone on all around you without your being aware of it. Don't be ashamed; it is quite beneath your notice. It provides, nonetheless, an adequate excuse to examine a narrow problem from a broad perspective. Some of the conclusions, however tentative, are here collected.

From a moral point of view, the practice appears to operate at the fringe of the usual notions of fairness; my readings place it outside the fuzzy line of acceptability. The deontological, Kantian arguments, largely a matter of armchair logic, push it well beyond the line. The teleological, utilitarian arguments are less univocal, as they will nearly always be, for the felicific calculus is mainly a matter of empirically mapping the pervasive rippling effects of the question at hand and measuring and balancing their magnitudes. The practice whipping up no tidal waves to make further inquiry moot, in principle, drily logical speculation just won't do. But, as sanctified by the long tradition of law professors unwilling (unable?) to budge from the armchair, an inward look at some of the "good reasons"

261. See, e.g., CAL. BUS. & PROF. CODE § 17200 (West Supp. 1985). In an acerbic column, the editor of the California State Bar Journal wrote the following about this code section:

[T]he California Supreme Court has held that section 17200 prohibits 'anything that can properly be called a business practice and that at the same time is forbidden by law.' . . . Your imagination should not be constrained by what the law specifically forbids, however. Section 17200 prohibits 'unfair or fraudulent' business practices as well as those which are 'unlawful.' . . . To be 'unfair' within this broad standard, a practice need not deceive anyone. . . ; that the practice offends a judge's fine sensibilities would seem enough.

Chilton, *Editor's Viewpoint*, 55 CAL. ST. BAR J. 348, 348 (1980) (citations omitted).

Some courts have already applied this theory to deceptive practices. See, e.g., *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974) (private right of action for deceptive practices created by inference from Consumer Fraud Act); *Laczko v. Jules Meyers, Inc.*, 276 Cal. App. 2d 293, 80 Cal. Rptr. 798 (1969) (violation of statute making unlawful the manipulation of automobile odometer is actionable despite fact that statute provides no specific civil remedy); *Rice v. Snarlin, Inc.*, 131 Ill. App. 2d 434, 266 N.E.2d 183 (1970) (Consumer Fraud Act inferentially authorizes private cause of action against seller engaged in unlawful practice). Apropos of our problem, deterrence of the defendant's conduct, not merely redress of the plaintiff's injury, has been recognized by some courts as a purpose of this action. See, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964) (civil damages in action under Securities Exchange Act serve both to provide relief to shareholder and to encourage compliance with proxy requirements); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 41-42 (1916) (purpose of Safety Appliance Act is remedial as well as penal).

likely to flow from the consequences of abolishing the practice, many, if not all, things considered, permits one to speculate drily anyway. In the end, there is little moral to say on behalf of the practice.

Not to be out of fashion, a microeconomic analysis was attempted. From it came the one conclusion that animates much of the dreary science: the practice of including unenforceable terms appears inefficient; the transaction costs will be lower if the offeror is duty-bound not to mislead the offeree regarding the state of the law by knowingly including an unenforceable term. Beyond this question of dollars, sense was looked for in a sociological analysis of the practice. The espousal of the "rugged individualism" that gets so many politicians elected nowadays, argues, at first glance, against the protection of the offeree so unself-reliant as to take the offeror at his implicit word. Upon a second glance, something can be said for less than complete self-reliance, including a possible increase in trustfulness and trustworthiness. Moreover, a remedy for the offeree allows him self-reliantly to take on the misleading offeror in the courts, whereas without it he is left helpless despite his rational ("efficient") choice to take the terms at face value. A remedy for being taken in on the state of the law may, on the other hand, undermine the incentive to be conversant in the law. The economics of reliance upon the offeror's implied assertions of law, however, make it reasonable to rely; thus in providing a remedy, we need not worry about encouraging the populace to be foolishly ignorant. A reminder of the dynamic process of the growth of the law cautions us against unduly inhibiting offerors from including terms of questionable enforceability, or even those of doubtless unenforceability that may be ripe for reconsideration. A legal remedy being a governmental function, it may give occasion for an increase in the government's power, although the cringes of libertarians may be stilled somewhat by the knowledge that the power is constrained by the "mete-wand of the law." Finally, until the legal doctrine proscribing the practice is well-established, the uncertainties of judicial outcomes give rise to costs to individual parties and the community purse.

Standing back to survey these moral, economic and sociological considerations, they strike one as favoring overall a legal remedy. In looking to the law for its wisdom, it is first noticed that the common law courts have not developed a general remedy partially due to the peculiarity that, from one perspective, the consequence of this deceptive practice is to leave the offeree, at the time of contracting, with rights greater than he had reason, in light of his ignorance regarding enforceability, to expect. The damages often are

obscure. For this and other reasons the problem has fallen within the interstices of the most readily apparent common law actions (deceit and prima facie tort) as well as all others. Even if there is a cause of action, its costs compared to the recovery will often deter a victim from bringing it without the availability of extraordinary damages. They are granted quite restrictively. If a general remedy is called for, it may be up to the legislatures to provide it. Not only might they consider statutory causes of action, but also fines, licensing and other administrative restrictions, and criminal sanctions.

APPENDIX

The elaboration of one instance of the knowing inclusion of unenforceable contract terms may be edifying. It was brought to my attention by my colleague Norman Poser, formerly the executive vice-president of the American Stock Exchange, for which I thank him. I quote from a journal column by him to pinpoint the issue and note the response on behalf of the offending industry:

A recent Securities and Exchange Commission rule proposal designed to ensure that customers are informed of their rights to litigate, rather than arbitrate, disputes with their brokerage firms has raised a minor storm of criticism from the industry . . . for allegedly not supporting arbitration to settle customer-broker disputes. . . .

Each of the federal securities acts contains a section stating that any agreement requiring a person to waive any provisions of the law is void. This is for the protection of investors. . . .

Thirty years ago, the U.S. Supreme Court decided in the leading case of *Wilko v. Swan*²⁶² that these antiwaiver provisions also protect an investor's right to enforce the securities laws by suing in federal court. Hence the typical clause in a customer's written agreement with his brokerage firm that any future disputes will be submitted to binding arbitration is unenforceable to the extent it covers disputes arising under the securities laws. On the other hand, such an agreement is perfectly valid if it covers other types of customer-broker disputes or agreements to arbitrate a dispute *after* the dispute has arisen.

Despite the ruling in the *Wilko* case, many brokerage firms still use customer agreement forms that require all future disputes to be submitted to arbitration. Although a customer who signs such an agreement is not bound by its unenforceable provision, a customer who does not consult an attorney may believe that arbitration is his only recourse.

The present SEC rule proposal simply states that any agreement that provides for the arbitration of future disputes must include a disclosure that 'arbitration cannot be compelled with respect to disputes arising under the federal securities laws.' . . .

It is not too difficult to understand why this disclosure requirement, which simply makes customers aware of their existing rights, has been the target of such severe industry criticism. Clearly there is a fear that its effect will be to increase the volume of litigation.

262. 346 U.S. 427 (1953) (footnote added).

[The competing values and considerations are discussed.]

Some of the persons who commented on the SEC rule proposal have even suggested that the agency ask Congress to repeal the *Wilko* rule in order to expressly validate clauses in customer agreements requiring arbitration of all future disputes. Since a customer has little choice but to sign the agreement form presented to him, the effect of such legislation would be to exclude from the federal courts all controversies between brokers and their customers, including those involving alleged violations of the securities laws. The suggestion contains an element of pipe-dreaming, and it's doubtful the SEC would accept it.

As of this writing, the SEC has not yet announced a decision whether or not to adopt its proposed disclosure rule. If the rule is adopted, it is unlikely to change much, except to enlighten a few unsophisticated investors of their right of access to the courts. For most people the question whether to litigate or arbitrate is chiefly one of cost. For this reason, the SEC proposal seems more of a tempest in a teapot than a controversial issue for the industry to fight.²⁶³

The proposed SEC rule was adopted.²⁶⁴

Another of my colleagues, Roberta S. Karmel, formerly a commissioner of the SEC, has quite a different view of this regulation. She began a journal column:

The Securities and Exchange Commission's (SEC) continued campaign against arbitration of disputes between broker-dealers and their customers is difficult to understand. It defies sound public policy which should be headed in the direction of endorsing alternatives to judicial resolution of disputes. Moreover, it does not appear to be based on any widespread dissatisfaction by investors or others with the existing legal

263. Poser, *Litigate? Or Arbitrate?: A Proposed SEC Rule Ensuring Investors Know They Can Sue in Disputes with Brokers Raises a Minor Storm of Protest*, INVESTMENT DEALERS' DIG. 12 (Sept. 13, 1983).

In a private letter to Poser dated November 8, 1983, Mr. William J. Fitzpatrick, General Counsel of the Securities Industries Association, responded to the article with two counterarguments: first, the SEC had previously agreed to the adequacy of a *Wilko* disclosure in a booklet given to those seeking arbitration and thus the rule proposal was considered an inappropriate reversal of a reasonable resolution; and, second, sufficient notice exists "without the necessity of redoing each and every outstanding margin agreement in existence today." [What about future agreements? For those in the immediate future, the SEC would allow the firms to save trees (and money) by using the existing form contracts with disclosure riders attached. See 17 C.F.R. § 240.15c2-2(b) (1986).] The industry does not object to disclosure, "[i]t is simply a question of opposing bad unnecessary regulation. I personally thought that the days of needless rules were behind us, but to my sorrow I find out they are not."

264. See 17 C.F.R. § 240.15c2-2 (1986).

framework relating to arbitration, but rather comes from an ideological attachment to litigation and a bureaucratic mindset that refuses to address the realities of customer complaint lawsuits.²⁶⁵

Karmel's objection is that arbitration is quite adequate to deal with whatever disputes there are, and can do so more cheaply and expeditiously. The SEC ought not to "improperly cast doubt on the efficacy and fairness of arbitration."²⁶⁶

Karmel's and the industry's objections against the right of customers to litigate may all be true, although Poser makes some telling counterpoints in his column, but the law clearly establishes the right. As long as that right exists, warranted or not, it is deceptive and unfair knowingly to mislead the customer into believing to the contrary by means of a (partially) unenforceable contract term. Any justification of the suppression of information about the right on the grounds that the right ought to be abolished strikes me as contrary to sound morals and, arguably, economically and sociologically unsound.²⁶⁷ A disclaimer of the full enforceability of the term appearing on the inside cover of a booklet handed to customers who seek arbitration is unlikely to offset entirely the prior false impression. If this is not the case, why would the industry object to revising the contract term, prospectively if not retroactively, to avoid the misinformation?²⁶⁸

265. Karmel, *supra* note 112, at 1.

266. *Id.* at 2.

267. Why should the customers be made the instrumental losers (that is, means to the end) in the struggle between the industry and the SEC? Notice, however, that the dissenters did not explicitly argue against the SEC rule regarding disclosure as a means of avoiding *Wilko*.

268. As an update to this controversy over *Wilko*, it should be noted that *Wilko* was severely limited in *Shearson/America Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987), where the Court found that "*Wilko* must be understood, therefore, as holding that the plaintiff's waiver of the 'right to select the judicial forum' . . . was unenforceable only because arbitration was judged inadequate to enforce the statutory rights." *Id.* at 2338.

[T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. . . [Thus] [w]hile *stare decisis* concerns may counsel against upsetting *Wilko*'s contrary conclusion under the Securities Act, we refuse to extend *Wilko*'s reasoning to the Exchange Act in light of these intervening regulatory developments.

Id. at 2341.