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Contract, Will & Social Practice

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CONTRACT, WILL & SOCIAL PRACTICE

*Lawrence Kalevitch**

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The belief that some single formula can in principle be found whereby all the diverse ends of people can be harmoniously realized is demonstrably false.¹

INTRODUCTION

A liberal theory of contract aims at meeting party expectations. Throughout this century, many lost faith in such an aim of contract law. Although many agree that the substantive law of contracts cannot meet party expectations, it still aims to do so. Fact-oriented and merely procedural law of contracts may vindicate party expectations.

A putatively different ideal and aim of contract law, enforcing only fair agreements, grows increasingly more popular. From the widespread belief that no rule-oriented or formal theory of contract law can meet party expectations, some would have contract law abandon party expectation and inquire only about the fairness of the bargain. But despite the failure of rules to provide party expectation, contract law may still pursue the aim of party expectations. A contract law resting on general principles and standards may succeed where contract rules failed by rooting particular disputes in the facts or evidence. Quite interestingly, only the facts of particular cases can address the notion of a fair bargain. The criterion of bargain fairness and the criterion of party expectation hold more symmetry than difference.

The ongoing Uniform Commercial Code ("U.C.C.") revision process has included tentative reform of the problem of the "battle of the forms" in the law of sales of goods. The contemplated revision would restore a factual or social practice basis to the issue of whether a contract for sale has been concluded.² A will or

¹ ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 169 (1969).

² The proposed revision to Uniform Commercial Code ("U.C.C.") § 2-207 (1993), "Additional Terms in Acceptance or Confirmation," provides:

(a) If the writings and other records of parties to an agreement contain varying terms, there may be a contract if the requirements of sections 2-204 and 2-206 are satisfied.

(b) Varying terms contained in a writing or record prepared by one party do not become part of a contract unless the party claiming

expectations theory is supposed to ignore fairness in the bargain. If the parties on the evidence have validly agreed to the bargain, then a will theory, or any liberal theory of contract, is presumed to have ended the inquiry. Thus, Able may have agreed, but the contract to which Able assented may yet be an unfair bargain. This reasoning makes no sense and constitutes the most wretched premise of conventional contractual theory. A will theory can only conclude that Able did agree to a contract if the contract is in fact fair to Able. Only a formal theory of assent creates the possibility of Able's both agreeing to a bargain and a finding that the bargain is unfair.³

A social theory of contractual assent cannot present both the phenomena sufficient to find assent and also an unfair bargain. One who rejects a social theory of contract may do so, but such a rejection would seem to imply more than just any theory of contract and rather contract itself. Suppose that Able and Baker come from different bargaining communities with customarily different standards of assent. Able understands that the parties have crossed the contract-making line, while Baker does not. Neither party is yet concerned because Able has the deal that she prefers, but only because Baker has not finished his negotiating. Able wants the "deal" enforced, but of course Baker does not. A court might

inclusion proves that the party against whom they operate expressly agreed to them, or knew or had reason to know of the varying terms from the circumstances and failed to object to them.

(c) If a contract is formed under section (a), the terms are:

- (1) those included under subsection (b);
- (2) those upon which the writings or records agree;
- (3) those to which the parties have otherwise agreed; and
- (4) any supplementary terms incorporated under any other provisions of this Act.

(d) Between merchants, the burden of proof under this section is satisfied by a preponderance of the evidence. Otherwise, it is satisfied by clear and convincing evidence.

³ Because the legal realists of the thirties and forties reacted against a formal rule-based theory of assent, perhaps they appropriately championed the view that valid contracts could be unfair bargains. These realists invented such terms as the adhesion contract, which were supposed to exemplify these concurrent phenomena. Though too little noticed, the movement away from formal assent in contract law leaves only the realist rhetoric.

resolve this dispute and enforce an unfair bargain (from Baker's view) by holding that Able's understanding of the contract-making line is correct.

But this is a legal decision and not a social decision of assent. A social decision would require that the parties share the same understanding of the contract line or that they mutually conclude that the line had been crossed, even if at different moments.⁴ When the shared capacities of the parties diverge materially, no contract can be formed and the parties or courts must rectify whatever resulting injustice occurred using principles outside those of agreements.

To understand how unfair bargains might be contracts requires an exploration of the history of American contract doctrine. This Article addresses the defeat of the consensualists and the estoppelists of the late nineteenth century at the hands of Holmes, Hand and Williston and their objective theory of contracts. These luminaries of contract law built upon the sad dictum of Adam Smith and the political economy of the nineteenth century, which centered on the proposition that the value of something could only be subjective. Thus, whatever she bargained for was the value that she attached. In principle this might even be true, but in practice, these same moguls lacked any theory of what a bargain was. Without a sound theory (and thus practice) of what a bargain was, the law of contracts settled on Holmes' vague notion of mutual, reciprocal and conventional inducement.⁵ But this general phrase would provide precious little guidance to any particular case; nor were courts interested in providing the gloss that this, like all vague ideas, needed for practical application. Sufficient in law was some act from which a conventional assent might be found. One who wished to show that one's assent was truly lacking and that there was no actual reciprocal conventional inducement met disinterest.

No one would doubt that in many problem cases through the years, the trouble came from the difficulty one had in believing that

⁴ The proposed revision of U.C.C. § 2-207 centers the finding of a contract for sale within the principle of § 2-204(1), which permits the making of a contract for the sales of goods "in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract."

⁵ OLIVER W. HOLMES, *THE COMMON LAW* (1881).

someone would consent to such a bargain. If value was so subjective, we should have great difficulty explaining the easy consensus surrounding the many cases and examples where the law meagerly doled out remedies to victims of the most unfair bargains. Mistake, duress, fraud and undue influence supposedly earmarked the cases of unfair bargains. Yet, these defensive pleas received serious consideration only when evidence suggested that the deal in substance was wrong and that there was unfairness in the bargain.⁶

The simple tests of assent and consideration provided an analytical framework so that we should resist nonlegal thinking, such as: "That bargain stunk from Maine to California." Contract law became counterintuitive in that the substantively unfair bargain was first analyzed as valid under the normal rules of assent and consideration, and then the matter of mistake or duress could be addressed. A presumption of validity would frequently prove hard to overcome.

The benefitting party should have the burden of proving real assent and real, mutual, conventional and reciprocal inducement where there is apt evidence of an unfair bargain. Instead, and counterintuitively, the simple rules of assent and consideration succeeded in ignoring the unfairness of a bargain; by imposing the burden of proof on the party by virtue of having acted in a conventional mode of assent, contract law would impose on those least likely to be able to afford their burden. The contemplated new evidentiary rules in the revised section 2-207 represent a watershed

⁶ It is sometimes argued that substantive unfairness in the bargain cannot be a pervasive test of undue influence, duress or unconscionability because it would produce the strange result of a duressed, but fair, bargain being enforceable. *See, e.g.,* MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993). Identifying fairness of the bargain by a price term alone perverts what is meant by a fair contract. Being forced to deal with someone at a better price than otherwise available does not remove the taint of the force. *Cf. Austin Instrument Co. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971). One can, perhaps, *only* imagine contracts that are substantively fair, but are produced by invalidating duress just because of the relation of duress to unfair bargain. Whom one contracts with is a substantive bargain term. Thus, a market or below market price for a buyer such as Loral Corporation cannot quiet facts of duress. A duressed, but fair bargain may be a literary figure akin to a devilish god.

about contractual assent, and offer new protections in both commercial and noncommercial sales.⁷ Even if the battle of the forms in merchant dealings has become a thing of the past,⁸ and whatever the final form of revised section 2-207, the overthrow of old and misplaced values will become complete in this process. Evidence of agreement will finally displace legal imperative. The traditional contract law was too conventional about what it would take to bind someone to a contractual obligation, but contract law would unconventionally ignore the prime evidentiary basis for relieving someone (or believing someone's excuse) from a contractual obligation. Thus, whether a bargain someone sought to enforce was unfair has only slowly dripped back into the discourse of contract law. The slow return of this idea came from courts gradually adopting reasonableness notions to expand the scope of the idea of contractual obligation. As the U.C.C. abolished much of the law of contractual invalidity and provided the reasonableness heuristic for incomplete expressions of agreements, it became silly and ridiculous to continue to propound the theory of the subjectivity of value. Widespread and recurrent transactions, mass merchandising and similar developments provided sufficient practical backgrounds for judicial determinations about what parties intended when they act within particular social practices. Similarly, this provided evidence of value too obvious to be ignored. Smith's dictum had become honored in the breach in commercial law; old truths await no better veneration.

I. PARTY AUTONOMY IN CONTRACTS

Party autonomy can address all of the important questions which arise in contract disputes. Yet, in the law of contracts, the fundamental idea of party autonomy has diminished chiefly because party autonomy is thought to be unable to deal with these problems. If party autonomy or party intention were unable to address

⁷ See *supra* note 2 (proposed revision of § 2-207(d)).

⁸ Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the "Battle of the Forms,"* 49 BUS. LAW. 1019, 1024 (1994).

the problems of contract law, then paternalism, distributivism, or another external standard would necessarily have to guide contract law.

Contract law may use party autonomy to deal with the particular problems which led to the conventional view that contract law must transcend party autonomy. The writer's particular subjects or examples include the topics of assent, duress and unconscionability, which are widely thought of as intractable or even meaningless legal ideas if viewed as problems of party autonomy under a will theory of contracts.⁹

The law of contracts is widely thought to have failed in giving effect to the will of contracting parties in two distinct and inconsistent ways. First, giving effect to the will of the parties is thought to be the problem of contracts and hardly any solution. Freedom of contract must, in a popular view, bring down upon the weak the contractual tyranny of the strong. Second, giving effect to the will of the parties poses an insuperable legal task of identifying when, or upon what, the parties had voluntarily agreed. History shows that contract law has occasionally permitted contractual tyranny and also failed to understand the intentions of parties. Thus, modern contract literature offers a law of contracts grounded in substantive principles outside party autonomy or the will of the parties, such as social justice or economics. The widespread thought that a contract law based on party autonomy must err in these ways is, however, unjustified.

The law of contracts, of course, failed to deal appropriately with important questions. But this failure occurred because contract law had already abandoned the guiding value of party autonomy.

⁹ Hardly anyone seriously considers the alternative of will theory because the past of will theory jeopardizes the security of contractual agreements by permitting a promisor to deny solemn promises because of mental reservations. Whether any truth backs that charge is irrelevant for present purposes. By will theory, the writer means a law of contracts in which doctrine has the purpose of giving effect to the parties' intention. An undisclosed contrary intention no longer upsets an apparent agreement under a will or intention theory any more than it does under traditional objective theory. Rather, the theoretical basis of contract enforcement is the will of the parties. Liberal political theory supports this view of contracts. *See also supra* note 4 and accompanying text.

The rejection of the will theory of contracts by the end of the last century led to an overreaction in contract law against party autonomy and party expectation.¹⁰ Consequently, an objective theory of contracts developed which eschewed party autonomy in the following and central manner: assent to a contract occurred when a person voluntarily manifested an intent to contract in a legally conventional way. Even though analytically separate doctrines, such as duress, fraud and mistake, retained older and material grounds for the investigation of the voluntariness of contractual assent, a new theory of contractual assent predominated, as the idea spread that assent between unpleasant alternatives was no less voluntary than assent between pleasing alternatives. In this new regime, older and putatively separate doctrines such as duress were considered charming relics of an outmoded and failed will theory.

In addition, the liberal political philosophy which inspired party autonomy and seriousness about voluntariness and intention fell out of favor. Critics argued that liberalism failed to explain contract law, which requires examining the substance of any bargain¹¹ in

¹⁰ The writer describes this at length in a work in progress, where he concludes that the so-called "will theory" of contracts of the nineteenth century existed primarily in the minds of those who at the turn of the century confronted a contract law which lacked any instructive idea of agreement. One possibility was the heavily subjective approach to intention, which logically meant that any promisor ought to be free to repudiate any promise. There is barely any evidence of any such theory of contract law in legal sources of the nineteenth century. Instead, as Professor Gordley has shown, the will theory of contracts marks the arrival of the continental theory, which puts the intentions of the parties at the fore of contract law. JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT LAW* (1991). Around the turn of the century was a defeat of a much tamer will theory than modern teachings suppose. The argument concerns the scope of evidence about contractual assent, which sadly was won by what we call today the objective theory of contracts. Ironically, in light of the subsequent rise of estoppel in contract law, the losers in that argument centered their claims on the idea that contracts by estoppel, those without actual assent, differ from contracts in which actual assent appeared.

¹¹ Liberals doubtfully accepted the thesis that contract law may not consider the substance of a bargain because reasoning from the bargain to decide whether it is invalid for duress or unconscionability intrudes on party autonomy. On that thesis, the substantive bargain is out of bounds. However, this outside or external

order to make determinations on duress and unconscionability.¹² The need to look at and evaluate the substantive bargain to decide such cases mandates that liberalism adopt a non-liberal or distributivist principle.¹³ So too, liberalism cannot offer a theory of contract which autonomously guides the distinction between voluntary and involuntary exchange.¹⁴ In offering party autonomy, a will¹⁵ or

metaphor begs the question of freedom of contract, though this metaphor has traditionally been thought to follow from freedom of contract. Looking at the contract bargain as outside or external to the parties' agreement assumes the previous and correct decision upon which the parties had voluntarily agreed. Duress and unconscionability claimants do not concede that is what happened; rather, they put agreement in issue. *See infra* parts V, VI.

¹² Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

¹³ "[C]onsiderations of distributive justice not only *ought* to be taken into account in designing rules for exchange, but *must* be taken into account if the law of contracts is to have even minimum moral acceptability." *Id.* at 474. The truth of this thesis is at once obvious and trivial. Contractual imperialists who would impose rules of exchange on others must do so on the basis of distributive justice. Those who would desist from designing or imposing rules of exchange, or liberals, have different obligations. Most notably, liberals have to understand the social practice of exchange and contract so that the social practice may flourish.

¹⁴ *Id.* at 475-78. Yale Law School Dean Anthony Kronman holds that the moral value of voluntarism preferred by liberalism, collapses in the face of rationality in a choice of the sort exemplified by the robber's, "Your money or your life." A choice in such a situation, as in others which are bound by unpleasant alternatives, is rational. Yet, Kronman correctly hypothesizes that liberals would not want to draw the voluntariness line at such rational choice. He infers that liberalism cannot draw *the* line at all. But, to draw *the* line is a preoccupation of legal imperialism and perhaps, distributivism. Liberalism chooses not to draw the *same* line for everyone; high risk-takers do not deserve *the* paternalistic line; nor do low risk-takers deserve *the* libertarian's line. Legal imperialism provides an outlook demanding a line *qua the* line for everyone. *See infra* part VIII.

¹⁵ A will theory follows liberalism in using the parties' intentions to resolve contractual disputes. Will theory is entirely unsatisfactory from the perspective of contractual imperialism, which would provide *a priori* backup and baseline rules of contract law. This presumes that contracting parties cannot speak for themselves and that contract gaps of intention exist for the law to fill. Lawrence Kalevitch, *Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 169 (1993). The writer can no more disprove the presuppositions of imperialism

liberal theory is thus said to fail by needing to turn to non-liberal principles. Duress, unconscionability or even fraud is perceived as resting necessarily on paternalistic values far indeed from party autonomy, which would validate everything but non-cognitive agreements.¹⁶

Second, party autonomy cannot be a strong value in contract law when contract law refuses to provide legal protection for what the parties intended. For example, the problem of a murder contract or other illegal bargains demonstrates that party autonomy generally has little to do with contract law.

But a murder contract and a contract entered into under duress or an unconscionable contract share both similarities and important differences which are sufficient for guidance by party autonomy. A general ground: The distinctions some regard as necessarily resting beyond party autonomy, for example in social justice or economics, come from the relevant social practice. Only in social practice might there be any distinction. As to this tenet, it is also worth recalling that only a liberal view may accept different lines of voluntariness and involuntariness in different areas of contractual activity.

Once contract law departed from the guidance of social practice it could no longer distinguish duress from contractual assent, unconscionable advantage-taking from contractual assent and criminal conspiracies from contractual behavior. Without the guidance of social practice, a largely meaningless idea of intent came to dominate the law of contracts: It is essential, however, that the acts manifest assent intentionally. That is, there must be a conscious will to do those acts.¹⁷ The first restatement illustrates the meaninglessness of this idea of intention: "A offers to sell B his library at a stated price, forgetting that his favorite Shakespeare,

than imperialists can disprove the presuppositions of a liberal will theory of contract. Whether there are generally gaps in contracts for the law to fill is not a factual question to be decided by empirical investigation. In particular contract disputes, courts may choose between filling gaps in the documentary evidence of the parties by legal rules or by evidence of the parties' otherwise expressed intentions. Liberalism favors the latter.

¹⁶ TREBILCOCK, *supra* note 6.

¹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. c.

which he did not intend to sell, is in the library. B accepts the offer."¹⁸ B is entitled to have A's favorite Shakespeare.

On the question of whether A intended to sell his library including his favorite Shakespeare, the answer under the "conscious will to do the act" definition is unanswerable (what is the act?) and hence, this restatement idea of intention is meaningless. No one can know which of the two quite differently resulting factual propositions is intended by the "conscious will" definition: does A intend to sell the library including Shakespeare by his acceptance of B's offer for the library as the drafters opined, or does A merely intend to sell the library not including his favorite Shakespeare?¹⁹

A court needs more information than the empty "conscious will to do the act" to decide such cases. Perhaps the drafters fairly assumed that restatement readers would understand. An offeree such as A is not merely doing an act which is describable without using a host of legal concepts. Those concepts led the drafters to their conclusion. The key concern was about people such as A

¹⁸ *Id.* illus. 2.

¹⁹ *Cf. id.* § 19. "[A]ssent is not a mere appearance There must be conduct and a conscious will to engage in that conduct." *Id.* "[A] mental reservation of a party to a bargain does not impair the obligation he purports to undertake." *Id.* § 17 cmt. c. But, even if A does not purport to undertake any obligation to sell her Shakespeare, her "conscious will" lacking, the objective theory may bind A to a contract obligation because a reasonable person could believe that A's "mere appearance" manifested assent. Objectivists might explain that where A ostensibly appeared to assent, she purported to assent. That is a deep contradiction. For, we may not need to rely on mere appearances; we rely on the mere appearances under the objective theory because we do not know whether A intended to sell Shakespeare along with her library. Nevertheless, B must actually believe that A's appearances of assent meant that A did assent to sell her Shakespeare. Otherwise, protecting B from A's appearance of assent serves no party interest other than B's advantage-taking. Thus, if B needs to show her own genuine, subjective appreciation of A's assenting, this way requires explanation. The second restatement conceded the collapse of objective assent into a will theory by adding an express caveat about the will-based mistake issue regarding A's Shakespeare and intent to contract. *Id.* § 19 illus. 2.

observing the ethical value of "behaving carefully"²⁰ with respect to others.

Two unmentioned points in the first restatement are stated in the same illustration, which is also used in the second restatement.²¹ First, B might know or have reason to know that B would not mean by his acceptance to sell his favorite Shakespeare along with his library.²² In either event, A's "temporary forgetfulness" produces no contract.²³ Second, whether the A-B contract is voidable for mistake also finds its way into the later restatement analysis of the illustration.²⁴

Intent in contract law became a conscious will to do an act, rather than an intent to effect a contractual relationship. Neither act nor will presented any simple fact which might be investigated, but rather depended on more complex social understandings²⁵ about seemingly simple facts,²⁶ such as signing a document and shaking

²⁰ The rise of negligence in contract law accompanied the ascent of negligence in tort law. Nor is the modern diminishment of negligence in the latter irrelevant to what is happening in the former. Just as contract law accepts negligent attributions of assent much less facilely than it did earlier in the century, so has negligence in torts fallen from its citadel.

²¹ RESTATEMENT (SECOND) OF CONTRACTS § 19 illus. 2.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Relational contract theorist, Ian MacNeil aptly used the metaphor of madness to describe our intellectual-legal depiction of contract abstracted from society:

[S]ociety surely must be the most forgotten fact in the modern study of contracts, whether in law or in economics. This lapse of memory we deliberately impose upon ourselves in both disciplines by our heroin-like addiction to discrete transactions. And I use that simile advisedly, for surely it is some kind of madness—the image flashes to mind of the mad scientist of movie or television—to carve out the body of society its economic heart, yet expect to examine it as an independent and functioning organ.

IAN MACNEIL, *THE NEW SOCIAL CONTRACT* 1 (1980).

²⁶ If contractual intention is any kind of fact, it rests, like other interpretive facts, on an interpretive theory. Contract law can propound a theory of intent on any basis it wishes. For example, Judge Posner may factor a wealth-maximizing theory of intention at least for cases in which the parties' actual intent is missing.

hands or saying "yes." These social understandings might be expressed in contract law or left for discovery in litigation. By denying that any intent to effect a contractual relation was necessary for an actor to engage a contractual relationship, the law left itself open to express the social understandings. Not surprisingly, the law chose the lawyers' social understandings and thereby lost the capability to understand the intentions of anyone not schooled by lawyers. Ironically, the law's idea of intent to contract fit perfectly with a class of society who did in fact intend to effect contractual relations: the lawyered class.

Once the law of contracts took it upon itself to distinguish voluntary from involuntary behavior, the failure of the law to make these theoretical distinctions led to the now conventional idea that duress, fraud and unconscionability had to be reconstructed from outside party autonomy and from outside contractual intention. "Policing the contract" became the organizing expression which identified the failure of party autonomy to provide a contractual regime protecting legitimate expectations.

Yet, it is wrong to appreciate the failure of a particular legalistic program of contracts as proof of the failure of party autonomy. Once contract law was removed from social practice which alone can provide party autonomy, contract doctrine failed. The divorce of contract law, here in the subject of contractual assent, from social practice left contract law to create substantive legal tests of assent. Unless people and organizations share these legal tests, the assent of contract law cannot give effect to their intentions. And party autonomy is lost, unless in some other way, contract law brings social practice into its account.

However, a will or liberal contract theory may no more endorse a prescriptive contract law telling parties what they have done than it may participate in traditional contract's incoherent preaching

An autonomy or will theorist prefers a social practice interpretive theory under which "missing" intent arises from lack of supporting evidence. *E.g.*, *Varney v. Ditmars*, 217 N.Y. 223, 233, 11 N.E. 822, 826 (1916) (Cardozo, J., dissenting) (stating the concept of indefiniteness in contract law as the lack of evidence of contractual intent).

about what, "as a matter of law," parties have in fact done.²⁷ Because liberalism cannot endorse such a contract law, for some it fails.²⁸ Of course, liberalism cannot tell anyone what may and may not be done. That is the success of liberalism and the fundamental error in divorcing doctrine from social practice or propounding doctrine in arrogant ignorance of social practice.

Seemingly paternalistic and protective doctrines such as unconscionability²⁹ are said to impeach the liberal value of party autonomy. In another view, however, putative policing doctrines, such as unconscionability, follow from liberal values such as party autonomy. The inspiration for refusing to enforce contracts lies in rejecting a frequently fraudulent autonomy bred by traditional contract doctrine. Contract law went mad³⁰ about the meaning of agreement and the value of autonomy. A century-long infatuation

²⁷ Melvin Aron Eisenberg, *Expression Problems in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127 (1994).

²⁸ Kronman stipulates a form of argument that cannot be answered by liberty theory. By limiting the field in that way, he takes a small victory and surely not the trophy that he sought. Tripping up a liberal in this way is as mean as denying a utilitarian his calculus of pain and pleasure. Kronman argues that the liberty theory must create a theory of rights that are independent of the rights that people hold by

nature or convention. But, rights cannot be ascertained in this way. Every claim concerning rights is necessarily embedded in a controversial theory: the only way to justify the claim that a person has a certain right is to argue that he does, and this means deploying a contestable theory that cannot itself be proved or disproved by simply looking to see what is the case. In order to apply the liberty principle, we must already have a theory of rights. Because it does not itself supply such a theory, the liberty principle, standing alone, provides no guidance in deciding which forms of advantage-taking ought to be allowed.

Kronman, *supra* note 12, at 483-84. Kronman claims that liberal theory may not use conventions to derive rights. Though it is true that a liberal conception of duress could not be proved right for everyone under any particular bargaining convention, it is not true that a liberal conception of duress propounds a substantive conception of duress. A libertarian or a liberal may propound a theory of duress which uses conventions or social practices appropriate to particular disputes.

²⁹ As parts IV-VI, *infra*, maintain, unconscionability protects the idea of contractual assent.

³⁰ See *supra* note 25.

with an objective theory degenerated autonomy as the concept of agreement in contract doctrine.

Appreciating the substance and fairness of a bargain jeopardizes neither liberalism nor contract. Voluntariness may constructively reinvigorate the core of contract. Unconscionability, duress and fraud in this view do not stand outside the idea of contract awaiting the imports of distributivists or economists to justify invalidation of apparent agreements. Rather than liberalism, a peculiar twentieth century idea of contractual assent or intent, a mere "conscious will" to do an act, a meaningless and legalistic idea of assent and intent, fostered the outsider status of unconscionability and the kindred doctrine.

II. ADVANTAGE-TAKING AND VOLUNTARINESS

The basic inquiry of duress, unconscionability, or fraud is whether one party unfairly took advantage of another. Part and parcel of contract is the fact that each party takes an advantage from another. Working well, neither party minds losing the particular advantage to the other as she prefers the advantage that she will take from the other. Taking advantage is not problematic in contract; taking unfair advantage is. The doctrinal terms for unfair advantage include duress and unconscionability.

Normal contractual advantage-taking follows from a liberal principle of state abstention in voluntary affairs. Voluntariness is never, or rarely, complete. Second thoughts often permeate the giving of contractual assent. No wise or experienced person would ever utterly throw herself into contractual assent. When people do wholeheartedly assent, one may properly question their wisdom or experience but, more importantly, their motive for assent.

When assent is unfairly produced, as through physical or economic duress, the motive for contractual assent is quite different from cases of normal advantage-taking. Assent in physical duress (as with economic duress or unconscionability) is, if voluntary, not identical to assent to a contract. It is assent to a forceful demand. That forceful demand comprises the unfairness of which one would speak in describing duress as unfair advantage-taking. A duress

victim assents to a contract on the demanded terms no more than a submissive rape victim assents to rape.

Nevertheless, some insist that victims of duress act voluntarily. They insist that the contractual assent behavior in duress is voluntary, even more voluntary than usual. For these critics, all decisions between alternatives, however produced, are voluntary. Indeed, they argue that choice, even between unpleasant alternatives, is voluntary. Such thinking nicely summarizes the degradation of contract. This thinking strips particular, expressive behavior from its social context under the illiberal axiom that only one normative account may follow from particular behavior. In the context of contractual assent and duress, for example, the particular fact that a duress victim signed the contract is the expressive behavior which led to the legal conclusion of contractual assent; intention to contract. In this vacuous and vicious theory, there is no room for a liberal idea of contractual intention. Social practice, however, has no trouble accurately describing an event of physical duress as bearing no real contractual assent; no intention to contract. Economic duress and unconscionability often present more difficult questions, but are still better answers when understood by social practice. Yet, what might be duress in one social context may be assent in another.

No theory of particular, expressive behavior can distinguish material differences in social contexts. If signing a contract alone is assent, then the context of fraud in the inducement or the execution of the document, or physical or economic duress cannot matter. Traditionally, contract law has analytically separated contractual assent from unconscionability, duress, or fraud as though these are separate social events. Hardy, if futile, legal distinctions between acts which may void or merely permit avoidance followed from the analytical legal separations.³¹ However, the facts of such problematical "contracts" do not occur separately, but together. Contract law retained the particular expressive theory of assent by creating supplementary and apparently independent remedial principles for formally effective, but materially defective assents.

³¹ RESTATEMENT (SECOND) OF CONTRACTS § 19(3) (1981).

Contract law lost a theory of voluntary assent unless one includes what the doctrine separates, duress and the like. It is not that assent is as voluntary in duress as in the usual case of contract; but the voluntariness of assent became immaterial with the adoption of the objective theory of contracts as particular expressive behavior in which voluntariness fell to manifested assent. As the restatement asserts, all that contractual assent requires is a "conscious will to do an act."³² And assent as conscious will is held separate from duress and the like.³³

Yet, the law of duress requires material and not formal consent whenever physical force is suggested as the motive for someone's formal signing of a contract. Similarly, but differently conceived concerns about scarce opportunities and goods also require material consent. Although our law has traditionally protected against unfair advantages by holders of scarce resources under various other labels, laws against restraint of trade have a basis in duress vitiating

³² *Id.* cmt. c.

³³ Indeed, insight into the inextricability of assent and duress, for example, culminated in the second restatement's candid holding that a manifested assent does not need to be real assent. This holding immediately directed attention to causes, such as duress which may invalidate the contract. *Id.* This curious result follows only from perpetuating the particular expressive theory of assent, called manifested assent. Manifested assent continues, aside from the invalidating causes, because of the concern that a promisee may be injured by an appearance of assent in a circumstance in which a promisee has not committed any of the nominate invalidating causes, such as duress. The reason for the restatement's continuing solicitude for the promisee is the assumption that she actually understood the apparent promise as genuine assent and may be injured should the law permit the apparent promisor to prove that the apparent assent was not real. Here, contract law requires no proof of actual injury, which would seem to be so probative on a promisee's actual understanding of a manifested assent, presumably because it is likely to occur in ways that are often incapable of being proven.

But whatever social practices supports, understanding a promisee's expression as assent also resolves the question of the promisor's understanding. When reasonable persons in such settings might only understand an expression as assent to a contract, no need arises for distinguishing a promisor's manifested intent from her actual intent, nor does the law supplant actual non-assent with manifested assent. Thus, a promisee is not excused from proof of actual injury caused by a difference between an apparent and a real promise because such proof may be difficult to muster.

unduly one-sided contracts. For example, employment-required covenants not to compete traditionally receive a validation test of reasonableness in time and in geography. Here, the assent that employees give to unreasonable terms is frequently understood as mere formal consent, essentially involuntary and produced by the greater need of the employee for work than the employer for protection. Nor does contract law give way, as often believed, to a grander social policy than freedom of contract; freedom of contract produces material or real assent only to reasonably protective terms. The typical employer has no further reasonable expectation.

The would-be employee is treated like the needy resident of a weather-ravaged land after a hurricane in Miami and after the recent earthquake in California. In both locations, reports of gouging surfaced immediately after the disasters struck. Sellers were offering Miami residents plywood to shelter their homes shortly before Hurricane Andrew struck, while itinerant outsiders offered generators along major South Florida roadways soon after the storm. Prices jumped far into the abnormal. The formal consent for which contract law is justly infamous abounded. Were there no difference between formal and material assent on the scale of voluntariness, the greater need for shelter and power would fortify arguments that here was even more willing assent than usual or necessary. Here again, choice between unpleasant alternatives would still be thought of as voluntary.

As with the description that they share of a contract signed under the gun of another, some might describe these disaster victims as even more willing and voluntarily assenting than usual. This view misconceives the law of contractual assent as the law of supply and demand.³⁴ Without refinement, this supply and demand theory suggests that a mugger whose victim submits has obtained contractual assent. Some gougers defended their conduct. For example, one gouger, interviewed by a ubiquitous television reporter, raised the mantle of freedom of contract in Miami after Hurricane Andrew: "I drove down here from Jacksonville, so I

³⁴ Trebilcock points out a survey to the same effect, under which respondents rejected the fairness of a store raising its prices of a temporarily scarce resource. TREBILCOCK, *supra* note 6, at 89.

guess I deserve something extra.”³⁵ For too long, traditional analysis, no doubt effective as analysis and nothing more, has paraded aspects of voluntariness as sufficient for the concept of contractual assent. Yet, were one inclined to the pragmatic rather than the analytic, one should say that contractual assent generally requires more than mere shadows or aspects of voluntariness, especially when one claims duress.

Accepting the normativity of formal consent precludes examination of the meaning of someone’s signing a contract document or another’s paying a gouger. The premise of formal consent, if accepted by a liberal view of contract does indeed preclude any liberal view of duress, gouging or other forms of unconscionability. But the probity of the premise of formal consent for a liberal theory of contracts cannot be established.

Arguments like this take contractual assent as formal only and purport to tie liberals to an unliberal conception. Different theories of political organization might concur on the legal and organizational force to the idea of formal consent. So, too, might they disagree. Formal consent might suit a distributivist regime because contractual choices may rarely dictate important wealth distributions. But a liberal regime cannot accept formal consent for the opposite reason: material consent and real assent will importantly determine wealth distributions under liberalism. The numerous invalidating doctrines of contract law affect the configuration of material assent. In so doing, unconscionability, duress and fraud, for example, speak directly from the liberal value of party autonomy to the issue of contractual intent or assent. Reading the law of assent as merely “a conscious will to do an act” means that assent to a mugger is sufficiently voluntary to form a contract, not a crime. That distorted view misses the animating social practices by which contract and crime are quite different, though some aspects of voluntariness appear in both.

Formal ideas of assent have been accompanied by a simplistic conception of freedom of contract. The employee who has signed an unreasonably long or spacious covenant not to compete is

³⁵ Susana Barciela, *Andrew’s Aftermath*, MIAMI HERALD, Aug. 29, 1992, at 28A.

thought on the desideratum of freedom of contract to have a moral and legal obligation. Thus, we have long used such rhetoric to excuse the employee from her promise on the ground of an unfair bargain, when the question (or the answer) may have been whether the employee had in fact agreed to such a bargain.

III. CONTRACTUAL INTENT: MEANING AS SOCIAL PRACTICE

Just as the behavioral norms under which moral or legal obligation arises vary from time to time and place to place, norms may differ in the same time and place between organizations and individuals. Contract law may affect these norms or use these norms. When contract law uses these preexisting norms, it opens the possibility that behavior between A and B may lack legal effect, though apparently identical behavior between C and D may have legal effect. The traditional legal expression explaining this apparent discrepancy is the intention of the parties. A and B may mean or intend something different than C and D. Under the principle that what the parties mean or intend by their behavior controls in contract law, these two cases are decided differently, though particular expressive behavior is identical.

Additional facts may differentiate these cases, but these additional facts do not alter the observation that certain behavior of the parties was identical. Unless one understands the party intentions or meanings as simple facts, this must be so. But if intentions are facts, then they are facts that are richer than what A and B or C and D said to one another. Any observer who is familiar with the ordinary meaning of the words that the parties exchanged should report that A and B said pretty much the same as C and D. The same observer cannot clearly report what the parties intended by their words. If asked what these parties meant, a cautious observer will report what these parties meant tentatively, and perhaps, alternatively.

For example, an observer might not know that A had a gun under the table and that B knew of the gun. The observer would therefore likely take B's words, "I accept your offer," as intending to form a contract for the same reason that the observer would find a contract between C and D. Yet, contract law holds that duress

invalidates the contract between A and B because B likely did not intend to create a contract with A if induced to agree by physical duress. However, if the observer knows of the gun, under contract law she might distinguish the cases of A and B from C and D on this basis. The gun under the table is a new and material fact. Yet, if this is so clearly a fact, it is not truly different from subtler facts about the parties' intentions.

Interpreting meaning or intention invites the observer to look under the table for a gun which might provide the best explanation as to why B accepted A's offer. Yet, an observer cannot find anything interesting under the table without some interpretive ideas about what might be there. The observer of contract-formation events has to have an idea about what it is that makes a contract to have identified A and B's behavior as perhaps resulting in a contract. When that observer is asked what else happened, her ideas about forming a contract are likely to evoke her to report that A had a gun in his hand, rather than the metallic object which was pressing against B's flesh.

The welter of raw facts presents essentially meaningless information unless the observer does some presorting. Information may become meaningful only when it attains significance. Two levels of significance hold in a liberal contract analysis. First, socially understood behavior is necessary to sort significant facts. Second, legal significance comes to some of those socially understood facts. For example, it is quite understandable that B may regret his contract with A and refuse to perform. If no gun were involved, and B regretted his contract because he had the flu, then social practice would have to be consulted to determine the intent or meaning of whether a case of the flu is understood to overcome socially acceptable, contractual behavior. Thus, where A claims that B should be bound despite the gun because B merely chose between unpleasant alternative opportunities, as contract actors often do, the choice ("your signature or your life") is less impressive than the social understanding that such choices may have a different significance (socially and thus legally) than other choices.³⁶ The regulative function of contract litigation

³⁶ *Contra* Note, *Economic Duress after the Demise of Free Will Theory: A*

distinguishes between behavior that is socially acceptable and that which is socially unacceptable.³⁷ Practicing duress or unconscionability typically falls into the latter category; enforcing normal exchanges falls into the former. In neither case, however, does a second level of meaning, the law, have to present new normative understandings of the parties' behavior. It may. But it is an analytical error to suppose that a normatively qualitative jump necessarily occurs from the legal translation of socially understood behavior to the final step of legal interpretation. An autonomy or will theorist prefers a social practice under which "missing" intent may arise from lack of supporting evidence.³⁸

IV. WILL-INDEPENDENT NORMS IN CONTRACT

Among the challenges in recent years to the integrity of a liberal account of contract is the contention that a liberal theory cannot explain or justify certain traditional features of the law and institution of contract. Consider, for example, a contract³⁹ that is clearly unenforceable and illegal in contract law: a contract between

Proposed Analysis, 53 IOWA L. REV. 892, 894 (1968). "The free will concept . . . has serious shortcomings. Because both normal contracts and those formed under duress result from a choice between alternative evils, it is *impossible* to distinguish one situation from the other on the basis of any difference in the *freedom* of the consent." *Id.* (emphasis added). This note abuses the concept of freedom of choice by treating it as a simple fact manifested by any event of choice. Consider whether anyone has the freedom to murder. If by this, one meant that the odds were long that someone would stop an attempted murderer, one would use freedom in the simple fact sense of it being likely that one could succeed in murdering another. However, the test of social practice bars the freedom to murder others. In demanding, but not finding an empirical test for measuring whether the amount of freedom an alleged duress victim exercised, the cited note overlooks social practice.

³⁷ Classical contract theory states a transcendently stronger thesis: that the regulative function of contract *law* is to separate from socially understood behavior that which is socially acceptable from that which is socially unacceptable.

³⁸ *E.g.*, *Varney v. Ditmars*, 217 N.Y. 223, 233, 111 N.E. 822, 826 (1916) (Cardozo, J., dissenting).

³⁹ Here, contract merely means agreement.

A and B, by which, in exchange for A's promise or payment of money, B will murder C. Because murder is illegal, courts reject A's claim for a remedy for B's breach and vice-versa. Yet, the intentions of A and B, if controlling in contract law, argue that the legal result of invalidity arises from a norm that is independent of the will of the parties. The thought is common that contract law must jump to an independent legal norm, the illegality of bargains, to deny enforcement of this socially disapproved intention of the murderous A and B. The intentions of the parties appear to conflict with the applicable legal norm. The consequence of such thinking both excuses and supports normatively independent moves for contract law from the parties' intentions to extrinsic standards.

This position has attracted wide support for the use of contract law to support social goals that are independent of party goals. No doubt contract *law* may accomplish normative goals that are independent of the parties' goals. That differs, however, from the idea that contract law must inevitably adopt norms or values independent of party autonomy. It may be true that contract law adopts norms or values beyond party autonomy, though that seems doubtful. But the claim here is merely that contract law does not need to go beyond party autonomy. Like law generally, contract law can be meaningfully autonomous of goals and purposes that are extrinsic to party intention. Unlike law generally, contract law should be so.

Contract law disapproves of murder contracts. A murder contract signifies the will of the parties. Ergo, contract law to some extent rests on a will-independent norm. This syllogism rests on an erroneous minor premise which converts the intention to murder C, as the result of a bargain, into the social and thus legal idea of intention to be legally bound. Only a strange idea of intention to be legally bound generates this logic. This is the equivalent of saying that A and B are morally bound to commitments that they know are morally wrong or that A and B have joined in a socially acceptable enterprise as contract, which remains socially acceptable even if an aim of the particular enterprise is socially abhorrent. Thus, in the traditional view, the autonomy of parties who are outlaws deserves equal respect under a will theory as it bestows on normal parties. By rejecting party autonomy for outlaws who make illegal bargains, a liberal theory of contracts must fail.

This argument mistakenly identifies socially understandable behavior with socially acceptable behavior. If contractual obligation arises from behavior which is socially acceptable, it does not logically follow that socially understandable behavior that is somewhat like contract also produces the same obligation or the same intention that the social practice of contract produces. Indeed, our intuitions about the sense of commitment, the intention to contract and the "morality of contract law," as Lon Fuller might have said,⁴⁰ support a wide gulf between contractual outlawry and conventional contract goals. Nevertheless, a narrow intent test supports identical conclusions about conventional and illegal exchanges. Yet, that test finds little support in social practice. Rather, a peculiar and socially abstracted legal test of intention generates a new, will-independent norm which attracts the criticism that the will of the parties insufficiently explains contract.

The murder contract hypothetical surely displays an intent⁴¹ to perform the evil bargain. The question is whether that is the same as the social idea of intention to be bound to a contract. If the social practice of contract excludes socially understandable but socially unacceptable contract means (duress) or goals (murder), then a will-based contract law must exclude contracts to murder. No one under such a social practice may both have an intention to be bound to a contract and use socially unacceptable methods or seek socially unacceptable goals.⁴² By determining actual intentions, thus, social practice circumscribes the legal test of intent to contract. Parties can only be understood and be situated within a social practice, so that social practice cannot be outside the parties.

The murder contract becomes no different than the problem posed by the appropriate boundaries of other intentional behavior. For example, the logic of the view that a contract to murder manifests the same contractual intention that is present in a sale of land or goods rests on a very simple idea of agreement. The idea

⁴⁰ See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

⁴¹ The intent may be entirely apparent and not real. The hirer may be a police officer who is engaged in a sting; the murderer-to-be merely a con man who is ready to run with the money.

⁴² However, relevant social practice may be indifferent to some methods or other goals, eccentric or idiosyncratic, which liberalism would then enforce.

is merely that the parties agreed. But people and institutions agree in many ways. Most agreements are never thought to be contracts. Occasionally, sad reports of contract lawsuits surface from broken social agreements, such as prom dates. Because contract doctrine so meagerly addresses the subject of which agreements are contracts and which are not, cases of broken dates are perplexing from a purely legal perspective. Such cases help us understand how we may too quickly accede to the suggestion that a murder agreement is a contract. A contract for the sale of goods, a murder contract and a date-break are all agreements. Yet, they are not all contracts any more than any agreement is a contract.

Nevertheless, the emptiness of any legal or doctrinal explanation as to why these are not all contracts permits resolution of both date-break and murder contract cases on the social practice of party autonomy. Whether the victim of a date-break should recover depends on whether the parties actually expected legal protection from their agreement. In this respect, most cases of date-break will present casual circumstances which give rise to few, if any, actual expectations. Yet even here, the special significance of a prom may differentiate that case from other social engagements. The social practice surrounding the prom, including the expenses of gowns and tuxedos, may show a different or higher level of commitment than social engagements in general. When, as likely in this context, this social practice is controversial, a jury may best speak to the social practice.

Legal doctrine does speak fully on the murder hypothetical, however. But the question raised by the doctrine of illegal bargains is whether the murder rests on the social practice of party autonomy or whether its treatment of a murder conspiracy rests on another, independent value. If especially significant dates can give rise to actual expectations of legal protection, if such may fall within a social practice which makes breach of promise unacceptable, the same test is likely to exclude legal protection for a contract to murder. Party autonomy means more than the act of agreement as in the context of casual social engagements, and the same is true for anti-social agreements. By refusing to enforce heinous agreements, party autonomy may frustrate the will of heinous parties. Party autonomy does not require enforcement of all agreements, but only those which fall within the social practice of

contracting. When contract law broadly strikes down illegal bargains, it rejects any claim that the parties intended to legally enforce their bargain as factually incredible. Thus, the party autonomy of contract law grounds the rejection of legal enforcement of murder contracts and other illegal bargains.

Contract law is not merely about agreements or manifested intentions that are divorced from social practice. Contract divorced from social practice might engage in strange, but logical reconstruction of, for example, tort law, entirely in the language of contractual intention: when A drives on the street, contract law divorced from social practice might hold that A manifests an intention to compensate anyone who is injured from A's negligent driving. Similarly, when a manufacturer puts a product into the stream of commerce, contract law divorced from social practice might hold that a manufacturer promises to compensate anyone who is injured in a reasonably foreseeable way by a defect in the product. Logic permits this, but experience or social practice rejects that description of intentional behavior such as driving or manufacturing.

Thus, to say of the murder contract, driving, or manufacturing, that intending to do an act is identical to intending to be contractually bound, mistakes what may be no more than intentional behavior with intention to be legally bound to a contract. As with equating agreements with contracts, social practices repudiate such an understanding. In duress cases we reject a logical explanation, choice between unpleasant alternatives, because it similarly misses a norm in the social practice of contract-making.

Only by divorcing the will of the parties from the context of our social practices is one led to assume that there may be the same meaning in any form of intention as there is in the intention to be legally bound. But removing the parties' conduct from context always produces nonsense.

V. SOCIAL PRACTICE

To summarize: Two explanations follow from courts' refusing to enforce murder contracts. Either courts refuse to do so because parties to such contracts lack the intent to be bound that is necessary for a valid contract, or because contract law renders such

contracts invalid regardless of the parties' intentions. The conventional view of contract law holds the latter view. That view welcomes into contract law nonparty goals, leaving contract law as an eclectic blend of party autonomy and external standards. At any moment, the latter may trump the former and produce chaos for particular expectations by particular people and institutions who are parties to contracts.

Because party intent seemed to offer no reason why courts might reject illegal bargains such as murder contracts, contract law seemed to need nonconsensual norms. But this assumes that the same intention supports murder contracts and normal employment contracts, duressed contracts and voluntary promises. The norm of party autonomy has been thought to support equally each of these agreements as valid contracts.

Instead, the previous discussion suggests this: Social practices differentiate between kinds of agreements. Contract law may draw upon social practice to differentiate by appreciating the difference between socially unacceptable and socially acceptable behavior. Broadly, that is the function of all law. The contract to murder frazzles the party autonomist because it includes some behavior which is routinely understood to produce a contractual obligation. The party autonomist's seemingly normal, contract-making behavior is seduced in the same way that an audience is moved by the charm, wit, or intelligence of a serial killer, whom they momentarily perceive as normal or attractive.

A director may focus an audience's attention on those favorable attributes of a serial killer (i.e., charm, wit, or intelligence) which an audience would like to possess. Similarly, from the point of view of contract law, one may focus upon certain aspects of a case or hypothetical and be likewise so mesmerized by the parts as to miss the whole picture. For example, one who hires another to murder acts no differently in part than one who hires a gardener. The structural similarities between the contract-making activities, as with the structural similarities of the audience's self-view and the attractive characteristics of the cinematic serial killer, challenge our abilities to understand party autonomy and ourselves. Both experiences ask us to understand them better.

The murder contract, for all of its *contractually formal* similarities with socially acceptable behavior, falls substantively

outside the social practice of contract.⁴³ The conventional thesis is that the mere *purpose* of the murder contract puts the murder contract outside the social practice of contract. Thus, contract law here has to trump party intent and this opens the door for regulation of any contract purpose, including those unsupported by social practice.

On the other hand, if one found that in fact, and not in form, people who agree to murder contracts do not have the same kind of intention to be bound, if any at all, as occurs in socially acceptable contracts, one should not accede to the conventional thesis that it is merely the unlawful purpose of such a contract which produces its invalidity. Yet, the conventional supposition is that murder contract parties do have the same intent to be bound. Like the charming serial killer, parties to such socially unacceptable contracts are too easily thought to be "just like us."⁴⁴

Similarly, people who are forced to sign a contract at the point of a gun and people who use guns to coerce assent, are too easily thought to have the same intention to be bound as parties who assent to contracts through socially acceptable forms of persuasion. Conventional thinking here assumes what is in doubt, including the fact that parties to such contracts actually have the same intentions or expectations as parties to socially acceptable contracts. Yet, if it were the fact that actual intentions or expectations of parties to socially unacceptable contracts differ from those of socially acceptable contracts, no such leap outside party autonomy would be necessary.⁴⁵ As the writer knows no more about the intentions or expectations of "duressers," killers and their payors than he knows of serial killers, the writer shall keep silent on that except to object to claims that contract law must presume an identity in the

⁴³ Only the social practice permits the distinction between employment contracts for the military and murder contracts.

⁴⁴ Cf. ABRAHAM GOLDSTEIN, *THE INSANITY DEFENSE* (1967). "Instead, as it becomes more apparent that no clear line divides the sane from the insane, that 'we' and 'they' are more alike than we had suspected, the question of identifying those who are not to be held responsible has nagged all the more." *Id.* at 4.

⁴⁵ Still, one might argue, persuasively perhaps, to incorporate extrinsic criteria into contract law on other grounds. Again, the claims here challenge only the logic that contract law must transcend party autonomy.

intentions or expectations of normal, sociopathic or psychopathic behavior.

VI. SOCIAL PRACTICE: UNCONSCIONABILITY AND DURESS

Perhaps the foregoing use of social practice by liberal will theory is itself an adoption of a party-extrinsic idea of social practices. In this, perhaps, some may see a surrender of party autonomy to the reasonable person engaged in a particular social practice. Thus, extrinsic contract law criteria enter contract law even on this account. Testing the intentions or expectations of parties to allegedly duressed contracts by social practice is merely a use of an objective or extrinsic criterion in contract law. Hence, contract law must use party-extrinsic criteria. Yet, these points merely reiterate liberalism's failure to provide oxymoronic *legal* autonomy and do not make any case at all against party autonomy. Undeniably, the doctrine of unconscionability, for example, may be understood to be an addition of non-party values to the law of contracts.⁴⁶ As it is often stated, unconscionability permits the

⁴⁶ Even noted will theorist Charles Fried surprisingly professes the extra-party view of duress: "Whether it is possible to admit the defenses of duress and unconscionability without giving away the heart of my position?" CHARLES FRIED, *CONTRACT AS PROMISE* 93 (1981). "If a promisor knows what he is doing, if he fully appreciates the alternatives and chooses among them, how can it ever be correct to say that his was not a free choice?" *Id.* at 94. "It is the *deeper*, though moral criterion for coercion that we look for A proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses. It is coercive if it proposes a wrong to the object of the proposal." *Id.* at 97 (emphasis added). "So I conclude that a promise procured by a threat to do wrong to the promisor, a threat to violate his rights, is without moral force . . . [and] such threats constitute the legal category of duress." *Id.* at 98-99.

Fried accepts the view that eagerly giving in to a mugger is a free choice because a victim appreciates a more dangerous alternative. Even a liberal will theorist may thus collapse a conscious will to do an act into an intention to enter a contract. If muggers do not think that their victims assented to a contract, why should anyone else? If those who practice fraud, duress, or unconscionability do not actually think that their victims assented to a contract, should anyone else?

Anyone who fully appreciates the alternatives and chooses among them is not under duress when full appreciation means that under the relevant social

courts to "police" the contract bargain. The language used here to describe what courts should do under the doctrine suggests a particular philosophy of contracts, the noted distributivist view.

Here, again, one easily misses the point of this doctrine, as with duress: it is connected intrinsically to the social practice of agreement rather than separate from agreement. Perhaps it is merely easier to see the effect of the social practice on duress than on unconscionability. Yet, the source is the same, and social practice may be as contestable in a case of duress as it so often is in cases of unconscionability. Economic duress nearly always poses contestable cases of this sort. The broad historical and contemporary consensus, expressions of social practice, against the use of physical force in making contracts is somewhat looser in cases of economic duress. So, too, is this true in determining what contracts shock our conscience. There may be several reasons for a doctrine that permits a court to reject contracts or parts of contracts as unconscionable. Here, the aim is not to establish that unconscionability comes from a particular philosophy, but rather to show that a liberal theory of contract resting on socially acceptable practices may prudently and consistently permit courts to invalidate putative contracts involving socially understandable, but unacceptable, practices. In doing so, courts do not need to reach beyond the intentions of the parties as manifested in social practice. Thus, the charge against liberalism collapses if liberalism can explain unconscionability and related modern developments to be within party autonomy. Indeed, a liberal will theory may accept and explain unconscionability and other legislative "policing" of contracts.

A. Llewellyn and Unconscionability

Karl Llewellyn's thoughts about unconscionability are well-known and perhaps sufficiently show that a philosophy behind unconscionability follows from the liberal value of party autonomy.

practice, the choice was voluntary. It is possible that a society might practice voluntariness in such a way as to include mugging contracts. But that society is unlikely to have much in the way of liberal theory or organization.

Llewellyn distinguished the dickered terms of a contract from the undickered terms which appeared in a written document furnished by one party. As to these latter terms, Llewellyn suggested that the blanket assent that a party gives to these undickered terms often extends only to those terms which are reasonable.⁴⁷ In this respect, the adoption of unconscionability, similar to much of the U.C.C.,⁴⁸ reformed legal meaning and not social practice. Llewellyn's account of unconscionability as part of social practice may be wrong. Perhaps people do sign contracts intending to assent to everything in a contract document, regardless of whether they might have agreed to the contract had they known of the terms that they had not read. No doubt *some* people do so and should receive legal treatment under the practice of blanket assent. The U.C.C. calls for a factual hearing on claims of unconscionability to locate the applicable social practice, whether it is "dickered" or "blanket" assent.

People do sign putative contracts that they have not read. Rarely, however, have they not followed Llewellyn's sketch of first having reached agreement as to the dickered terms. The question which form or adhesion contracts poses for contract law precedes the idea that someone is legally obligated to perform everything in a contract document that she signed. Classical contract law took the very legalistic and overbroad view that one assented to everything

⁴⁷ What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370-71 (1960); cf. Arthur Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

An immutable duty to read the contracts that one signs would contradict Llewellyn's statement of unconscionability as lack of assent. An objective test of intention forces a choice between the two views which remain controversial. Will theory chooses neither, but would ask for evidence in contested cases on the allegations of each party that one's expectation better corresponded to the parties' conduct.

⁴⁸ U.C.C. § 2-302 (1989).

one signed, even in cases in which the evidence might show that one had not read the document. Contract law took the view that one had a "duty to read," which substituted for any evidentiary question as to whether one had read (or understood).⁴⁹ That view may or may not have accorded with any social practice. It seems likely that it did accord with some social practices and not with others. The lawyered class, for example, traditionally trusted their lawyers and granted blanket assent to what their lawyers had approved.

But courts and lawyers take blanket assent too seriously as a legal idea, when in fact the social practice of signing a document is equivocal when parties sensibly or necessarily lack lawyers at their elbow. Blanket assent thus becomes a dangerous excuse or apology for legal obligation. Unconscionability has come to stand for the non-legalist, social practice approach to assent. To say that this approach imports extrinsic criteria into the decision as to whether the parties had actually intended to be bound to the document that was signed, begs the question that is being asked. To say that blanket assent should be the law for anyone who signs a contract document, is to propound a criterion that is extrinsic to *some* parties' intentions if anyone behaves in the way that Llewellyn supposed. Blanket assent would be no less extrinsic for some parties than a rule which barred all exchanges for less than market price.

The foregoing sketch locates the modern doctrine of unconscionability well within the liberal value of party autonomy. The idea of unequal bargaining power is not an excuse here for importing extrinsic standards to free parties from agreements to which they actually had agreed. Unconscionability asks important questions about what in fact was agreed to and moves contract law away from the sterile, formal idea of contractual assent, which frequently had little, if anything, to do with what parties, or one of the parties, intended.

⁴⁹ This must be a duty to understand.

B. Legislation and "Policing" Contracts

The argument for viewing contracts as suitable for substantive legal regulation stems from the perception that contract law cannot manage problems of fairness, such as duress and unconscionability. In this view, problems of contractual immorality require contractually external criteria. However, a liberal theory can provide reasons why contracts should not so be conceived. By focusing on an original contractual idea of voluntariness, a liberal theory can both explain the presence of legislation on contracts and provide a workable theory which manages the problems of policing not contracts, but contract-like behavior.

Contractual legislation, for example, consumer protection statutes, are often thought to prove the inability of contract law to cure the problem of superior bargaining power; such statutes supposedly set limits on freedom of contract. Yet, liberal theory can explain contract-regulating legislation as legitimate attempts to rectify illiberal common law doctrine. Second, the liberal thesis may explain legislation as legitimate attempts to codify liberal contractual doctrine. The modern doctrine of unconscionable contracts attempts to rectify illiberal contractual doctrine which had taken certain categorical views about what constituted assent to a contract. Nothing in a good liberal motive assures success. Statutes, perhaps, even more than common law decisionmaking tend to create categorical imperatives which take on a life of their own and all too easily threaten to overwhelm their purposes.

Legislative rectification of doctrinal error may always feed the anti-liberal view, to some extent; yet, that is not a good reason to withhold rectification, even if the effect appears to challenge the liberal view. Legislation on contract law may merely suggest that the contract doctrine developed by the courts was defective. Were the contract doctrine incontestably the right doctrine on liberal grounds, it would follow that liberalism's conception of contract had proven itself unworthy. But the contract law which is called into question by developments such as consumer protection law, as well as seemingly uncomfortable bodies of doctrine, such as duress, doubtfully stated liberal conceptions of contract. What is questioned by the seeming ineptness of contract law is a conception of

contracts developed through the common law; the connection between that doctrine and liberalism is faint and formal.

Liberalism can tend to the concept of contract from within its own borders, while the traditional, objective theory of contracts must call for outside help. The legally imperialistic objective theory of contracts was, and is, liberally fraudulent. A critical piece of that objective theory, a legal notion of blanket assent, propagated the illiberal idea that any seeming assent to contract was as much an assent as any. Choice between unpleasant alternatives, whether induced by force, is still choice. Similarly, all sound is music. Liberalism, however, recognizes that what is music for some may not be music for others. Similarly, liberalism acknowledges different kinds of choice.

Unconscionability and duress may appear to palliate the overbreadth of the moral principle that people should do what they have promised. In this view, the moral value of doing what is promised falls before the independent and higher value of excusing promises that are unconscionably obtained. But, there is neither point nor need to juxtapose promising from socially unacceptable methods of obtaining someone's promise.

Characterization of what happens when parties are subject to duress, as choice between unpleasant alternatives, offers a seemingly neutral or objective factual description of events of duress. This is the plain fact of the matter, about which one must agree to continue discussion.⁵⁰ For, the claim is that a duress victim has chosen to contract. This choice deserves no less respect as a contractual choice than a choice to buy or sell at the prevailing market price. If liberal, political, or legal theory has no ground to distinguish among choices, then perhaps only a consequentialist analysis is available to justify perpetuation of the intuitively proper concept of duress.⁵¹ When choice is choice, only extrinsic criteria may respect some, but not all, choices that people make.⁵²

⁵⁰ Ronald Dworkin has criticized the "plain fact view" as a "semantic sting." RONALD DWORKIN, *LAW'S EMPIRE* 45-86 (1986).

⁵¹ The traditional argument is that freedom of contract must have limits so that it does not collapse.

⁵² The semantic sting is that a distributivist or consequentialist takes all choice as factually indistinguishable. Listen to Posner's purported description of

A liberal contract theory does not accept this plain fact view of choice: Choice is the energizing concept of liberalism. If every choice is a plain fact and therefore no different from every other choice, every choice qualifies in the same way for either side of the liberal equation.

But this plain fact view holds no better with respect to ruling out all further conversation about choice than any plain fact view. A liberal will contest the view that choice is choice. Some choices are distinguishable, a liberal will say, in this respect and others in other respects. For duress, the distinction lies in the tatters that are left of liberty when voting or contracting at the point of a gun are the same as free elections and contractual assent.⁵³

C. Posner on Unequal Bargaining Power

Richard Posner's discussion of unequal bargaining power in contracts displays the kind of pretentious objectivity that animates imperialistic legal imputations—the plain fact view.⁵⁴ Posner notes that an admiralty law principle solves a popular paradigm of duress.⁵⁵ A ship in distress receives a rescue offer, the terms of which would bind the ship owner to pay the salvor ninety-nine percent of the ship and its cargo. Assuming that the ship owner or

the basis of duress:

A points a gun at B saying, 'Your money or your life' B is very eager to accept the first branch of this offer by tendering his money. But a court will not enforce the resulting contract. The reason is not that B was not acting of his own free will. On the contrary, he was no doubt extremely eager to accept A's offer. The reason is that the enforcement of such offers would lower the net social product by channeling resources into the making of threats and into efforts to protect against them.

RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 113 (1992). Query whether B's "very eager" acceptance shows that B was "acting of his own free will." *Id.*

⁵³ Yet, a liberal's claim to rescue liberty from the clutches of consequentialism, seems no less a "plain fact view" of liberty than a consequentialist's "plain fact view" of choice.

⁵⁴ For a better view of Judge Posner, see *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007 (7th Cir. 1984) (en banc).

⁵⁵ Posner, *supra* note 52, at 116-17.

her agent agrees to this offer, Posner points out that the admiralty principle of a reasonable fee is all that the salvor receives.

Posner curiously describes this case: "[T]he situation is one of bilateral monopoly, with the added complication that transaction costs are even higher than in other bilateral monopoly contexts . . ."⁵⁶ This is an interesting way to describe the plight of the ship owner who has only one rational choice, to yield to the demand or offer and duke it out later in court. This is a real case of economic duress according to Posner.

Yet, Posner reveals in a different example how unequal bargaining power may have an "innocent explanation." Such innocent explanation, however, comes from the relevant social practice. Boilerplate language in contracts may actually not harm consumers because overall, they might have to pay the steeper transaction costs which might follow from the invalidity of such adhesion contracts. Cannot innocent explanation also support the salvor's offer for ninety-nine percent of the ship and cargo? If a business needs to have a form contract with highly favorable terms for itself in order to save consumers money in such transactions, then another business may need to charge ninety-nine percent for its rescue.⁵⁷ If ninety-nine percent may be invalidated as too steep, and reasonableness is used to determine the fee of the admiralty salvor, then reasonableness may displace the terms in the adhesion contract of consumers.

In denying whether there is fruit or even any meaning at all in the idea of unequal bargaining power in one paragraph (which blindly condemns all but innocent explanations of boilerplate), Posner, in the next paragraph, on bilateral monopoly, approves protecting the ship owner from the salvor, seemingly only because of unequal bargaining power. His consumers who do not face bilateral monopoly may face the same effect of inequality of bargaining power when the market multilaterally offers the same boilerplate. The case of ten "salvors," all of whom demand ninety-nine percent is all too frequently the consumers' fate.

⁵⁶ Posner, *supra* note 52, at 116-17.

⁵⁷ The writer here has in mind "Rescue, Inc.," whose hypothetical cost and opportunity structure suggests a 99% average fee structure.

Neither the consumer nor the salvor examples provide sufficient reason to invalidate these contracts. If it is socially acceptable to reap the benefit of ownership of an extremely scarce resource, the bilateral monopolist or the multilateral oligopolist has not used duress to obtain her contract. The ship owner is more like the consumers who Posner imagines not at the moment her ship needs rescue, but before it sails at all. At that time, the ship owner may have other choices which are often offered to deny that consumers lacked meaningful choice about boilerplates. Just as consumers may resist the advertising which perhaps creates their desires for particular products sold on a take-it-or-leave-it basis, a ship owner may choose to insure her ship and cargo prior to sailing. At this moment, there is no emergency or "bilateral monopoly." If insurance will cover either loss or cost of salvage, a ship owner may foresee the salvor as a bilateral monopolist and decide to insure against the event.

Missing from Posner's discussion of unequal bargaining power is a willingness to apply the same social practice standard to the consumers that he approved for ship owners. It is likely that behind the admiralty reasonable fee rule lies a generally shared social practice which overtakes the general proposition drawn from other social practices permitting the exploitation of scarce resources. Liberalism does not bow to such social practices as extrinsic to party autonomy; it welcomes those explanations of the meaning of what happened between the parties. If the salvor knows the admiralty rule, then the salvor has no legitimate expectation that the ship owner has assented to a contract at a higher figure. But, if choice is simply choice, the last observation is out of bounds.

Similarly, Posner disposed of the consumers' complaint on the allegation of a social practice of blanket assent to adhesion contracts because they produce mutual benefits. But this supposed social practice requires explanation as to why the benefits of blanket assent outweigh its costs, if consumers are to accept the blanket assent rule. Consumers do seem to accept blanket assent under the limitation that Llewellyn supposed, that the undickered terms are reasonable. Limiting the effectiveness of an adhesion contract in that way seems to comport with social practice. Just as the adhesion contract drafter would be entitled to expect enforcement of the myriad of unread but reasonable provisions under that

social practice, so too would the salvor who bargained for ninety-nine percent of the cargo value have a claim under that social practice for a lesser reasonable fee.

D. Fairness of a Bargain as an Extrinsic Criterion of Intent

Suppose that Rawls signed a contract of adhesion with Nozick which contained terms that were so unfavorable to himself that a reasonably informed person would be shocked at its unfairness. What would it take for such a person to conclude that Rawls should be bound to the contract? Only that Nozick convinced this person that Rawls understood and intended the contract. Should Nozick do so, he will have provided a better explanation for the actual fairness of the contract than a reasonably informed person may have perceived at first look. The fact that Rawls signed the contract of adhesion will not itself convince anyone that her first look was incorrect. Nozick will succeed only by tendering a better explanation for why a court or a reasonably informed person should believe that Rawls' signing the contract-like document manifested Rawls' assent to such an apparently unfair agreement. That explanation will relate the signed Rawls-Nozick document to the social practice of contract.⁵⁸

An open-ended mechanism for determining assent under a non-legalist or fact-oriented will theory of contractual assent extinguishes policing metaphors of unconscionability or duress and their tempting riddles about rational choice amidst compulsion. This is not an issue of "you did assent, but the law later excuses your obligation." Courts do not invalidate an otherwise valid contract, although law books sometimes speak that way. Unconscionability or duress tests the validity of the putative contract under the relevant social practice of mutual assent.

⁵⁸ Suppose the contract had Rawls selling himself into slavery to Nozick. Could not the reasonably informed person, would not everyone, properly regard this contract as unjust and decline its legal enforcement? That this belief is true in our society, reflects the limits of our social practice of contract. No reasonable person would believe either that Rawls did agree to enslave himself to Nozick or that Nozick actually believed that Rawls so agreed.

Thus, the conventional characterization of unconscionability as "policing the contract" induces the perception that the doctrine serves as a party-extrinsic criterion by which valid contracts may be invalidated. But if a court invoking the doctrine of unconscionability thought that no one *would* have agreed to such a bargain had they actually understood it, one does not need to assume that someone did understand the bargain, but *should* be freed from it. One might as rationally believe that the party claiming unconscionability did not understand the bargain. We can understand unconscionability as an internal contract idea testing party autonomy, just as well as we can understand it as an extrinsic idea. We can plausibly talk about unconscionability from either point of view.

Yet, in substance, can we do so? Consider the following argument: unconscionability imposes an external criterion to the enforcement of bargains based on the test of whether a reasonable person would have agreed to the contract. By testing the actual parties' bargain against the hypothetical bargain that reasonable people would have made, the doctrine eschews actual party intent in favor of fictitious intent.

The aim of this argument suggests that the substance of a bargain is not probative of the intentions or the understandings of the parties. Although this reasoning sounds quite odd, it is quite popular. The bargains that parties strike are at least as probative of their actual intent to be bound as are their signatures in a writing. Yet, the policing view of unconscionability stems from the signature on the page, or some such formal expression of assent, and leads directly to the conclusion that unconscionability concerns a different issue. If unconscionability requires a criterion that is extrinsic to the parties' intent, then so does the rule that says that one is bound to a contract by signing it.

Consider the last point: the rule that signing a contract is a manifestation of assent sufficient to bind the signer emerges from the way that people show their intent to contract. It is a widespread social practice. Yet, it excludes contract witnesses or notaries who sign contracts; nor does the practice apply in the same way to people who sign as sureties or guarantors. In addition, the rule does not apply to people who signed under duress, who were defrauded in particular ways, or to the people against whom unconscionability was practiced.

These events call for a review of the social practice of contracts in any case in which they occur. Because the social practice explains the significance of these events in its own terms, the need or wish to look beyond the social practice for an explanation requires some explanation itself.

A naive call for law provides one explanation for why people want to look beyond the social practice to resolve a question of contractual assent. Because one must usually turn to law courts to enforce contracts, even a simple case of physical duress, like the gun to the head example, looks like the law of duress is external to the social practice of contracting. Courts which invalidate a contract claim in such physical duress cases could, of course, be applying a law of duress that is completely divorced from social practice. Here, when a court does invalidate a contract claim for duress, it is ambiguous whether the judicial act applies a criterion that is independent of the social practice or a criterion that is part of the socially unacceptable forms of behavior of the practice.

A second and stronger explanation of why courts should label as external criteria the social practices that they use to decide duress cases, an imperial call for law, concerns hard cases of duress. The most contestable and controversial cases send some the following message: The social practice is indeterminate about whether this claim is meritorious, and so the law of contracts must settle this matter. Here, however, is another message from such hard cases: "Ladies and gentlemen of the jury, the evidence you have heard supports the claims of both parties to this case, a very close case, to be sure" Adoption of a legal rule about a hard case is possible (and all too frequently done), but unnecessary. Were such cases necessarily resolved by a legal rule, an external criterion would have to be used.

VII. BETTER CONTRACT LAW

Liberal theory offers an account of contract doctrines, such as duress or unconscionability, by eschewing the separation of the idea of agreement from such ideas as duress or unconscionability. Liberal theory welcomes seemingly different results from seemingly similar facts when social contexts and practices evidently justify

what, for that reason, are substantively similar results. The claim that liberalism cannot *a priori* draw the lines around fair and unfair, duressed and unduressed and conscionable and unconscionable agreements is true and trivial.

Distributivists make the latter claim and frequently infer the more significant conclusion—that contract law must draw the line on distributivist premises. Should it be unnecessary to draw the duress or unconscionability substantive line in contract law, liberalism's incapacity to do so would no longer be trivial. The revised objection to liberalism thus holds that contract law needs substantive *a priori* standards or rules on duress or unconscionability. Whether this is a naive or imperialistic call for law to displace or particularize principled expressions derived from social practice, this finally raises a question of true philosophical choice which shows, *inter alia*, how philosophy may affect contract law.⁵⁹ Whether framed as an issue of duress or unconscionability, the issue that such cases put to courts is whether parties reached an agreement that courts should enforce. Moral, political, or economic principles may all provide standards or rules by which courts may resolve the question. These same ideas fund the social practices by which parties frame their own views on whether an agreement has been reached which courts should enforce.

The call for law presumes that from among these principles and practices, some have special appeal for a law of contracts. Alternatively, a law of contracts requires certainty or predictability, which in turn requires generalization of the particular insights or benefits of principle or practice. A liberal will theory alone denies each of these claims. It would be redundant to continue to address this first claim directly. The second claim remarkably restates the most common ground that is offered in support of contract doctrine.⁶⁰

⁵⁹ Cf. Richard Crasswell, *Contract Law, Default Rules and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

⁶⁰ E.g., *Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc.*, 870 F.2d 423 (7th Cir. 1989). Even highly regarded commercial judges have provided evidence of contract law's aesthetic of legal uniformity over party intention:

Empro says the parties intended to be bound, a factual issue. Empro treats "intent to be bound" as a matter of the parties' states of mind, but if intent were wholly subjective there would be no parol evidence

A substantive line-drawing contract law provides certainty and predictability which, above all, some might claim as the principal test of contract law.

Liberalism could challenge this thesis of certainty and predictability either positively or negatively. Liberalism could claim that its contractual proceduralism creates a more certain and predictive law of contract. Liberalism, however, may not make such a claim without betraying the first principle of liberty under which contract-making should be certain and predictable or flexible and unpredictable—a question for particular parties and not the law of contracts. What liberalism may offer here is the supposition that the parties are situated better than the legislature or the American Law Institute to obtain the certainty or flexibility that they wish.

Liberalism could challenge, on the negative side, the idea itself that contract law of whatever foundation can provide certainty and predictability of the particular sort that thesis has in mind. Traditionally, contract law doctrine has taken justification in certainty and predictability. From the early days of the mailbox rule⁶¹ to current contemplation of the battle of the forms,⁶²

rule, no contract case could be decided without a jury trial, and no one could know the effect of a commercial transaction until years after the document were inked. That would be a blow to business. Contract law gives effect to the parties' wishes, but they must express these openly. Put differently, "intent" in contract law is objective rather than subjective—a point *Interway* makes by holding that as a matter of law parties who make their pact "subject to" a later definitive agreement have manifested an (objective) intent not to be bound, which under the parol evidence rule becomes the definitive intent even if one party later says that the true intent was different.

Id. at 425.

⁶¹ *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818), has received the traditional legalist justification of "better a rule than no rule at all." It is possible that the merchants in the case understood a social practice about a delayed communication of an assent; even that the court was right for the wrong reason. A liberal will theory seeks such evidence.

⁶² Examples of contract thinking which aim at perpetuating rules of contract law abound. Among the most notorious innovations in contract law is U.C.C. § 2-207, about which there seems to be far more commentaries than reported cases. See, e.g., Douglas Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982).

Most of the commentary would reform or abolish the section. Baird and Weisberg have suggested that the openness of § 2-207 came by design of the drafters. In overthrowing the mirror image rule, they suggest that the drafters replaced that rule with the broad standards of § 2-207. But, Baird and Weisberg contest the drafters' favoring broad legal standards: "[T]he formalist principles of offer and acceptance underlying the mirror-image rule are fundamentally sound." *Id.* at 1223. Their first reason is that the problem of the welsher may be handled by the mirror-image rule, contrary to the conventional supposition. Second, they suggest that the terms that the parties would receive under a mirror-image rule may produce a better result than "off-the-rack" terms that the code would supply where the parties have performed under § 2-207(3). A mirror-image rule would permit parties

to avoid the off-the-rack rules that the Code supplies in the absence of express agreement; such ready-made terms may be poorly suited to the transaction and consequently advance the interest of neither party. Compared with 2-207, the mirror-image rule encourages parties to adapt the terms in their forms to the needs and abilities of buyers and sellers in their particular market.

Id.

How might a rule of contract law be sound? Baird and Weisberg concede that a clear showing of the parties' intent should govern. Because the problem in the battle of the forms is that party intent is not clearly shown, they reject factually oriented intent inquiries, as § 2-207 was in their view intended, which would be necessarily imprecise. *Id.* at 1219 n.4. Further, Baird and Weisberg assert,

In battles of the forms, one has no way of knowing if the parties have in fact intended to enter into a binding contract regardless of any asymmetry in particular terms. It is not only difficult to gather the facts needed to determine whether the parties intended to contract; it is *impossible*, because by the very nature of battles of forms the parties never reflected whether they were legally bound despite differences in terms. Indeed, the premise of a battle of the forms is that the parties are not aware that the terms conflict until a dispute arises, and the dispute may not arise until well after performance.

Id. at 1239-40. But reflecting whether they were legally bound is neither the traditional test of objective contract law nor the only evidence a will theory of intent (that is what Baird and Weisberg indorse) needs to accept on the issue of mutual assent. As these commentators recognize, cases under the battle of the forms in which mutual performance had not begun are rare. The major question in battles of forms is not whether parties consider themselves bound to a contract. The question is to what exactly are they bound. Indeed, Baird and Weisberg contribute to the ongoing § 2-207 debate by pointing out the real question that a liberal will theory sees: whether the incorporation of the U.C.C.

doctrine has favored the idea that parties have a right to know where they stand. Any number of programs of contract law can answer that question. For example, some authorities take the doctrinally unorthodox view that promises should only or largely be enforced because of actual or likely reliance by a promisee.⁶³

Perhaps, though, some parties mutually believe, either idiosyncratically or pursuant to a social practice, that their executory contracts should be enforced. Such parties may nevertheless fall into dispute about their particular executory contract and ask a court to resolve the dispute. If a court adopted the rule that purely executory contracts are invalid, the rule would tell the parties where they stand. Yet, neither this nor any particular law of contracts would regularly or predictably tell these parties what they intended for their executory contract.

Contract law can thus tell people where they stand, but that may be a legal position that neither party sought. Contract law may be predictable in this way. It may tell a party what the judge will do.⁶⁴ Such a contract law, as for example Professor Atiyah⁶⁵ contemplates, would not honor a social practice under which executory contracts are understood as valid. Contract law would not be predictable for such parties.

Should one ask how the social practice might best follow the law in this party-predictive way, one may conclude that the law should follow the social practice. Party-predictability should flow from the social practice just as judicial or legal predictability, as appropriate, should flow from the courts. Were there only one underlying social practice of contracting, contract law would be

supplementary terms, and especially a merchantability warranty, is conducted under a test in accord with what Professor Murray aptly labels, the bargain-in-fact. John E. Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597, 601-02 (1978).

⁶³ E.g., PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 716-79 (1979); Patrick S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193 (1978).

⁶⁴ The writer puts this rather softly, wishing for the sake of the predictability argument to concede that law may to some extent permit prediction of what judges will do.

⁶⁵ See *supra* note 63 and accompanying text.

uncontroversial and uninteresting, whether contract follows social practice or social practice follows contract law. Where social practices are controversial, as they currently are, only a liberal will theory provides party-centered certainty and predictability.⁶⁶

CONCLUSION

Lawyers and judges often feel a need to settle a matter, even of contract law. It is never clear that to do so they must reach outside the practice of contract. Nevertheless, it is sadly true that lawyers and judges often go outside contract law. Under the guise of will theory, lawyers and judges gave us such foolishness as the mailbox rule; under the guise of an objective theory, lawyers and judges made us believe that parties were bound by what they signed; and under the spell of the distributivists, we believe that liberalism's contract often needs paternalistic medicine. Lawyers and judges may instead treat parties having contractual disagreements with patience, listening to their versions of the social practice and resisting both naive and imperial calls for law.

This Article has sketched a liberal contract theory which rests on party autonomy and needs no external values. Under a liberal will theory, a contract between two devout distributivists deserves different treatment than a contract between two devout libertarians. In the course of applying will theory to each of these two contracts, distributive considerations may be included in the case of the distributivists, but distributivist considerations should be unpersuasive in the case of the libertarians. The more problematic case of a contract between a libertarian and a distributivist will renew calls for law to settle all such disputes, which are soundly ignored. In

⁶⁶ Richard Epstein soundly points out that many business deals are fine-tuned and custom-made written agreements which courts should honor. Richard Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 109 (1989). But, honoring even these super-contracts depends on respect for contracts generally. Courts which routinely lack confidence that their contract law will produce just results in enforcing what is on the paper, will inevitably entertain doubts even about the documents that Epstein has in mind. The same autonomy which animates this view of written contracts, implicates judicial respect for other forms of evidence about the parties' intent.

short, will theory treats divergent intentions, or conflicting social practices, as conventional contract law fact-sensitively treats mistake in the formation of contracts.⁶⁷ The more mistaken party is bound to the intention of the less mistaken party. When parties have different intentions, contract law follows the intention of the party lacking knowledge or reason to know the other party's different intention. Where each knew or had reason to know of the divergent intentions, no contract results. But, liberal will theory does not propound this result, as does the *Restatement (Second) of Contracts*, but serves as a guide to interpreting the will of these parties. Perhaps will theory would bind the libertarian to the distributivist's intention on evidence that the libertarian was an extreme libertarian who accepted responsibility even for lesser mistakes in the face of a more mistaken distributivist (who knew or had reason to know of the libertarian's intent, but the latter knew naught of her own).

Between two extreme libertarians, super risk-takers, people who expect no legal paternalism, a claim of unconscionability or duress, for example, should ordinarily encounter deaf judicial ears. On the other hand, distributivist analysis and rectification for surprising post-contract events are part and parcel of the legitimate expectations of distributivist contract parties. Liberal will theory may use every contract doctrine or contract social practice. It favors none. Any other view is imperial and potentially exploitative. Contract law does not need to wound anyone, as it may animate the legitimate expectations of even distributivists. But that, of course, was the point of liberalism.

Difficult questions about what parties to contracts intended and have assented to, strongly resemble difficult questions about what the law is. Jurisprudence about the latter encounters difficulty explaining the meaningfulness of calling law what judges end up doing in controversial cases. If judges might have gone either way in controversial cases, then they create law after the fact of the decision and no meaningful rights precede the decision. Among others, Ronald Dworkin has long labored against this view of

⁶⁷ E.g., RESTATEMENT (SECOND) OF CONTRACTS § 20 (1981).

controversial or hard cases in an effort to explain how rights precede even the decision of the hardest cases.⁶⁸

In the humbler context of contracts, the same problem arises. If the case might go either way, how parties might have any rights before the case comes to decision is perplexing. This Article puts special concern on what meaningful notion of assent or consent, the idea of agreement, can exist in the law of contracts. When do parties agree? How do they agree? The probity of imposing any such rules under a naive or imperial idea of legal intent derives from nonliberal values. Under liberalism, social practice sufficiently explains contractual intent as belonging to the will of the parties, not the law.

⁶⁸ *E.g.*, RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1976).

