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There is a remarkable dissonance between contract theory and practice on the subject of form contracts. In practice, form contracts are ubiquitous. From video rentals to the sale of automobiles, form contracts are everywhere. Yet contract theorists are nothing if not suspicious of such contracts, having long ago dubbed them pejoratively "contracts of adhesion." Indeed, I would wager that a plurality of contracts teachers would favor a judicial refusal to enforce form contracts altogether—or could not explain exactly why they would reject such a suggestion.

In this essay, I will identify one theoretical source of the common antipathy towards form contracts and why it is misguided. I contend that the hostility towards form contracts stems in important part from an implicit adoption of a promise-based conception of contractual obligation. I shall maintain that, when one adopts (a) a consent theory of contract based not on promise but on the manifested intention to be legally bound and (b) a properly objective interpretation of this consent, form contracts can be seen as entirely legitimate—though some form terms may properly be subject to judicial scrutiny that would be inappropriate with nonform agreements. In this regard, I shall endorse the much-maligned approach of the United States Supreme Court in its decision in *Carnival Cruise Lines v. Shute*.[1] With this account of form contracts in mind we can better appreciate the wisdom of that other maligned contracts case: *Hill v. Gateway 2000, Inc.*[2]

I. THE CASE AGAINST FORM CONTRACTS

Ever since Friedrich Kessler dubbed them "contracts of adhesion,"[3] form contacts have been under a scholarly cloud. The reason is

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1. 499 U.S. 585 (1991).

2. 105 F.3d 1147 (7th Cir. 1997). Since I will be evaluating and partially defending the court's decision in *Gateway*, I should disclose that in 1999 I was retained and compensated by Gateway to express an opinion to the American Law Institute and the National Conference of Commissioners on Uniform State Laws on the merits of proposed revisions of Article 2 of the Uniform Commercial Code that would have effectively reversed the holding of that case. I have had no further relationship with Gateway since then.

3. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of*

straightforward: If contract is based on promise, then how can someone have promised to do something in a writing he or she has not and was not expected to have read? As I shall explain, whether this presents an intractable difficulty for form contracts depends not only on whether one views a contract as based on promise, but also on whether one adopts a subjective or objective theory of assent and which objective theory one adopts.

A. *Form Contracts, Promising, and the Objective Theory*

Professor Joseph Perillo, the honoree of this symposium, has recently shown in these pages that there are not two, but at least three, approaches one can take towards the assent needed for contract formation.[4] First is what he calls the "medieval" objective approach, which looks exclusively to the public meaning of the language used by the parties. He provides a late example of this from Zephaniah Smith writing in 1795:

> The intent of the parties, is to be gathered from the external signs and actions. For no man may put a construction upon his words contrary to the common understanding. Therefore he who has an obligation in his favour, has a right to compel him, from whom it is due, to perform it in that sense, which corresponds to the ordinary interpretation of the signs made use of.[5]

If you take contract to be based on the making of a promise but adopt this extreme objective approach towards discerning the existence of a promise, then form contracts are unproblematic. Just look at the signs employed in the form and give them their normal public meaning. Not only would this approach treat form and nonform agreements alike, it would treat form terms exactly the same as separately negotiated terms within an agreement.[6] All would be judged by the objective meaning of the words employed.

Second, if a subjective view of contractual assent is taken, then form contracts pose a very serious problem. If a person must consciously have had the particular terms in mind when signifying agreement to them, then most terms in most form contracts lack assent. Most people fail to read most terms most of the time and no person can credibly claim to read all of the terms in form contracts all of the time. Every contracts professor and law student knows this from personal

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Contract, 43 Colum. L. Rev. 629 (1943).

4. The next few paragraphs have been deeply informed by Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 Fordham L. Rev. 427 (2000).

5. 1 Zephaniah Swift, A Digest of the Law of Evidence in Civil and Criminal Cases and a Treatise on Bills of Exchange 377 (1810), as it appears in Perillo, *supra* note 4, at 451.

6. Which, perhaps I should emphasize, is not the approach I shall advocate below.

experience. Everyone reading these words, including yours truly, has at one time clicked the "I agree" box of a software license agreement without reading the terms in the scroll-down box. Hence the problem: How can someone be said to have "actually"—meaning subjectively—consented to terms of which one was completely unaware? To impute subjective assent to the person indicating consent to a form is obviously to engage in a fiction. Under a subjective theory of contractual assent, very few, if any, of the terms in a form contract would be assented to.

Though Professor Perillo demonstrates that the subjective theory of contractual assent was never a dominant approach, he also explains how the modern objective approach is more subjective than the medieval approach insofar as it seeks to discern the "objective intention as reasonably understood by one or both contracting parties."[7] As an early example, he offers the opinion in the 1871 case of *Smith v. Hughes*:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[8]

While this may look upon first glance to be the same as the medieval objective approach, a subtle and significant subjective shift has occurred. Instead of adhering strictly to the public meaning of the signs used, one asks what one party would reasonably have thought the other party meant by his words and deeds.[9]

With this as one's objective approach to the existence of a promise, form contracts run into a serious problem. If contracts are enforceable promises to do or refrain from doing something, then one must have *actually* promised to do or refrain from doing something. True, such promises are to be judged objectively, but if the promisee knows or has reason to know that a particular promise went unread then it is unreasonable for the promisee to conclude that the promisor even objectively manifested assent by signing a form contract or clicking "I agree." In this manner, combining a conception of contract based on promise with either a subjective or a modern objective

7. Perillo, *supra* note 4, at 451.

8. Smith v. Hughes, 6 L.R.-Q.B. 597, 607 (1871).

9. In addition, one party must have subjectively understood the other party's meaning to be that of a reasonable person. *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 779 (Mo. Ct. App. 1907) ("[I]f what McKittrick said would have been taken by a reasonable man to be an employment, *and Embry so understood it*, it constituted a valid contract of employment for the ensuing year." (emphasis added)).

approach leads one to question the legitimacy of form contracts.[10]

B. *The Benefits of Form Contracts: Todd Rakoff's Analysis*

Because most terms in a form contract are rarely read, it is considered a fiction to think one has promised—either subjectively or objectively under the modern view—to perform according to a term of which the other party knows good and well one is unaware. Despite this, most contracts professors and practitioners also know that form contracts make the world go round. Psychologists tell us that the human mind will strive mightily to resolve the dissonance between two incompatible ideas. In this case, some resolve the conflict between theory and practice by rejecting form contracts because consent is lacking, while others are led to reject consent as the basis of contract and then, because consent is unnecessary, also reject form contracts in favor of government-supplied terms.[11] By either route, then, form contracts are disdained.

Nowhere was this dissonance between the theory and practice more tellingly displayed than in Todd Rakoff's classic treatment of form contracts in *Contracts of Adhesion: An Essay in Reconstruction*.[12] It is almost as though Rakoff's piece is comprised of two separate articles. The first explains at length all the reasons why form contracts, so disparaged by his peers, are beneficial, if not essential, to the market economy. "Firms create standard form contracts," he wrote, "in part to stabilize their external market relationships, and in part to serve the needs of a hierarchical and internally segmented structure."[13]

> Form documents promote efficiency within a complex organizational structure. First, the standardization of terms, and of the very forms on which they are recorded, facilitates coordination among departments. The costs of communicating special understandings rise rapidly when one department makes the sale, another delivers the goods, a third handles collections, and a fourth fields complaints. Standard terms make it possible to process transactions as a matter of routine; standard forms, with standard blank spaces, make it possible to locate rapidly whatever deal has been struck on the few customized items. Second, standardization makes possible the efficient use of expensive managerial and legal

10. Though I contend that a consent theory leads to a different stance on form contracts than does a promise-based theory, it remains the case that a completely objective approach to promise would also vindicate form contracts. The difference is that a highly objective theory of promising would vindicate the entire form without qualification, while a consent theory coupled with the modern objective approach vindicates the terms of a form contract within some limits, which I explain below.

11. For an example of a contracts scholar who vehemently rejects consent, see Jean Braucher, *Contract Versus Contractarianism: The Regulatory Rule of Contract Law*, 47 Wash. & Lee L. Rev. 697 (1990).

12. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174 (1983).

13. *Id.* at 1220.

> talent. Standard forms facilitate the diffusion to underlings of management's decisions regarding the risks the organization is prepared to bear, or make it unnecessary to explain these matters to subordinates at all. Third, the use of form contracts serves as an automatic check on the consequences of the acts of wayward sales personnel. The pressure to produce may tempt salesmen to make bargains into which the organization is unwilling to enter; the use of standard form contracts to state the terms of the deal obviates much of the need for, and expense of, internal control and discipline in this regard.[14]

Economists around this time came to call this last situation the "agency problem."[15] In a firm in which agents are unavoidably entering into transactions with third parties that will bind their firm, how does the firm constrain the ability of agents to serve their *own* interests, for example, by offering extravagant terms of which their principals will unavoidably be unaware? Simple: we bind both agents and third parties to the (unwaivable) terms in a form contract. Business on a scale that benefits everyone would simply be impossible if firms were unable to control the terms their agents could offer to third parties by using form contracts.

But what of the third parties themselves? Here, Rakoff anticipated what came to be the much-discussed economic concept of rational ignorance. With respect to a large proportion of terms in almost any contract, the low probability of the term ever being invoked in some future lawsuit, combined with the relatively low stakes of many such contracts, makes it irrational for form-receiving parties to spend time reading, much less understanding, the terms in the forms they sign.

> [F]or most consumer transactions, the close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous. Moreover, many of the terms concern risks that in any individual transaction are unlikely to eventuate. It is notoriously difficult for most people, who lack legal advice and broad experience concerning the particular transaction type, to appraise these sorts of contingencies. And the standard forms—because they are drafted to cover many such contingencies—are likely to be long and complex, even if each term is plainly stated. Once form documents are seen in the context of shopping (rather than bargaining) behavior, it is clear that the near-universal failure of adherents to read and understand the documents they sign cannot be dismissed as mere laziness. In the circumstances, the rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest.[16]

This leads to a two-fold problem for a theory of contract based on

14. *Id.* at 1222-23.

15. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ. 288 (1980).

16. Rakoff, *supra* note 12, at 1226.

assent: first, clearly the person signing such a contract did not subjectively, consciously assent to terms that went unread. Second, no one offering such terms can reasonably have thought that the other party subjectively assented and therefore, according to the modern objective theory, there was no *objective* assent either. That is, no one who hands a form contract to another to sign, knowing full well that it will largely go unread, can conclude that the other party has consciously assented to each of the terms therein.

Another of Rakoff's advances on previous scholarship—one that has been inadequately appreciated, I think—is to reject the association of form contracts with the pejorative concept of unconscionability.[17] Unconscionability is associated with the problems of unequal bargaining power, unfair surprise, and substantively unreasonable terms. For Rakoff, in contrast with other contracts scholars before or since, none of these concerns is at the core of the problem with form contracts.[18]

Instead, he contended that the issue with form contracts was not whether terms were bargained for but whether they could be "shopped" elsewhere; not on whether some terms constituted an "unfair surprise" but on whether it was rational for the form receiving party to read any of them; not whether the terms were substantively objectionable but whether there is a lack of assent caused by rational ignorance.[19] After all, most forms are signed by agents of large companies doing business with agents of other large companies, neither of whom can complain about the problems typically handled by unconscionability doctrine.

Terms that are in the parties' interest to focus on and "shop," Rakoff called "visible terms." Terms for which it was not in the interest of rational cost minimizing persons to shop elsewhere (or even read) he called "invisible terms." "Considered by themselves, then, the visible terms of a contract of adhesion are most often those that would constitute the entire explicit contents of a very simple ordinary contract, with the price term (dickered or not) being the paradigmatic example. The invisible terms are, quite simply, all the rest."[20]

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17. *See id.* at 1190-94. However, the distinction between the particular problems raised by form contracts and those addressed by the doctrine of unconscionability underlies his entire treatment.

18. However, Rakoff was concerned with one-sided terms in form contracts—a problem also thought to underlie the doctrine of unconscionability. *See id.* at 1227. ("[O]ver time more and more risks are shifted to the adhering party.").

19. This is not to say that Rakoff rejects a doctrine of unconscionability based on lack of bargaining, unfair surprise, or substantively unfair terms. Rather he rejects equating the problem of form or "adhesion" contracts with these problems addressed by unconscionability. Such forms could *also* be unconscionable, but are objectionable, he contends, even if they are not.

20. *See* Rakoff, *supra* note 12, at 1251.

While I think Rakoff's distinction between terms that one has a sufficient interest in reading and those terms about which it is rational to remain ignorant was a critical advance on previous theory, I think his decision to call the former terms "visible" and the latter "invisible" was unfortunate. After all, the terms one may rationally fail to read are not *literally* invisible; rather, they were unread and unshopped. Unread terms *could* be read if a party so chose; literally invisible terms cannot.

This rhetoric choice could well account for how Rakoff resolves the dissonance between the important value of form contracts, which he took pains to explain, and the unread nature of what he calls "invisible terms." In what seems almost like a second and different article, he argues that only visible terms should be enforced as written. Invisible terms should presumptively be supplanted by terms supplied by statute or by the courts.

> In most cases, the terms that a drafting party stipulates to fill in the transaction type will be invisible and hence, under the proposed analysis, presumptively unenforceable. If nothing further appears, the case should be decided by application of background law. But even if the drafting party tries to show that an invisible term should be upheld, the court cannot evaluate that showing without determining how the case would come out absent the form clause; for the showing must be particularized, and the degree of deviance from the background rule as well as the reasons supporting both the background and form terms would appear always to be relevant. Therefore, before the invisible terms can be judged, the background law and its application to the particular case must be known.[21]

There are a great many things one can say about this recommendation. For one, it assumes that courts, legislatures, or the American Law Institute are capable of writing gap-filling terms that better serve the interests of both contracting parties than is the author of the form.[22] Imposing terms more favorable to the party disfavored in the form will raise the cost of the transaction to the other party—and not just the monetary cost. By so doing, this may ultimately disserve the party who is supposed to be the beneficiary of government intervention. It might work to the ultimate advantage of the "adherent" to consent to a "one-sided" term and rely on the other

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21. *Id.* at 1258.

22. Rakoff does make an effort to support this claim:

> Compared . . . to the drafters of forms, judges, legislators, and administrative officials are impartial. They fill roles that encourage them to take a broader view of the common good. Legislators, at least, are subject to popular political control—and the decisions of administrators and judges, ultimately, to legislators. If government is at all legitimate, it is legitimate for the purpose of framing generally applicable legal rules. That cannot be said of the form draftsman.

Id. at 1238.

party to deliver voluntarily what may not be required of it under the terms of the form.[23] It is very hard for third parties writing terms of contracts to know whether they are really improving the situation for the adherent. However, if we lack confidence that any particular intervention is actually beneficial to the adherent, the principal justification of intervention is greatly weakened to say the least.

Furthermore, the terms that will actually be imposed on the parties are even more removed from the transaction than is a form. If anything, the problem of rational ignorance will be greatly exacerbated. Parties would no longer be weighing the probability of a suit against the cost of reading the form in front of them; they now would have to weigh this probability against the cost of hiring a lawyer to tell them what is in case law or a statute and predict, if prediction is possible, how a background rule will be applied by a future court. Surely this proposal moves an agreement much farther from the consent of the parties and towards a regime in which the legal system supplies terms that others think best.

Nevertheless, Todd Rakoff provided important and previously overlooked reasons why form contracts are useful and why they do not automatically implicate the same problems addressed by the doctrine of unconscionability. His unfortunate choice of terminology notwithstanding, the substance of his distinction between visible and invisible terms in forms is a highly useful one, as we shall see in the next part.

II. FORM CONTRACTS AND CONSENT TO BE LEGALLY BOUND

A. *The Consensual Basis for Enforcing Form Contracts*

Suppose that the enforcement of private agreements is not about promising, but about manifesting consent to be legally bound. Suppose the reason why we enforce certain commitments, whether or not in the form of a promise, is because one party has manifested its consent to be legally bound to perform that commitment.[24] According

23. For an example of this phenomenon in the feed and grain trade, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996). There, she provides a "theory of legally unenforceable agreements" explaining why it may be in one party's interest to agree to a "one-sided" legal commitment while relying on the good faith of the other party to do more than it was obligated to do under the contract. *See id.* at 1787-95. Bernstein's analysis responds directly to Rakoff's claim that courts and legislatures can provide default rules that are superior to those provided by one party and consented to by the other.

24. By referring to consent as "*the* reason," I do not mean to suggest that there are not several important reasons why consent to be legally bound ought to be the central principle of contractual enforceability. *See* Randy E. Barnett, Contracts Cases and Doctrine 614-36 (2d ed. 1999) (discussing how six core principles of enforceability—will, reliance, restitution, substantive fairness, efficiency and

to this theory, the assent that is critical *to the issue of formation or enforceability* is not the assent to perform or refrain from performing a certain act—the promise—but the manifested assent to be legally bound to do so.[25]

Consider the Uniform Written Obligations Act, which has been in effect in Pennsylvania since 1927:

> A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.[26]

Here the promise (or release) is enforceable if accompanied by a separate statement indicating that the signatory intends to be legally bound. It is this statement that substitutes for consideration and provides the element of enforceability.

Now think of click license agreements on web sites. When one clicks "I agree" to the terms on the box, does one usually know what one is doing? Absolutely. There is no doubt whatsoever that one is objectively manifesting one's assent to the terms in the box, whether or not one has read them. The same observation applies to signatures on form contracts. Clicking the button that says "I agree," no less than signing one's name on the dotted line, indicates unambiguously: I agree to be legally bound by the terms in this agreement.

If consent to be legally bound is the basis of contractual enforcement, rather than the making of a promise, then consent to be legally bound seems to exist objectively. Even under the modern objective theory, there is no reason for the other party to believe that such subjective consent is lacking. Even if one does not want to be bound, one knows that the other party will take this conduct as indicating consent to be bound thereby.

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bargain—can be mediated by the criterion of consent).

25. I have defended this approach elsewhere. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986); Randy E. Barnett, . . . *and Contractual Consent*, 3 S. Cal. Interdisc. L.J. 421 (1993); Randy E. Barnett, *Some Problems with Contract as Promise*, 77 Cornell L. Rev. 1022 (1992); Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 Soc. Phil. & Pol'y 62 (1992); Randy E. Barnett, *The Internal and External Analysis of Concepts*, 11 Cardozo L. Rev. 525 (1990); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 866 (1992) [hereinafter Barnett, *Sound of Silence*]. Some doctrinal implications of this approach to contractual obligation are developed in Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 Soc. Phil. & Pol'y 179 (1986); Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 Harv. J.L. & Pub. Pol'y 783 (1992); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 Cal. L. Rev. 1969 (1987). *See also* Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 U. Va. L. Rev. 1175 (1992) (discussing Macneil's inconsistent use of the concept of consent).

26. Uniform Written Obligations Act, Pa. Stat. Ann. tit. 33, § 6 (West 1997).

If this sounds counterintuitive, as it will to many contracts professors, consider the following hypothetical. Suppose I say to my dearest friend, "Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you." Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later? To take another example, is there some reason why a soldier cannot commit himself to obey the commands of a superior (within limits perhaps) the nature of which he will only learn about some time in the future? Hardly. Are these promises *real*? I would say so and cannot think of any reason to conclude otherwise. What is true of the promises in these examples is true also of contractual consent in the case of form contracts.

If contractual enforcement is not about the promise to do or refrain from doing something, but is about legally committing oneself to perform the act described in the envelope, there is no reason, in principle, why this consent cannot be considered real. Therefore there is no reason, in principle, why such consent cannot be objectively manifested to another person. This reveals the nested nature of consent. The particular duty consented to—the promise or commitment—is nested within an overall consent to be legally bound. The consent that legitimates enforcement is the latter consent to be legally bound.

Suppose now that instead of the promise being in an unopened envelope, it is contained in an unread scroll box on a computer screen. Does this make the act of clicking "I agree" below the box any less a manifestation of consent to be bound by the unread terms therein than did the promise to perform the unknown act described in the envelope? I cannot see why. Whether or not it is a fiction to say someone is making the promise in the scroll box, it is no fiction to say that by clicking "I agree" a person is consensually committing to these (unread) promises.

True, when consenting in this manner one is running the risk of binding oneself to a promise one may regret when later learning its content. But the law does not, and should not, bar all assumptions of risk. Hard as this may be to believe, I know of people who attach waxed boards to their feet and propel themselves down slippery snow and tree covered mountains, an activity that kills or injures many people every year. Others for fun freely jump out of airplanes expecting their fall to be slowed by a large piece of fabric that they carry in a sack. (I am not making this up). Or they ride bicycles on busy streets with automobiles whizzing past them. It seems to me that if people may legally chose to engage in such unnecessarily risky activities—and these choices are not fictions—they may legally choose to run what to me is the much lesser, and more necessary, risk of accepting a term in an unread agreement they may later come to

regret.

B. *The Limits on Enforcing Form Contracts*

Does the justification for enforcing form contracts based on the existence of a manifested intention to be legally bound entail that any and every term in a form contract is enforceable? I do not think so. To begin with, as with negotiated terms, there are limits to what the obligation can be. It cannot be a commitment to violate the rights of others or (in my view) to transfer or waive an inalienable right.[27] But the enforcement of some form terms may be subject to additional constraints that would not apply to expressly negotiated terms.

While it does manifest consent to unread terms as well as read terms, I believe there is a qualification implicit in every such manifestation of consent to be legally bound. Call it the "your-favorite-pet" qualification. If a term of the sort that Rakoff calls "invisible" (insofar as it is rational to remain ignorant of its content) specifies that in consequence of breach one must transfer custody of one's beloved dog or cat,[28] it could surely be contended by the promisor that "while I did agree to be bound by terms I did not read, I did not agree to *that*." As Andrew Kull has explained in the context of the defenses of mistake, impossibility, and frustration:

> Common sense sets limits to a promise, even where contractual language does not. Though a promise is expressed in unqualified terms, a person does not normally mean to bind himself to do the impossible, or to persevere when performance proves to be materially different from what both parties anticipated at the time of formation. Faced with the adverse consequences of such a disparity, even a person who has previously regarded his promise as unconditional is likely to protest that he never promised to do *that*.... The force of the implicit claim is hard to deny: I did not mean my promise to extend to this circumstance; nor did you so understand it; to give it that effect would therefore be to enforce a contract different from the one we actually made.[29]

If, therefore, a realistic interpretation of what clicking "I agree" means is "I agree to be legally bound to (unread) terms that are not radically unexpected," then that—*and nothing more*—is what has been consented to objectively. To appreciate this better, consider the following three possible interpretations of clicking "I agree."

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27. *See* Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law 77-82 (1998) [hereinafter Barnett, The Structure of Liberty]; Barnett, *Contract Remedies and Inalienable Rights*, *supra* note 25.

28. I prefer this example to the "first-born-son" provision since there may be well-founded objections to enforcing such a transfer even were it consented to. Dogs and cats can ordinarily be sold, given away, and presumably even used as collateral for an obligation. Nevertheless, such a term in a contract would be highly unexpected.

29. Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 Hastings L.J. 1, 38-39 (1991).

1. By clicking "I agree" I am expressing my intent to be bound only by the visible price and quantity terms and none of the terms in the box above. (In the case of free software, I am agreeing to nothing whatsoever when I click "I agree" though I know that the other party does not wish me to use the software without agreeing to these terms).[30]

2. By clicking "I agree" I am expressing my intent to be bound by any term that is in the box above no matter how unexpected such a term may be.

3. By clicking "I agree" I am expressing my intent to be bound by the terms I am likely to have read (whether or not I have done so) and also by those unread terms in the agreement above that I am not likely to have read but that do not exceed some bound of reasonableness.

Options 1 and 2 have the advantage of certainty but sacrifice the consent of the parties. Option 1 is agreement not only to visible terms but to terms supplied by statute or some future judge which are much farther removed from the consent of the parties than the terms in the scroll box. Option 2 is easy to administer but unlikely to reflect the subjective and, for this reason, the objective meaning of "I agree."

If option 3 is the most likely meaning of clicking "I agree," as I think it is, then two things follow. First, in Rakoff's terminology, "invisible" terms that are unlikely to be read, as well as "visible" terms, can and should be enforced. Second, "invisible" terms that are beyond the pale should not be enforced unless they are brought to the attention of the other party who manifests a separate agreement to them. While option 3 does, therefore, require judicial scrutiny, it requires much less judicial scrutiny than option 1 (the option preferred by Rakoff, and probably most contracts scholars, over option 2) which permits courts to provide all the terms of the agreement beyond the few that are visible.

Discerning whether or not an "invisible" term is radically unexpected would require an inquiry much like what law and economics analysis provides. Namely, is this the sort of term that a reasonable person *would have* agreed to had the matter been expressed? Or perhaps the better formulation is that, *if most reasonable persons would not have agreed to such a term, then the other party cannot assume consent to be bound to such a term unless it is made visible.* In this way, hypothetical consent is perhaps the best way we have to determine actual consent to unread terms.

Option 3 was the approach taken by the Supreme Court in *Carnival Cruise Lines v. Shute*,[31] a case involving a forum selection clause in a

30. This suggests that the contract lacks the objective consent of the software distributor.

31. 499 U.S. 585 (1991).

form contract on the back of a cruise ticket. While rejecting the proposition that a non-negotiated forum-selection clause is never enforceable simply because it is nonnegotiated,[32] the Court emphasized that such "clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."[33] In essence, the Court rejected options 1 and 2 in favor of option 3. "Fundamental fairness" can be viewed as a surrogate for highly unexpected terms. Nobody expects the Spanish Inquisition.[34]

Does an inquiry into the fundamental fairness of terms reflect a rejection of freedom of contract? Hardly. We must never forget that it is a form contract the Court is expounding. The issue is what the parties have (objectively) agreed to. If I am right, parties who sign forms or click "I agree" are manifesting their consent to be bound by the unread terms in the forms. They would rather run the risk of agreeing to unread terms than either (a) decline to agree or (b) read the terms. Refusing to enforce *all* of these terms would violate their freedom *to* contract. But parties who click "I agree" are not realistically manifesting their assent to radically unexpected terms. Enforcing such an unread term would violate the parties' freedom *from* contract.[35]

Refusing to enforce a term a court finds to be radically unexpected does not prevent both parties from contracting on that basis. All a party who seeks to have such an unexpected term enforced need do is make it visible to the other party. The term would then be expected

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32. *Id.* at 585.

33. *Id.* at 595.

34. See Monty Python, The Spanish Inquisition Sketch, *available at* http://www.montypython.net/scripts/spanish.php:

> Chapman: (slightly irritatedly and with exaggeratedly clear accent) One of the cross beams has gone out askew on the treddle.
>
> Cleveland: Well what on earth does that mean?
>
> Chapman: *I* don't know—Mr. Wentworth just told me to come in here and say that there was trouble at the mill, that's all—I didn't expect a kind of Spanish Inquisition.
>
> (JARRING CHORD) (The door flies open and Cardinal Ximinez of Spain (Palin) enters, flanked by two junior cardinals. Cardinal Biggles (Jones) has goggles pushed over his forehead. Cardinal Fang (Gilliam) is just Cardinal Fang)
>
> Ximinez: NOBODY expects the Spanish Inquisition! Our chief weapon is surprise . . . surprise and fear . . . fear and surprise. . . . Our two weapons are fear and *surprise . . . and ruthless efficiency. . . . Our three* weapons are fear, surprise, and ruthless efficiency . . . and an almost fanatical devotion to the Pope. . . . Our *four* . . . no . . . *Amongst* our weapons. . . . Amongst our weaponry . . . are such elements as fear, surprise. . . . I'll come in again.

35. *See* Barnett, The Structure of Liberty, *supra* note 27 at 64-65 (explaining how "freedom of contract" has two dimensions: "freedom to" and "freedom from" contract). I first saw this felicitous terminology in Richard Speidel, *The New Spirit of Contract*, 2 J.L. & Comm. 193, 194 (1982) ("[T]he spirit of a people at any given time may be measured by the opportunity and incentive to exercise 'freedom to' and the felt necessity to assert 'freedom from.'").

and, barring the application of some other limiting doctrine, should be enforced. This is analogous to the rule of *Hadley v. Baxendale*,[36] which requires that special notice be given of any consequences of breach that are unusual and therefore not normally foreseeable or expected. Like the rule in *Hadley*, the "fundamental fairness" test should be viewed as a way to distinguish what was actually consented to from what was radically unexpected and therefore not objectively agreed to, rather than a vehicle for overriding the consent of the parties.

What is true of terms unread because of rational ignorance is also true of terms unread because they are supplied later, an issue that was raised in the cases of *ProCD, Inc. v. Zeidenberg*[37] and *Hill v. Gateway 2000, Inc.*[38] *ProCD* involved what is called a shrink-wrap or box-top agreement in which the terms are contained inside a box that one cannot read until one gets home from the store and opens the box. In *ProCD*, the court held that the terms of the software license were agreed to. In *Gateway*, the parties agreed to the sale of a computer over the phone. The written terms of the sale were later delivered to the buyer in the box along with the computer, both of which he was free to accept or reject. In *Gateway,* the court upheld the enforceability of the agreement that followed the telephone transaction. In both of these transactions, then, there was an initial "agreement"—the store purchase and the phone order—and terms to follow later.

At first blush, there is one seemingly big difference between clicking agreement to (unread) terms in a scroll box and agreeing to (unread) terms in a form one has yet even to receive. With the scroll box a party *could* read the terms if he or she so chose and reject them by refusing to click "I agree." With terms arriving later in a box, one cannot read them until one receives them. In such a case, it seems appropriate that one be given the opportunity to decline such terms by returning the goods. The court in both *ProCD* and *Gateway* emphasized the existence of this option.

Requiring an opportunity to decline the terms received later seems, however, to reveal a defect in the argument I have offered here. Why insist on the opportunity to decline the terms? If the enforceability of a commitment is not based on the appearance that one has subjectively made a promise, but on the consent to be legally bound, and if, as I have argued, one can consent to be legally bound to terms one has not read—and that the other party knows one has not read—then why does one need a right to decline these terms? Have they not already been consented to? For that matter, why even send the terms

36. 156 Eng. Rep. 145 (Ex. D. 1854).
37. 86 F.3d 1447 (7th Cir. 1996).
38. 105 F.3d 1147 (7th Cir. 1997).

along with the item, since one has already consented to them initially when buying the software or ordering the computer over the phone?

Such a line of questioning would misconstrue my claim. I argued above that, in principle, one *can* consent to terms one does not read. By the same token, *in principle* I think one can consent to terms one is not even shown in advance. The main point of this essay is that there is nothing incoherent or illogical about claiming that consent to be legally bound in these situations is real—not fictitious. I was not claiming, however, that anyone actually *does* consent to such terms. That is a factual or empirical question that needs to be answered not in principle but in practice.

In practice it is difficult to establish definitively the true implicit meaning of actions when parties do not make their intentions explicit. One way we typically do this is to ask counterfactual questions. For example, do we think a person buying a computer over the phone would say they agree to *any* unseen term no matter how unexpected it may be, or to any term they have never even had an opportunity to read? The result of such counterfactual (or hypothetical) exercises is to establish the likely meaning of silence and establish a default rule that then puts the onus on a dissenting party seeking to get an express agreement to the contrary.[39]

This suggests that, while it is *possible* for a computer buyer to consent to numerous terms she not only did not read but could not read because she never received them, such an interpretation may be an entirely unrealistic assessment of actual transactions. I think the act of purchasing software or ordering a computer over the phone is more realistically portrayed as the first step of a process of consent that is not finalized until there is an opportunity to inspect the terms, even if such opportunity is never exercised. By insisting on this, the court in *ProCD* and *Gateway* can be seen as viewing the manifestation of consent as a combination of the initial purchase or phone order and the act of retaining the software or computer.

That a manifestation of consent has two parts at two different times is far from novel. In the famous case of *Hobbes v. Massasoit Whip Co.*,[40] the seller sent conforming eel skins used to make whips to the buyer who kept them. The Supreme Judicial Court of Massachusetts found that this constituted acceptance of the eel skins because of the prior relationship or understanding of the parties. "The plaintiff was not a stranger to the defendant," wrote Justice Holmes,

39. A counterfactual inquiry by a court or jury is a sensible method to discover the probable meaning of silence by consumers because judges and jurors are consumers too. What they think most people would mean by their silence is a good indicator of what most people do mean. Of course if parties are not typical consumers but members of a trade, their silence may have a different meaning and evidence of this should be examined.

40. 33 N.E. 495 (Mass. 1893).

> even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it was fair to assume that if it had admitted the eel skins to be over 22 inches in length, and fit for its business, as the plaintiff testified and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins.
>
> In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance.[41]

In *Gateway*, the parties were not strangers to each other. In the absence of the phone order, Gateway could not simply send the buyer a computer and take his failure to return it as consent to the purchase. The phone order imposed a duty on the buyer to accept or return the computer and accompanying terms. As in *Hobbes*, the transaction must be viewed in its entirety to assess the reasonable meaning of the buyer's silence.[42]

From this perspective, the only genuinely controversial issue of *Gateway* is whether the court should have upheld the enforceability of the form in the absence of some express notice to phone buyers that a form would be sent to them later.[43] There are some compelling reasons for requiring that notice be given. If most consumers would be surprised by the existence of additional form terms in the box, a default rule requiring notice that a form will follow in the box is more likely to lead to manifestations of assent that reflect the subjective assent of the parties than a contrary rule requiring no disclosure.

As I have explained elsewhere,[44] we can expect that repeat-player-sellers will have low cost access to a default rule requiring them to notify buyers that a form agreement will follow later in the box and can inexpensively comply with the rule. In contrast one-time-player-buyers are unlikely to know of a background rule permitting forms to follow without notice, and for this reason are unlikely even to ask whether such will occur. According to this analysis, a default rule

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41. *Id.*

42. For an insightful elaboration of the meaning of silence in on-line and other modern transactions, see James J. White, *Autistic Contracts*, 45 Wayne L. Rev. 1693 (2000).

43. The comparable issue in *ProCD* is whether there should be some explicit notice on the box that a form agreement is on the software inside.

44. *See* Barnett, *Sound of Silence*, *supra* note 25, at 885-94.

requiring disclosure by sellers is more likely to reduce any gap between objective consent and subjective assent and is to be preferred for that reason.

All Gateway or other sellers need do to obtain enforcement of their form is to tell consumers on the phone that the form will follow in the box. They no more need to read aloud all the terms to follow than the software company needs to read aloud all the terms in the scroll box above the button labeled "I agree." Both formalities perform the same function: putting the other party on notice that it is agreeing to other terms that it may or may not read.

Moreover, withholding consent until the form is delivered is prudent because it locks the other party into some terms rather than agreeing to a blank slate. It also provides an incentive for the other party to offer more reasonable terms that marginal parties who do read their forms will not reject. For this reason too, we may infer from their silence that most parties are withholding their consent until they have actually received the terms and had an opportunity to reject them even if they never plan to read the terms themselves.

In sum, just as persons can manifest their intent to be bound by terms they have not read in a scroll box, they can manifest their intent to be bound by terms they will receive later in the box containing the goods they are buying. The empirical question is whether or not they *have* so consented. The presence of notice that more terms are to follow resolves any uncertainty as to the existence of consent and greatly reduces the risk of any misunderstanding. And if repeat-player-sellers know that one-shot-player-buyers would be surprised to learn additional terms are forthcoming, they cannot take the failure to return the computer as an objectively manifested consent to the terms in the box.

Apart from what it suggests about whether notice of terms to follow and opportunity to accept or decline them should be required, the last discussion establishes that any such requirement is entirely consistent with the main thesis of this article: One can consent to be legally bound even to terms in form contracts of which one is rationally ignorant, whether the unread terms are in a box on a computer screen, in a box purchased in the store and opened later, or in a box sent later by UPS. Nothing in principle prevents a competent individual from assuming the risk that they later will dislike one of the unread terms in the box, though there are limits on what one can consent to in this manner. Barring a showing that these terms were radically unexpected, or that some other defense applies, the enforcement of even the "invisible" terms of form contracts can be justified on the basis of consent—real consent properly understood—not a fiction.

CONCLUSION

Section 2-204 of the Uniform Commercial Code famously says that

"[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[45] I am always surprised when lifelong self-professed "realist" critics of what they like to call "formalism" criticize *ProCD* or *Gateway* because they fail to conform to some highly rigid conception of offer and acceptance. Yet, as is widely acknowledged, formal offer and acceptance is only one way of manifesting assent. There is no reason in principle why contracts cannot be formed in stages, provided the circumstances or prior practice makes this clear or adequate notice is provided. This insight is neither revolutionary nor reactionary.

In assessing the enforceability of form contracts, we must never forget that contract law is itself one big form contract that goes unread by most parties most of the time. Yet, as I have argued elsewhere, under certain conditions, there can realistically be said to be consent even to the enforcement of the default rules of contract law.[46] In which case, the enforcement of judicially supplied default rules can be said to be based on consent and is not inconsistent with contractual freedom. But the inference of consent to be governed by judicially supplied default rules is rebutted when there has been consent to be bound by the rules in a party-supplied form contract. In other words, the consensual justification for the enforcement of the default rules of contract law does not apply to the extent these default rules are supplanted by the terms contained in a form contract supplied by one of the parties, to which the other party has manifested consent.

Of course, one can question either the justice or utility of enforcing any or all consensual agreements. Elsewhere, I have attempted to

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45. U.C.C. § 2-204 (1998).

46. *See* Barnett, *Sound of Silence*, *supra* note 25. The relationship between the arguments made there and here is a bit complex. There, I sought to show how consent to *particular* default rules, like the consent to particular terms of an agreement, could be said realistically to exist. Where the conditions for such consent were absent, as they are for terms in form contracts of which the form recipients are rationally ignorant, however, a general consent to be legally bound can still imply a consent to default rules *but only within substantive limits* governed by the expectations of the rationally ignorant party.

> The manifestation of intention to be legally bound is a necessary condition of contractual obligation and, *when parties are rationally informed*, a sufficient justification to enforce the *particular* default rules in effect when the contract was formed. When, however, either or both parties who have manifested their intention to be legally bound are rationally ignorant, only conventionalist default rules can provide a sufficient consensual justification for enforcement.

Id. at 897-98 (emphases added). This limit on the consensual justification of default rules corresponds to the limits on the substance of form terms contended for here. *See also id.* at 905 (discussing the conditions needed to justify as consensual the enforcement of *immutable* rules of contract law around which parties cannot contract).

justify such enforcement. There I contend that freedom of contract—which in this context includes both the freedom *to* consent to form contracts and the freedom *from* having other terms imposed on both parties by judges or legislatures—is needed to solve the pervasive social problems of knowledge, interest, and power. What the analysis presented here is intended to do, and nothing more, is refute the commonplace notion that form contracts, including click agreements, are illegitimate by their very nature because they lack actual contractual consent.