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Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook

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DISMANTLING DEMOCRACY: COMMON SENSE AND THE CONTRACT JURISPRUDENCE OF FRANK EASTERBROOK

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INTRODUCTION

In this symposium issue, Professors Joo, Ghosh, Ledwon, Horsburgh, Cappel and Conley have brought the theories and methodologies of various disciplines to bear on the question of the relationship of common sense to contract law. I think they would all agree that common sense, whether we are examining it from the perspective of the social sciences or the humanities, is a way of signaling the relationship between law and culture or law and society.

The relationship seems problematic, of course, because culture is collective while contract discourse is individualistic. [2] Common sense is, in at least one of its many meanings, a word that signals our belief in community and in the possibility of a shared knowledge or understanding of human nature and social life.[3] In contrast, contract law is replete with examples of

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[1] Professor of Law at Touro College Jacob D. Fuchsberg Law Center in Huntington, New York and co-author of two recent books, CULTIVATING INTELLIGENCE: POWER, LAW AND THE POLITICS OF TEACHING, with Louise Harmon (New York University Press), and CONTRACTING LAW with Amy Kastely and Sharon Hom (Carolina Academic Press). I would like to thank my research assistants Angie Baker and Maja Ilic-Buxo, the members of the law review, in particular John Mooney and Anthea des Etages for their hard work and patience.

[2] *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 U.C.L.A. L. REV. 829 (1983). (describing individualistic and collectivist patterns of analysis which organize the various principles, policies and arguments found in contract law).

[3] *See* definitions of common sense in Lenora Ledwon, *supra* at 1070. The collective aspect of common sense can be seen in the definition of the term as "such ordinary complement of intelligence, that, if a person be deficient therein, he is accounted mad or foolish." This definition is normative because those who lack common sense are placed in categories reserved for those who are unable to conform to community standards. Their behavior is deviant and the deviance is explained in terms of mental deficiencies. On the other hand,

rhetoric expressing an ideological commitment to voluntariness and consent and deprecating government interference in private ordering. This emphasis in contract law on individual liberty is part of our political creed and an essential link between a basic tenet of democracy and a commitment to a neo classical conception of a free market economy.

Simply acknowledging the collective nature of contract law is not the solution to the conflict between the ideology of consent and the reality of social control and legal coercion.[4] In complex societies and in heterogeneous societies, and the United

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common sense is sometimes referred to as something that is unlearned, a form of "practical intelligence" or my favorite "mother wit." "Common Sense", Webster's Revised Unabridged Dictionary 1913, (visited on Mar. 8, 2000), <http://www.biblioma/Reference/Webster/data/1390.html>. Randy Barnett claims that default rules reflect "commonsense or consensual understandings." Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992); *...And Contractual Consent*, 3 S. CAL. INTERDISCIPLINARY L. J. 421 (1993) ("tacit assumptions", conventional commonsense, can be supplemented by rationality analysis and moral analysis).

[4] *See, e.g.*, the discussion of the dichotomy between individual/state derived contract terms and the U.C.C.'s use of the trade usage in Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N. C. L. REV. 777 (1986).

I have to admit that I do not understand the opposition that Barnett seems determined to perpetuate with his description of consent theory as an "antidote" for "relational/communitarian/leftist" theories of contract law. Barnett, ...And Contractual Consent *supra* note 3 at 430. His consent theory begins with an assumption that contracting parties share a common culture. He distinguishes relational theory as an analysis grounded in something called "public policy." Public policy is also grounded in a cultural, that is, normative, analysis. Impersonal, anonymous transactions are governed by rules that are slightly different from those that govern the exchange or economic relationships of people or entities that have had a long term relationship or are interdependant in a way that makes one party vulnerable to the other. In both cases the state, legislatively or judicially, supplies terms. Harold Havighurst argued that contract in its "wild anarchic state" advances the interests of the strong but that " in a society whose political organization is democratic", the law is concerned with "justice" and with limiting the freedom of the strong to impose their will on those who are less powerful. HAROLD C. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 129-130 (1961).

States is both, one expects to find more than one culture and belief system. The problem we see in all the *Gateway* cases[5], not just *Hill v. Gateway*,[6] and in other disputes that require the application of Article 2 of the Uniform Commercial Code, however, is often not conflict between cultures, but conflict within a culture.

Even within a "dominant " culture, beliefs and ideals exist that conflict and contradict one another. Cultural anthropologists, like John Conley who has written of Llewellyn's anthropological background and its expression in Article 2, are now quick to point out that the homogeneity that once was thought to exist in culture is an illusion.[7] Some inconsistencies are easily ignored because culture is contextual. But other inconsistencies are the by-product of real conflict and the need or desire of different groups or segments of society to justify or rationalize their respective commitment to the preservation or the subversion of the status quo. [8]

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[5] Hill v. Gateway 2000 Inc., 105 F.3d 1147 (7th Cir. 1997) *cert. denied* 522 U.S. 808, 118 S. Ct. 47 (1997); Brower v. Gateway 2000, 676 N.Y.S.2d 569 (App. Div. 1998); Filias v. Gateway 2000, 1998 U. S. Dist. LEXIS 20358 (D. N.D. Ill. 1998); Klocek v. Gateway Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000); *dismissed*, 2000 WL 1372886 (D.Kan.); Westendorf v. Gateway 2000 Inc., 2000 Del. Ch. LEXIS 54; 41 U.C.C. Rep. Serv.2d 1110 (Del. Ch. 2000).

[6] 105 F.3d 1147 (1997).

[7] It is an illusion for which anthropologists are partly responsible. James Clifford has written a wonderful essay in which he contrasts the "multisensory, multifocal perceptions and encounters of participant observation" and the often "heterophonic" and disagreeing voices that appear in the anthropologists fieldnotes disappear in the "ideological, naturalizing discourse" that is the convention in ethnographic writing. James Clifford, *Notes on (Field)notes* in FIELDNOTES: THE MAKINGS OF ANTHROPOLOGY 47-70 (Roger Sanjek ed.) (1990).

[8] It is important but extremely difficult to distinguish those cases where an individual believes it to be in his own self-interest to resist a legal rule or social norm that works for the benefit of a trading partner and either (a) cases where the resistance reflects social change -- a shift in cultural attitudes or beliefs and (b) the persistent challenge to entrenched norms by members of a group consistently disadvantaged or harmed by a particular rule or practice.

Although Jay Feinman has argued that "there simply does not exist an agreed set of principles and practices in commerce" and that contracts cases

In the *Gateway* cases the cultural or normative contests are various. There are conflicts over (1) the norms to which sellers should be held; [9](2) whether and under what conditions those norms can be avoided[10]; (3) the norms that govern the activist judge [11] and (4) the basic requirements of a participatory and representative democracy. [12]

In this essay I hope to examine and comment on each of these contests and on the jurisprudence of judges like Frank Easterbrook who would refashion the law and the lives of millions of consumers with his vision of human society and

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prove that "parties do not share beliefs on what is appropriate commercial behavior," I would argue that case law shows the existence of shared values and the contests over those shared values. Courts do make normative choices – either to confirm the existing norms or to legitimize the competing values and norms, but it is no solution to say that the choice is made on a "policy basis." *See* Feinman, *supra* note 2 at 837.

[9] In each of the Gateway cases cited *supra* note 5, plaintiffs alleged breach of warranty and failure to provide the technical support promised at the time the computer was purchased. In *Hill* and *Filias* the plaintiffs also asserted claims under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* (hereinafter RICO)

[10] At issue in all these cases was the assent of the consumer to an arbitration term included in the Standard Terms and Conditions Agreement (STCA), with a term that stipulated that the consumer "accepted" these terms if he or she kept the computer more than thirty (or in some cases, five) days. The STCA was included in the box with the computers that were sold.

[11] There is some dispute over law and procedures that equalize power. All of the cases were brought as class actions. Class actions are a procedural device used to empower marginal or emerging groups. But the form of litigation is often criticized because it limits the autonomy of the individual class member. For an example of the opposition to class actions on the grounds that it gives too much power to consumers *see, e.g.*, John M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974). Statutes like RICO and the Deceptive Trade Practices Acts of the various states are attractive because they usually permit plaintiffs to recover treble damages. Similarly the doctrines that disfavor contracts of adhesion and invalidate unconscionable contracts or contract terms are sometimes referred to as "equalizers" where the parties to a contract do not have equal bargaining power. *See, e.g.*, the discussion of unconscionability as a "counteractant to superior bargaining power" in HAVIGHURST, *supra* note 4 at 111.

[12] *See* HAVIGHURST *supra* note 4 discussing the use of power in contract to deny a party his or her "right to a day in court."

human relationships. In the process I hope to revisit some of the themes that have been presented in the essays of the several authors included in this symposium issue. Among these are the function or role of the judiciary in the creation and imposition of norms governing behavior in exchange relationships, the role ambiguity might play in the creation of a successful statute, and the importance of imagination in the work of judging.

A CODE, CONTINUITY AND SOCIAL CHANGE

As a person who dabbles in anthropology, I have always had an abiding interest in the Uniform Commercial Code. Like Professor Conley, I like to think of it as an attempt by Karl Llewellyn to put his knowledge of anthropology to work. [13] What I admire most about the statute and, from my way of thinking, one of the reasons why the statute is very successful, is that it

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[13] Llewelyn credited his experience with the Cheyenne for what he felt were new insights he gained into the judicial process. "You suddenly hit upon the beauty and vision in a strange culture, and you may be the person in whom a seed takes root, so that light is shed at home. The values of comparative law and comparative politics are not different except that the chances for deep illumination may be less." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 513 n.13 (1960). He went further in explaining exactly what he learned that was useful in drafting a statute or code:

> ...the law of the Cheyenne Indians made clear to me what I had never before dreamed: to wit, that law and justice had no need at all to be in conflict or even in too much tension, but could instead represent a daily working harmony. ...I had mostly taken for granted a sort of perpetual struggle between the needs of regularity and form and the precedent-phase of justice on the one side and, on the other, any dynamic readjustment of a going system to what just needed to be done. ...I had to get to the Cheyennes in order to wake up to the fact that the tension between form, or precedent, or other tradition and perceived need requires, in nature, to be a tension only for the single crisis. ...an adequately resilient legal system can on occasion, or even almost regularly, absorb the particular trouble and resolve it each time into a new, usefully guiding, forward looking felt standard-for-action or even rule-of-law.

Id. *See also* John Conley *supra* at 1053.

contains language that accommodates a wide range of beliefs that animate legal decision makers - lawyers, litigators and judges - as well as the businessmen and women whose agreements are subject to the statute.[14]

I don't know whether the flexibility of the U.C.C. was part of the original concept. Some of the flexibility that the commentary justifies may well have resulted from conscious attempts to compromise between competing interests during or after the drafting process. The avowed purpose of the drafters was to provide a statute that would be flexible enough to handle a world the drafters could not imagine at the time they went about their work.[15]

The flexibility in U.C.C. Article 2 actually serves a more immediate purpose. It mediates the conflicting values that coexist in contemporary contract law. Flexibility has a cost and that cost may be the inconsistencies and contradictions that critics

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[14] Professors Robert E. Scott and Alan Schwartz have done an analysis of the drafting process for uniform statutes. Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995). Their analysis examines the political economy and the operation of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. These authors explain why some statutes contain bright line rules while others have rather vague standards. They conclude that when there are different interest groups involved in the drafting process, the terms of a statute are likely to be vague and amorphous. If the drafting process is dominated by one group, it is more likely that a statute will have bright line rules rather than vague standards.

[15] *See, e.g.*, Comment 1 to §1-102:

> This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. *It is intended to make it possible for the law embodied by this Act to be developed by the courts in light of unforeseen and new circumstances.* (Emphasis added).

COMMERCIAL AND DEBTOR-CREDITOR LAW: SELECTED STATUTES 4 (1993).

See also the discussion of Karl Llewellyn and his intentions with respect to the Uniform Commerical Code in Grant Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461 (1967).

of Article 2 find troubling. I would argue that these contradictions are appropriate and even necessary.

Acknowledgement of the power of the formal or traditional contract rules and the ideals that animate them can be found in Article 2 and so can language in various provisions that is suffuse with a completely different world view. In this competing vision of contract law, courts enforce bargains or the expectation that there is a binding legal obligation in circumstances where the traditional rules might not. But there are plenty of ways to deny enforcement as well. This is, after all, a statute that allows you to find a contract in the behavior of the parties, especially conduct that "recognizes the existence of a contract" despite (1) missing terms – if there is a reasonably certain basis for measuring damages – and (2) the fact that the "moment of the making" is indeterminate.[16] Yet the very same section offers an escape hatch into the interpretive realm of "intent", providing courts or judges who are so inclined with language they can use to deny enforcement. It is thus possible to reach diametrically opposed results on the same or similar facts while using the same statutory provision. [17] In any event, buyers and sellers alike find that the statute is capable, in the right hands, of vindicating an expectation that a bargain exists and providing a remedy when that expectation is disappointed.

As Professor Ledwon suggests in her article, ambiguity has its uses.[18] Clarity might actually undermine a statute while ambiguity could be the key to its success. A statute drafted to embody a particular ideology, advancing or embracing one among many competing values, runs the risk of rejection or obsolescence.[19] When judges can't find language in a statute that they can use to justify their decisions, they are tempted to ignore

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[16] U.C.C. § 2-204 (1977).

[17] *Id.*

[18] Lenora Ledwon, *supra* note 3 at 1088.

[19] "Judges have been taught to honor legislative supremacy and to leave untouched all constitutionally valid statutes, but they also have been trained to think of the law as functional, as responsive to current needs and current majorities, and as abhorring discriminations, special treatments, and inconsistencies not required by current majorities." GUIDO CALABRISI, A COMMON LAW IN THE AGE OF STATUTES 6 (1982).

or rewrite the statute. But if there is language that lends itself to very different outcomes (accompanied by a commentary that encourages a particular reading of the statute), very little rewriting is necessary. And there is room for courts to change their minds, to move in the direction that the drafters had in mind.[20]

Uniformity is an ideal. If "uniformity" were a destination, no one vehicle, especially a statute, would be suitable for such a trip. The shared (mythical) culture that would support a uniform statute, with perfect expression and internal consistency, cannot exist in the absence of complete identity in histories, life experiences, knowledge and, ultimately, beliefs and values.

That being said, I would add that while culture is not necessarily homogeneous, it is not chaos either. Neither is flexibility the same thing as anarchy. Flexibility minimizes conflict in a disciplined way. Anarchy is a no holds barred, bare-fisted exercise of brute force. It is power unleashed or power unrestrained. *Hill v. Gateway* is, in my opinion, an invitation to return to what Harold Havighurst called contract as "wild anarchic state."[21]

It is no doubt true that a model of commercial law based on a homogeneous Cheyenne society might seem inapposite to mid twentieth century "white" commercial practices. What Llewellyn seems to have derived from his experience with the Cheyenne, however, is a sense of culture and law as a dynamic, not a static, process.[22] The inevitability of change, if not the social disruption that accompanies it, animates the anthropological method. The flexibility touted by the drafters was explained in terms of social and technological change. At the same time, if you are an anthropologist, and not an economist, the decision to provide "off the rack" terms is not so much a matter of efficiency as it is an expression of confidence or hope.

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[20] *See, e.g.* Ionics Inc. v. Elmwood Sensors Inc., 110 F.3d 184 (1st Cir. 1997) (overruling Roto-Lith Ltd. v F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962)).

[21] See HAVIGHURST, supra note 4.

[22] *See* LLEWELLYN, *supra* note 13.

There is hope that despite the messiness of any single culture and the complexity of a heterogeneous society with its multiple cultures, it may still be possible at any point in time to identify shared values and beliefs (if not nationally, then locally or in a particular trade.)

So there are several aspects of the U.C.C. that seem "anthropological": the recognition that change is inevitable but that the tenacity of culture ensures continuity; the explicit incorporation of various kinds of communities: local, trade and merchant; the use of standards that are supposed to reflect the belief of the mores of a marketplace: good faith, diligence, reasonableness and care.[23] The standards that are included, commercial reasonableness, fair dealing, merchantability, like all cultural phenomena, derive content and specificity in a particular context. Over time, what "passes without objection in the trade" as a personal computer, or what might be considered "fair or average quality" or the "ordinary purpose" for which such goods are fit, might change. The U.C.C.'s use of standards can accommodate those changes.

Those who agree with Judge Easterbrook in his analysis of Article 2's application to consumer purchases of software and hardware often point to the changes in technology in the information or internet economy. Do the changes that have occurred in the past decade or the past two decades warrant a completely different approach to sales transactions? Have our basic assumptions about human relationships altered? Are there norms that exist that have not yet found expression in the law? Are there norms that are emerging; norms that the judges imagine would improve the human condition – whether we think of that in terms of wealth or efficiency or some other non-quantifiable but laudable quality?

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[23] The importance of continuity and change is seen in the use of language that can be used over and over again to justify results even as the meaning of the words and the standards alters because of technological and socio-economic change. In contrast, a standard such as good faith that is meant to have the widest application references a really fundamental shared value – honesty – unless it is being used as a status ethic, as in the case of merchants where "commercial reasonableness and fair dealing" is required.

Judge Easterbrook thinks the expectations of the average consumer have altered. At one point in *ProCD*, the precedent on which he relies in *Hill v. Gateway 2000*, he suggests that a rule that would require advance notice of the terms of the contract would "return transactions to the horse-and-buggy age."[24] There are probably many who agree with the sentiment, if not the overstatement. Other courts and commentators have noted the changes that mass production has wrought in our society and in our expectations:

> Underlying the Code provisions is the recognition of the revolutionary change in business practices in this century. The purchase of goods is no longer a simple transaction in which a buyer purchases individually made goods from a seller in a face to face transaction. Our economy depends on a complex system for the manufacture, distribution, and sale of goods, a system in which manufacturers and consumers rarely meet. Faceless manufacturers mass-produce goods for unknown consumers who purchase those goods from merchants exercising little or no control over the quality of their production. In an age of assembly lines, we are accustomed to cars with scratches, television sets without knobs and other goods with all kinds of defects. Buyers no longer expect a "perfect tender." If a merchant sells defective goods, the reasonable expectation of the parties is that the buyer will return those goods and that the seller will repair or replace them.[25]

The U.C.C. was drafted and adopted in the post World War II era as the United States became a "consumer economy" characterized by mass consumption, modern consumption and mass culture.[26] It was not just the alienation of the assembly line

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[24] ProCD, Inc. v. Matthew Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).
[25] Ramirez v. Autosport, 88 N.J. 277, 440 A.2d 1345 (N.J. S. Ct. 1982).
[26] Paul Glennie, *Consumption Within Historical Studies in* ACKNOWLEDGING CONSUMPTION 165 (Daniel Miller, ed., 1995). According to Glennie, scholars in that discipline have located the beginning of the consumer society in every century since the 16th. Glennie reports that most historians

worker with which the drafters had to contend or the development of the ubiquitous and functional plastic part. It was the ever-present problem of human frailty – our lack of precision or sloppiness, unwarranted optimism, gullibility, blind faith. And let us not forget greed. What should be done about human frailty in an era of mass consumption?

Computer companies like Gateway have not altered the marketing strategies documented by social scientists documented at that time, particularly the temptation to manufacture need through strategies like planned obsolescence.[27] In this consumer age, this consumer culture,[28] technological advances are accompanied by bugs and glitches and all manner of problems that may or may not be resolved by the manufacturer. In an

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social life and consumer acquisitiveness tied to fashion and, increasingly, advertising." *Id.*

[27] VANCE PACKARD, THE WASTE MAKERS (1960). There is a quote from Dorothy Sayers that probably says as much about the changes in our society as anything else. "A society in which consumption has to be artificially stimulated in order to keep production going is a society founded on trash and waste, and such a society is a house built upon sand." DOROTHY L. SAYERS, CREED OR CHAOS, quoted in WASTE MAKERS *supra*. Gateway, adopting a strategy used by automobile companies, has seized on the problem of obsolescence and turned it into a marketing advantage. *See generally* a description of the Gateway Easy Pay Plan (now called Your :) Ware) that includes the option to "upgrade" as new technology makes the computer you purchased obsolete. Asa Somers, *Direct Channel Trendsetter* in COMPUTER SHOPPER, Jan. 1999. Already some complaints have been heard in the land about the advertisements for this installment payment plan, because it is advertised at a low interest rate of 14. 9%, but can cost as much as 27% and the "trade in" on your old PC is based on wholesale, not retail, value. *See* Dawn C. Chmielewski, *Despite the Come-Ons, Leasing a New Computer is Pricey; Way to Go, Click on Computers*, THE BUFFALO NEWS, Aug. 4, 1998, at 7D.

[28] Consumption is now the subject of study by those who practice in disciplines other than economics, including philosophers, anthropologists and sociologists. *See generally* Johnathan Schroeder, *Ethics of Consumption: The Good Life, Justice and Global Stewardship*, J. OF CONSUMER AFFAIRS, Dec. 1999 (book review). *See also* Daniel Miller, *Consumption Studies as the Transformation of Anthropology* in ACKNOWLEDGING CONSUMPTION (Daniel Miller, ed.,1995); CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES (G. McCracken, ed. 1988).

expanding economy driven by the creativity of a new breed of entrepreneurs, companies may experience demand that exceeds their ability to deliver.[29] Should they be protected from the costs that arise from their inexperience or inability to expand quickly enough to meet that demand? Is this a cost that should be borne by the consumer for the benefit of the entire society? Why should the risk of poor management decisions fall on the consumer rather than the manager of a company, like Gateway, whose growth was astronomical.[30]

THE MORES IN A CHANGING MARKETPLACE

At the heart of the Gateway cases is consumer dissatisfaction with a product and the remedy that the seller offered them.[31] If Gateway had been able to fix the problems with the computers, it is unlikely that suits would have been filed by consumers in Illinois, Indiana, Delaware, Kansas, and New York. Nor would the Cleveland office of the Federal Trade Commission have filed a complaint alleging violations of the Magnuson-Moss Warranty Act, the rules promulgated under that

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[29] *See generally* Robert L. Simons, *How Risky Is Your Business*, HARV. BUS. REV. 85 (MAY/JUNE 1999)(describing the risks of rapid growth that comes when managers do not assess the ability of the company's infrastructure to support such growth -reducing quality - or personnel that can result in increased customer complaints. In 1997 Gateway 2000 increased its support operations by adding two new technical support centers in Colorado and New Mexico which were to add 250 people by year end and 700 more in the future while opening 14 or more showrooms. Joanne Gordon, *Green Pastures for Gateway*, CHAIN STORE AGE EXECUTIVE WITH SHOPPING CENTER AGE, Nov. 1997. Perhaps if Ted Waitt had the benefit of the risk exposure calculator devised by Professor Simons, there would not have been the public outcry that led to the flurry of lawsuits, an FTC consent decree and a fine of $270,000.

[30] According to one report, revenues grew 700% from 1987-1988 and 488% the following year. In 1996 and 1997, Gateway was expanding its business in hopes of maintaining its growth. Gordon, *supra* note 29.

[31] Gateway Cases, *supra* note 5.

act and the Federal Trade Commission Act and the related regulations.[32] Two years earlier, FamilyPC Magazine ranked the Gateway P5-120 number 3 best buy out of the eight computers it tested.[33] But stories of Gateway products that did not work or services not delivered as promised also spread.[34] It might have been a problem with rapid growth.[35] It might have been a case of technological innovation gone wrong. Or maybe it was just shoddy workmanship or puffery. Whatever the issues, the "repair or replace" remedy offered by the company was not acceptable to the consumers who did not get what they were promised.

Gateway is also about the process of contract formation and what the reasonable expectations of consumers are or should be. Arthur Corbin described contract law as the field of law that "attempts the realization of reasonable expectations that have been induced by the making of a promise."[36] For Corbin, "reasonableness" was grounded in collective sentiment – "what most people would expect" and a promise that "most people would perform." [37] And this notion of reasonableness had embedded within it the "mores of men." [38]

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[32] In the Matter of Gateway 2000, Inc., No. C-3844, 1998 WL 918348 (Dec. 22, 1998) (FTC); In the Matter of Gateway 2000, Inc., Agreement Containing Consent Order to Cease and Desist, 1998 WL 407401(FTC).

[33]Lisa Holton, *Financial Two Cents Worth*, CHI. SUN TIMES, 93, (Oct. 13, 1996).

[34] *See, e.g.*, Peter Jasco, *What Price CD-ROM hardware?* INFORMATION TODAY, Sept. 1996 (describing the "cheap components" in Gateway's Anniversary PC. Gateway also got into trouble with the FTC over its false advertising statements about its refund policy and on site warranty service and as a result it entered into a consent decree with the FTC that cost it $290,000. *See also* JoAnn Wilcox, *Technology for the Office*, SUCCESSFUL FARMING, Dec. 1, 1999 (five hours to get help from Gateway help line.)

[35] *See* discussion of Gateway growth supra note 30.

[36] ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1 (1952).

[37] ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1 (1952). Despite his statements that suggest "reasonableness" is about shared values, Corbin also recognizes that "customs and mores are themselves complex, variable with time and place, inconsistent an contradictory." Nonetheless, he thought the notion of "reasonableness" gave judges something to hang on to. *Id.*

[38] The language of neo-classical economics may have more power, but concepts that have their origin in the social sciences and the humanities,

Today the very suggestion that there are "mores", that there is any sort of consensus as to what people expect or what most people will do with respect to exchange relationships, is being challenged. Perhaps there is a sense in various communities: customers of Gateway, lawmakers like Judge Easterbrook and the Greek Chorus of law professors, legislators, lawyers for companies like Gateway, functionaries at government agencies, and consumer advocates – that this is a time of unprecedented change. It is not just the sustained economic growth over the past decade casts doubt on some of the basic assumptions in the field of macro-economics (the relationship between employment and inflation is one that comes to mind).[39]

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especially sociology, provide an alternative way to think and talk about the law. One of the topics of interest even among those who specialize in law and economics is the relationship between law and social norms. *See, e.g.*, Shubha Ghosh, *Where's the Sense in Hill v. Gateway 2000? : Reflections on the Visible Hand of Norm Creation, supra* at 1127. *See also*, Richard H. Pildes, *Symposium: Law, Economics and Norms: The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996); and Cass R. Sunstein, *On the Expressive Function of Law,* 144 U. OF PA. L. REV. 2021 (1996). I am somewhat confused about discussions about the effect of law on social norms or the relationship between law and social norms because I was taught that the word or concept "norm" includes informal and formal rules. Of course, my definition of norm is derivative, learned from Kingsley Davis, the author of HUMAN SOCIETY, more than thirty years ago. I suspect the meaning has not changed all that much. The typology of norms Davis describes classifies norms in terms of the importance attached to a norm and the type of sanction imposed for its violation. KINGSLEY DAVIS, HUMAN SOCIETY 52-82 (1966). Between folkways, which are very informal, and law, which is very formal, are mores. "Each more is believed to be essential to social welfare" Kingsley Davis instructed me and mores, I was told, "relate to the fundamental needs of society." Most importantly, " Mores are taken for granted as being a highly important part of the nature of things. Belief rationalizes them in the form of myth, ritual expresses them in the form of symbols and action embodies them in form of right conduct. " *Id.* at 60. Kingsley Davis argued that law did not determine "fundamental sentiments", but he did think that it could be used to alter social relationships and thus was an "advanced instrument of social change." *Id* at 70.

[39] For a discussion of the recent history and the changes that have taken place, *see generally* Laura D'Andrea Tyson, *Old Economic Logic in the New Economy*, 41 CALIFORNIA MANAGEMENT REVIEW 8, June 22, 1999 and Justin Fox, *What in the World Happened to Economics?* FORTUNE 90, Mar. 15, 1999.

There is a more general sense of uncertainty. We know where we have been but we are not yet sure where we are going. Either we are in unfamiliar and uncharted territory or the landmarks that we used to navigate in the past have disappeared -- demolished in the name of progress to make room for the construction of the ideological equivalent of a mega mall or warehouse store.

Some economists suggest that there is a parallel between the introduction of electricity and the growth of mass production and the introduction of the computer and the commencement of what they call the "information age."[40] The growth of consumerism as a way of life in the United States and across the world has had political consequences. Consumerism laid the Evil Empire low. It was not missles but blue jeans that fomented unrest behind the Iron Curtain. It was consumerism that fed the blazing economies in the Pacific Basin until they collapsed in the conflagration of speculation, over-expansion and graft.[41] In this new age, hegemony: consumer culture has no competition.

In the United States, the "consumer movement" could have been characterized either as a reflection of the traditional liberal values that affirm and support the rights of individuals or as a form of incipient class identity.[42] Where there was potential or actual conflict between consumer and manufacturer or retailer or creditor, the democratic process yielded significant legislation for the protection of the consumer. Political scientists might explain it in terms of interest group politics, but that does little to disprove the existence of mores that govern market behavior.

The U.C.C. has something to say about quality. §2-313 says it is reasonable, a matter of common sense, perhaps, to think that ". . . the probability is small that a real price was

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[40] Tyson, *supra* note 39.

[41] Ricardo Saludo, *Meltdown Revisited*, ASIA WEEK 34, JULY 21, 2000 (review of five books examining both the 'East Asian miracle' and the crisis that ended it).

[42] Consumerism has been defined as a "social movement" that redistributes power and adjusts relations between buyers and sellers. William K. Darley and Denise M. Johnson, *Cross-National Comparison of Consumer Attitudes Towards Consumerism In Four Developing Countries*, 27 J. of CONSUMER AFFAIRS 37, June 22, 1993.

intended to be exchanged for a pseudo-obligation...."[43] This comment about quality is consistent with the public concern with obsolescence of quality, a much-criticized strategy of sellers for increasing consumption. Cheaper materials, materials designed to break down or wear out, are used in place of those that would ensure longer durability. Often the "debasement" of quality is hidden from the consumer and only becomes apparent with use and the passage of time.[44]

Most people are frustrated by, but live with, the consequences of consumerism including the lack of durability of products. But there is such a thing as consumer resistance.[45] Sometimes statutory protections are invoked. Sometimes self-help is employed. One of my all time favorite stories illustrates the way a failure to comply with market norms on one side of a transaction may provoke an abandonment of ethical norms on the other side as well. A friend of mine has a father in law who is a senior citizen. She tells me that when he gets angry because some appliance breaks before he thinks it should, he goes to the store and buys a replacement -- a phone or clock radio or toaster oven. He then goes home and puts the broken item in the box and returns it to the store for a refund. His act is fraudulent but it is also subversive, a form of resistance to the notion that we live in a "disposable" society.

That part of the current consumerist struggle is being played out with respect to the quality of computers (and the monopoly power of software manufacturers) is predictable and

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[43] U.C.C. § 2-313 Comment 4. Although this statement appears in the comment to the section on express warranties, the general import of the statement provides a justification for implied warranties as well as a reason why express warranties should not be disclaimable.

[44] PACKARD *supra* note 27 at 57.

[45] Apparently there is a body of work on "consumer resistance strategies" including "consumer boycotts, cooperative movements, voluntary simplicity, market and advertising critiques, and the transformation of mass produced objects into individuated possessions and experiences." Russell W. Belk, *Studies in The New Consumer Behavior* in ACKNOWLEDGING CONSUMPTION 67 (Daniel Miller, ed.,1995).

appropriately symbolic.[46] The computer, especially the personal computer, is for many the symbol of the transformation of the economy into an "information" or an "internet" society. It is a consumer good that is linked to individual liberty and to upward mobility.

The problem with the personal computer is cost – it is both expensive and affordable. A computer is priced high enough to make repeat purchases problematic, but not low enough to make it disposable. It is one thing to have to throw away a pocket calculator and buy a replacement only weeks after it was purchased. It is quite another matter to have to live unhappily with a computer that doesn't work as promised or to throw away a personal computer purchased only a few weeks or months earlier.[47] It is not as expensive as a car, but not as inexpensive as the plastic, throw-away electronic appliances that clutter up our offices and kitchens.

Nor is a computer indispensable, at least for the vast majority of citizens. A computer at home and the advantages this provides is still a luxury. But a computer may become a necessity in much the same way an automobile became a necessity in our culture. If we succeed in making computer literacy a part of the basic education children are expected to receive and computer access critical to participation in everything from casting a vote to doing our jobs, we might see a shift in the way we classify this particular piece of technology.

The controversy is about computers, but it is also about mores that govern market participation. An awareness of human frailty, of human weakness, plays a significant role in cases involving breach of warranty and possible misrepresentation.

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[46] It is hard to lug a PC around but with the proliferation of laptop computers and the creation of the "palm pilot," the relationship between computers as a consumer good and the symbolic function of consumption is enhanced. *But see* the argument that consumption serves either as a message or that "lifestyle" as created by an individual's consuming choices is determinative of or communicates that person's identity in Colin Campbell, *The Sociology of Consumption in* ACKNOWLEDGING CONSUMPTION 111-117 (Daniel Miller, ed. 1995).

[47] Jake Kirchner, *Today's PC: Inexpensive and Obsolete: Problem of Built in Obsolescence Should be Addressed*, PC MAGAZINE, Oct. 20, 1998.

Contrary to the theories advanced about contracts, blame and fault play important roles in sorting out contract disputes. The question is who has been guilty of behavior that the law wishes to encourage or deter. If minimum standards of quality are expected of the manufacturer, then the responsibility is his if the goods do not meet those standards. But in the past and in the present, and the *Gateway* case is only one example, courts that wish to protect the producer focus attention instead on the deficiencies of buyers using doctrines like caveat emptor and duty to read.[48] Beyond the issue of fault is the subtle suggestion of patent dishonesty and untrustworthiness that would open the floodgates of litigation.[49]

Contests over such norms are seldom concluded in a month, a year, a decade or a century. There is still substantial disagreement about the content as well as the utility of the standards to which manufacturers, sellers, or financing companies, for instance, should be held. There is a corresponding argument about the appropriateness of legislation or court decisions that purport to adopt or enforce any "social" norms.

Neo-classical economists argue that the market itself is disciplinary.[50] Some postmodern theorists speculate that "power today is located above all in consumers, such as the housewife."[51] The problem with this argument is that the

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[48] *Gateway*, 105 F.3d at 1149. See also Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts,* 47 U. MIAMI L. REV. 1263 (1993) ("Courts moralistically preached that if a peson failed to read he contract, 'he cannot set up his own carelessness and indolence as a defense.'" quoting from McNinch v. Northwest Thresher Col, 100 P.524, 526 (Okla. 1909))

[49] " An oral recitation would mot avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it." Gateway, 105 F.3d at 1149.

[50] This credo: you don't need the law if you've got the market is exemplified by Easterbrook's comment in *ProCD*: " Competition Among Vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy." 86 F.3d at 1453.

[51] Miller blends Foucault with de Toqueville to discuss power as both "diffuse but also ambivalent." Daniel Miller, *Consumption as the Vanguard of History:*

"market" offers no remedy for those who suffer injury, no formal or public pronouncement of the norms that are being vindicated (which may cause both buyers and sellers to be confused). The price of Gateway stock has declined and so have earnings.[52] Was it reputation, recession or the greater sophistication on the part of those who purchase computers? Does economic waste occur in the time it takes for information about the aberrant or deviant behavior to reach a wide enough segment of the market to cause a reaction that would act as a form of discipline on sellers? And even those who theorize about the location of power in the mass of consumers (a theory about which I am somewhat skeptical), acknowledge that this power is both enabling and repressive.[53]

JURIDICAL NORMS

A judge like Frank Easterbrook who decides to lead rather than follow should expect resistance. There will be those who resent his ambition. There will be others who object to the direction in which he is headed or the route he has chosen to reach a particular objective. Much of the negative reaction to the decision in *Hill v. Gateway 2000* is a reaction to the strategies employed by Judge Frank Easterbrook.[54] Judge Easterbrook did violence to Article 2.[55]

A Polemic by Way of an Introduction in ACKNOWLEDGING CONSUMPTION 10-11 (Dennis Miller, ed.,1995).

[52] Gateway's earnings declined over several quarters. But other PC companies were also experiencing declining revenues. *See, e.g.*, Edward Iwata, *Dell Stock Plummets After Hours*, U.S.A. TODAY, Jan. 27, 2000. (reporting a decline in the revenues for Dell, Gateway and Compaq computers). Finally in early 2001, the resignation of the CEO of Gateway was announced. *See* Barnaby J. Feder, *Chief Executive Resigns at Gateway and Founder Returns to Resume Control*, NY TIMES, Jan. 30, 2001, at C, p. 6, Col. 1 Technology.

[53] Miller, *supra* note 51 at 10.

[54] *See, e.g.* the list of articles criticizing the Easterbrook's reasoning which can be found in Klocek v. Gateway Inc., 104 F. Supp.2d 1332, 1339 n.9 (D. Kan. June. 15, 2000), dismissed 2000 WL 1372886 (D. Kan. Sept. 6, 2000).

[55] Why did Easterbrook argue that the statute did not apply? The simple answer would be that if an arbitration provision is an additional term, it would be excluded – either because one party was not a merchant or because an

While judges are free to do exactly what Easterbrook has done, there are norms that govern judicial behavior, norms that apply when a judge is an "activist", the role that Easterbrook has assumed.[56] Surely there should be some acknowledgement that

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arbitration term is material. In Schulze v. Burch Biscuit Company, 831 F.2d 709 (7th Cir. 1987) the court concluded that the test for materiality in Illinois was surprise and hardship. It then reasoned that the repeated use of acknowledgements in the formation of multiple contracts would eliminate the element of surprise. Unless the Hills had engaged in repeated transactions with Gateway, the exception that eliminated surprise in Schulze would not apply. *See, also* ATD American Co. v. Imptex International Inc., 1994 U.S. Dist. LEXIS 6426 (D. Pa., May 16, 1994) and citations to Pennsylvania cases holding that an arbitration term is material for purposes of 2-207; Universal Plumbing and Piping Supply, Inc., v. Grimberg, Inc. 596 F. Supp. 1383, 1385 (Oct. 29, 1984)(citing cases in Nebraska, 3d Cir., 4th Cir., and the Eastern District of New York that hold an arbitration provision is material).

[56] At the swearing in for Judge Ann Williams, *see* Mark Schauerte, *Chicago Lawyer of the Year: Judge Ann Claire Williams*, CHICAGO LAWYER, Dec. 2000, I listened to a partner from Winston and Strawn, the attorneys for Gateway, who offered praise of the new Judge but also felt it appropriate to comment on the "courage" of Judge Easterbrook. That courage was required, I have no doubt. As Karl Llewellyn points out :

> to be right discretion, to be lawful exercise of discretion ...the action so far as it affects any man or group adversely must be undertaken with a feeling, explicit or implicit, of willingness, of readiness to do the like again ... [and] a willingness to have the action known and looked at...

KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 217 (1960).

The traditions, ideals and values that constrain judges have been described in various ways, most of them concern the limits on judicial discretion in the common law. *See, e.g.* BENJAMEN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1991); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988). The rules that govern statutory interpretation may vary, but the U.C.C. article 2 is not an ordinary statute. It is a code. *See* discussion of the intention of the drafters *supra* note 16 and accompanying text.

I am discussing only the informal sanctions that limit or constrain the freedom judges have in reaching a particular decision. This is not the place for a discussion of the formal sanctions which are now available. *See, e.g.* 28 U.S.C. 372 (c) (1) (any person alleging that a circuit, district, or bankruptcy judge has engaged in conduct prejudicial to the effective and expeditious

statements have been made that run counter to traditional understanding or commonplace assumptions about the way the world of contract law is organized. Easterbrook creates a false dichotomy in the first paragraph of the opinion contrasting a contract with "no terms" – ignoring the terms the statute supplies, including warranties of merchantability - with a contract with the terms drafted by the seller.[57]

Easterbrook follows up with a rhetorical question: "Where's the sense in that?" But even when this question is read narrowly, it is easy to criticize Easterbrook's claim that the result in *Gateway* is compelled by the principle of *stare decisis*. *Stare decisis* seems less principled than self-serving when, as in this case, the prior precedent was written by the same judge the year before. *Zeidenberg v. ProCD Inc.*,[58] the case on which he relies, and *Hill v. Gateway 2000* [59] are distinguishable both in terms of the status of the parties to the dispute and the application of the rules of offer and acceptance.[60]

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administration of the business of the courts. . .may file with the clerk of the court of appeals of the circuit a written complaint). The best known cases involving attacks on judges are those of Judges Sarokin and Lord. *See, e.g. Panel Discussion Disqualification of Judges (The Sarokin Matter): Is it a Threat to Judicial Independence,* 58 BROOKLYN L. REV. 1063 (1992-93) discussing Haines v. Liggett Group Inc., 975 F.2d 81, 97-98 (3d Cir. 1992). *See also* Gardiner v. A. H. Robins Company, Inc., 747 F.2d 1180 (8th Cir. 1984) (striking 'so ordered' and reprimand of corporate officers from the record of the case because the trial judge was 'biased' against the defendant pharmaceutical company.) and SHELDON ENGLEMAYER AND ROBERT WAGMAN, LORD'S JUSTICE (1985). The two judges were both accused of bias by lawyers for major multinational corporations accused of mass torts.

[57] *Gateway*, 105 F.3d at 1148.

[58] 86 F.3d 1447 (7th Cir. June 20, 1996).

[59] Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997).

[60] Although Easterbrook dismisses the Hills' argument that Zeidenberg was a merchant, in *ProCD* Easterbrook discusses the problem of price discrimination and distinguishes commercial users from consumers. Whether he was a merchant or not, Zeidenberg was not your ordinary consumer. 86 F.3d at 1450. Similarly, in *ProCD*, the license did not appear on the shrinkwrap and it was not on the box, but the box did state that the software came with "restrictions". In *Gateway*, although consumers might expect there to be disclaimers of warranty, they certainly would not expect an arbitration provision. *See* the cases cited *supra* note 52 in which an arbitration provision

In *ProCD*, Easterbrook announced that the defendant had conceded that the boxes of software on the shelves at a store were an offer to the consumer.[61] If the buyer's lawyer made that concession, it was imprudent. For as most first year law students can tell you, a display of merchandise in a store window, and one supposes on a shelf, is nothing more than an "invitation to offer."[62] By the time we get to *Gateway* Easterbrook thinks it sufficient to reiterate the fact that the vendor is the offeror and to remind us of another axiom of contract law – the offeror is master of the offer.

Judge Easterbrook ignored both §§ 2-207 and 2-206, the commentary to these sections, the existing precedent interpreting the statute and the commentary of scholars and experts on Article 2.[63] He did not mention §2-204, although the language of that section, taken in conjunction with the definitions of contract and agreement, might have lent some support for his position.[64]

The jurisprudence of Frank Easterbrook shocks me because I am, admittedly, a legal realist or at least an admirer of the legal realists.[65] Professor Joo compares Frank Easterbrook to Benjamen Cardozo, whom many would classify as a legal realist.

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was found to be "material" under §2-207. Comment 4 refers to material terms as those which "result in surprise and hardship." SELECTED COMMERCIAL STATUTES 58 (2000 EDITION).

[61] *ProCD*, 86 F.3d at 1450.

[62] Lefkowitz v. Great Minneapolis Surplus Store, 251 Minn. 188, 86 N.W.2d 689 (Minn. 1957); Fisher v. Bell, 3 All E.R. 731 (Queen's Bench Division 1960).

[63] *See* the discussion critical of Judge Easterbrook's interpretation of U.C.C. §2-207 in the Gateway Thread *supra* pages 1149 to 1205. *See, also Klocek*, 104 F. Supp.2d 1332.

[64] He did refer to §2-204 in ProCD, 86 F.3d at 1452. Even if we were to use the "gestalt" approach to contract formation in §2-204 which would look at all the communications between the parties without an attempt to isolate a particular document or communication that was the offer or the acceptance, there is still the problem of finding assent in the passivity of the buyers unless we are willing to assume 'tacit assent' from their silence or inaction. That too flies in the face of traditional contract doctrine. *See, e.g.* RESTATEMENT SECOND OF CONTRACTS § 69. (1981).

[65] "To a great extent, we really are all legal realists now." Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (reviewing LAURA KALMAN, LEGAL REALISM AT YALE:1927-1960 (1986))

The distance between Easterbrook and Cardozo, intellectually and ideologically, can be measured in terms of the distance between classical or neo-classical economics and the disciplines of anthropology or sociology -- the radically different conceptions of human nature embodied in these disciplines as well as the divergent methodologies employed by economists and anthropologists. The jurisprudence of Cardozo was informed by an appreciation for the humanities and for the social sciences -- for attempts to explain human behavior as it exists on the ground, not a model of it that exists in the air. Cardozo acknowledged mores as part of the mix in the process that is judicial decision-making but he also recognized that mores and morality are not always one and the same. [66]

One of my more insightful students, Raizel Liebler came up to me after class one day to comment on the connection she saw between Cardozo's opinion and Jewish culture/religion. It was very Jewish, she thought, to speak in terms of the ideal -- to presume that George Edward Kent would want to be reasonable and then to determine his contractual intent according to that standard of reasonableness.[67] The "reasonableness" that Cardozo describes is a moral vision – informed by a concern with the potential for injustice. Cardozo's cases, many of which are standard in contemporary casebooks, are replete with buyers and sellers who defy the assumptions of neoclassical economics. They are too human to fit within the two-dimensional self interested, wealth maximizing characters that inhabit the law and economics narratives.[68]

In *Jacob and Youngs, Inc. v. Kent*,[69] buyers are confronted with a minor variation or deviation in the performance

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[66] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921)(discussing Savigny and the idea that judges should "heed the mores of his day").

[67] *See* the discussion of Halacha in Deborah Waire Post, *Profit, Progress and Moral Imperatives,* 9 TOURO L. REV.487 (reviewing MEIR TAMARI, IN THE MARKETPLACE: JEWISH BUSINESS ETHICS (1991)).

[68] Allegheny College v. National Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173 (1927), Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

[69] 230 N.Y. 239 (1921).

of the seller. Cardozo's assertion about reasonableness in *Jacob and Youngs, Inc. v. Kent* is prefaced by an explanation of one of his *a priori* assumptions: although human beings aspire to perfection, we often fall short. What our fellow human beings can expect from us, therefore, is performance that is as close to perfection as we can reasonably come and compensation for deviation when it occurs.

When a judge makes a comment like Cardozo's – that human beings are all imperfect – it has a powerful impact. There was no need for a long list of citations of prior authority. This statement has the ring of truth, verifiable by each and every reader who has ever reflected on his or her failures. It is a statement about human nature (within Western culture) that justifies the inferences that Cardozo draws and the decision he reaches.

Easterbrook's cry "where's the sense in that" is also intended as a justification for his decision, but it is more pointed. It is both an assertion that his decision is dictated by the neutral principle of *stare decisis*. The comment is directed at those who might accuse him of acting arbitrarily, or worse yet, in a biased way. He must have expected a reaction and he certainly got one. Contracts experts fume over Easterbrook's interpretation of the Uniform Commercial Code and take issue with the technical or mechanical aspects of the decision. But his exclamation, "where's the sense in that," also sets the stage for Easterbrook's misreading of social realities and human nature.

Easterbrook tries to persuade his audience that it is reasonable for a consumer to agree to terms sight unseen. It is this process of reasoning, so formal and so remote from the actual experiences of ordinary consumers that Professors Horsburgh and Andrew Cappel reference in their comparison of the cognitive processes employed by buyers and sellers.[70]

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[70] *See* Beverly Horsburgh and Andrew Cappel, *Cognitition and Common Sense in Contract Law*, *supra* at 1091. See also Russell Korobkin, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law: Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rule and Form Terms*, 51 VANDERBILT L. REV. 1583 (1998)

Consumers, they conclude, the persons whose expectations are referenced, do not reason the way Easterbrook does.

Easterbrook makes statements about shared meanings – what we can be presumed to know and understand about our commercial relationships. We have seen that his interpretation, the meaning he assigns, is contested. Easterbrook is not describing what "is", he is describing what "ought to be". This is a case in which consumers are warned that they must read the documents that come with merchandise they buy because those terms will govern their commercial relationships. They are instructed in the conduct that is expected of reasonable consumers. They are to consult public sources, computer magazines, the web sites of vendors or demand compliance with the Magnuson-Moss Warranty Act. [71]

As Professor Joo points out, Cardozo crafted an approach to breach of contract that also is normative. I do not mean to suggest that the normative standard Cardozo spells out in *Jacob and Youngs Inc. v. Kent* is uncontested. The demand for perfection is not easily relinquished. The students I teach certainly prefer the perfect tender rule. They argue vociferously that the law should create and enforce a party's right to demand perfection. The right to demand gives them some measure of power in relationships where they are often the less powerful party. The perceived need for a perfect tender rule derives from shared experiences -- the frustration they associate with disappointment, with the purchase of goods and services that did not meet their expectations or live up to the promises that were made to them.

But Cardozo's normative approach differs from that of Judge Easterbrook. The opportunity to discuss how much is enough, or the quality of performance that a buyer is entitled to expect, is not ended. Judge Cardozo prescribes a process by which that particular issue can be revisited over and over again. Judgments about how much deviation will be tolerated may change over time and if they do, these changes will be reflected in emerging case law.

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[71] 105 F.3d at 1150. *See* discussion of FTC consent decree with Gateway, *supra* note 32 and accompanying text.

In contrast, Judge Easterbrook employed an "end game" strategy.[72] The subject of the dispute, however that is defined -- whether it is the quality that a consumer can reasonably expect from a computer manufacturer or the willingness of consumers to submit disputes to arbitration -- has been settled with finality. A rule has been stated and the facts constructed - the vendor is the offeror, the offeror is master of the offer and §2-207 does not apply when there is only one form. There can only be one outcome. The vendor wins. End of conversation.

It is not the dishonesty in Judge Easterbrook's decision that offends me; it is the ruthlessness of the strategy. It is no excuse or justification to say that Cardozo sometimes misstated the facts or that he fictionalized his decisions or that he omitted relevant facts.[73] The differences between Cardozo and Easterbrook are not a matter of poetry or rhetorical style. They are more fundamental than that. Easterbrook and Cardozo define justice in different ways. Judge Easterbrook thinks that reduced cost is what all consumers want. In his decisions in *ProCD* and *Gateway*, he explains why expectations must change if consumers are to have the benefit of reduced costs.[74] Cardozo, I am sure, would have been concerned with the moral aspects of this case, with the overreaching that is obvious in the terms of the arbitration provisions that Gateway (or its attorneys) crafted.

Easterbrook's analysis lacks an appreciation for history and for the values and desires (not translatable into dollars and

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[72] "End game" is one of those terms that has taken on a life of its own. It has been used to mean "exit strategy" or plans made in anticipation of a cessation of demand or business. *See* explanation of end game as declining product demand in Kathryn Rudie Harrigan and Michael E. Porter, *End-Game Strategies for Declining Industries*, HARV. BUS. REV. 111, July/Aug. 1983. I am using it in the traditional sense of a chess move that ends the game; a strategy that ends the engagement when there is a contest or competition of some sort. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 410 (1991).

[73] RICHARD A. POSNER, CARDOZO : A STUDY IN REPUTATION 42-43 (1990).

[74] In *Gateway*, Easterbrook wrote " customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device." 105 F.3d at 1149; In *ProCD*, he instructed us in the process of price discrimination and told us that consumers would lose the surplus value they presently experience because commercial customers are charged a higher price. 86 F.3d at 1449.

cents) that animate human beings.[75] It lacks the imagination (sometimes called empathy) that would allow him to see the full consequences of the decision he reached in the *Gateway* case. [76]

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[75] There is a growing body of literature in the field of socio-economics that offers a new model for human behavior other than the rational economic actor. *See, e.g.* Romesh Diwan, *Relational Wealth and the Quality of Life*, 29 J. OF SOCIO-ECONOMICS 305 (July 1, 2000).

[76] Anthropologists continue to struggle – with much cynicism and no small amount of postmodern angst – to achieve an emphatic understanding of the people with whom they live, in and outside their own nations, while collecting ethnographic data. *See, e.g,*. RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS (1993) (critiquing the classical norms of anthropology including the idea that "the optimal field worker should dance on the edge of paradox simultaneously becoming 'one of the people' and remaining an academic.") *See also* James Clifford, *Notes on (Field)notes* in FIELDNOTES: THE MAKING OF ANTHROPOLOGY (Roger Sanjek, ed. 1990)(discussing the "textual/rhetorical prefiguration of the facts" that are observed/recorded by ethnographers).

Clifford Geertz's analysis of the work of Malinowski describes this ideal with respect to process – the way research is conducted – as one that "at its limits, anyway, virtually erases, or claims to, the affective distance between the observer and the observed . . . ." CLIFFORD GEERTZ, WORKS AND LIVES, THE ANTHROPOLOGIST AS AUTHOR (1988).

Havighurst describes what he sees as the relationship between power, class loyalty, and something he calls "sympathy" which, if it has as its predicate not pity, but understanding, may require imagination as well.

> ...bias toward the weak, though not controlling, becomes a factor, I believe, whenever the cultural environment is such that makers and administrators of law are capable of sympathetic response towards all classes subject to their authority, and when they are not so dominated by loyalty toward the class that is strong as to be incapable of ever seeing injustice in the justice the strong seek to impose.

HAVIGHURST *supra* note 4 at 129-130.

The reference to the effect of class on vision, the ability to see or understand the injustice in the exercise of superior power, whatever its source, has been described before by other social critics. One of my favorites appears in Book one of The Forsyte Saga, A Man of Property. Young Jolyan Forsyte is at the zoo with his father and his children and he muses on the attraction of zoos in the Victorian era:

DISMANTLING DEMOCRACY: THE CONSTRUCTION OF CONSENT AND THE SILENCING OF DISSENT

Even as deregulation took hold in the United States, there was still wide spread support for the idea of consumer protection.[77] The rhetoric of deregulation promises the benefits of competition and reduced costs as various industries are freed from the costs of regulatory compliance. But there has not been a

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> To shut up a lion or tiger in confinement was surely a horrible barbarity. But no cultivated person would admit this.
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> The idea of its being barbarous to confine wild animals had probably never occurred to his father, for instance; he belonged to the old school, who considered it at once humanizing and educational to confine baboons and panthers, holding the view, no doubt, that in course of time they might induce these creatures not so unreasonably to die of misery and heart-sickness against the bars of their cages, and put the society to the expense of getting others! In his eyes, as in the eyes of all Forsytes, the pleasure of seeing these beautiful creatures in a state of captivity far outweighed the inconvenience of imprisonment to beasts whom God has so improvidently placed in a state of freedom! It was for the animals' good, removing them at once from the countless dangers of open air and exercise, and enabling them to exercise their functions in the guaranteed seclusion of a private compartment! Indeed, it was doubtful what wild animals were made for but to be shut up in cages!
>
> But as young Jolyan had in his constitution the elements of impartiality, he reflected that to stigmatize as barbarity that which was merely lack of imagination must be wrong; for none who held these views had been placed in a similar position to the animals they caged, and could not, therefore, be expected to enter into their sensations.

JOHN GALSWORTHY, THE FORSYTE SAGA 150 (1950).

[77] *See* Paul N. Bloom and Stephen A. Greyser, *The Maturing of Consumerism*, HARV. BUS. REV. 130 Nov./Dec. 1981. The authors discuss the strategies employed by organizations like the Business Roundtable and American Enterprise Institute in countering consumerism, transforming the public discourse and re-characterizing public interest organizations as special interest groups. But the authors reported that national opinion polls suggested that the public still felt dissatisfaction with the marketplace. Enthusiasm for deregulation has dissipated in the areas of energy (electricity), airlines and the banking industry because of consumer dissatisfaction with both the quality and the cost of service in each of these areas.

tidal wave of legislation on the state or federal level dismantling consumer protection statutes. Generally, administrations hostile to regulatory oversight do not propose the repeal of consumer protection statutes, as that would be politically unpopular. Instead, they are likely to cut funding to regulatory agencies.

Consumers still want and demand accurate and meaningful information as well as relief when they feel they have been cheated. In recent years, the battleground shifted from the legislatures to the courts. State Attorneys General have been activists in this area bringing suits against the tobacco industry, the banking industry and the airline industry. And the courts are not neutral here. Liberal judges run the risk of censure when they express disgust at the duplicity of corporate officials. Conservative activists employ discourse and strategies that appear nuetral, but the rhetoric about efficiency and overcrowding and litigiousness is nothing more than a thinly veiled disguise for decisions that protect corporate interests from the expense of lawsuits and the risk of liability.[78]

Judge Frank Easterbrook is in the vanguard of those who are actively working not just to protect a political minority from the consequences of the democratic process, but to give that minority the power to dictate the terms of their legal relationships.

As Cardozo conceded in *Jacob and Youngs, Inc. v. Kent*, there was always the possibility of contracting out of the standard of reasonableness judicially created, opting for perfection by "apt and certain words."[79] In other words, the burden of persuasion and of gaining assent was on the person who wished to depart from the standard of reasonableness Cardozo described. The problem at the heart of *Gateway* and numerous other consumer transactions is traceable to this assumption that "apt and certain" words reflect actual bargains or that this assumption applies in cases of mass production where there is unilateral control over written instruments accompanying the transaction. What good

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[78] See the discussion of this rheroic in Casarotto v. Doctor's Associates Inc., 886 P.2d 931 (1994)(Trieweiler concurring) , rev'd and remanded 517 U.S. 681 (1996)

[79] 230 N.Y. 239, 243, 129 N.E. 889, 891 (1921).

are "apt and certain words" if no attempt is made to obtain actual, meaningful consent to them? For many, what is at stake in *Gateway* is a vestigial commitment to consent in contract theory and doctrine.

There is a tension between the normative standards that are part of the Code and the provisions that let parties contract out of those terms. A commitment to an individualistic ethos should make consent by the other party a prerequisite to such a change in terms, but often the language that signals the choice to opt out of communal norms is not "dickered" but boilerplate. The process by which a relatively larger and more powerful contracting party imposes its will on those who do business is part of a much larger problem – a dismantling of democratic institutions and processes.[80]

The conflict is not between individual liberty and normative standards that are collective (and therefore coercive). The conflict is between normative standards that reflect the needs or desires of consumers and legal rules that deprive them of public fora in which to express their dissatisfaction with the behavior of more powerful participants in the marketplace.[81]

My original hypothesis was that U.C.C. Article 2 is carefully constructed to express competing values. The assumption that buyers have a right to expect a minimum standard of quality with respect to the goods they buy or a meaningful remedy if the goods are defective is counter balanced by terms that acknowledge the right of the parties to contract out

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[80] When the Contract with America was promoted by Congressional Republicans, common sense was the byword with respect to "legal reforms." Generally speaking, "common sense" meant protection for corporate defendants. It also meant that legal rights and wealth were linked. *See* Private Securities Litigation Reform Act of 1995 which creates a presumption that the "most adequate plaintiff" will be the person with the "largest financial interest." 15 U.S.C.A. 77z-1 (a) (3) (B) (iii) (I).

[81] In other settings this transfer is more conspicuous and more highly contested. It has incensed citizens and ignited crusades for campaign finance reform or for a reduced role for lobbyists at each level of government. The same sort of political struggle is being waged in connection with the revision of Article 2 of the U.C.C. Article 2. *See* Richard E. Speidel, *Symposium: Perspectives on the Uniform Law Review Process: Revising U.C.C. Article 2: A View From The Trenches* (forthcoming HASTINGS L.J.)

of these community standards. The seller can bargain for a term that absolves him from responsibility for nonperformance or inadequate performance, but the freedom to contract out of these terms is limited too by requirements of good faith and unconscionability, provisions that also reference community norms.[82]

These doctrines are made necessary because we will not admit to the absence of bargaining in most consumer transactions. And these provisions are invoked most often in cases where there is no real bargaining, when one party has complete control over any terms that are proposed in writing. Without such doctrines, what we would see is not a dialectic between individual and collective values, but a complete transfer of power over the regime of private ordering to the more powerful participants in the marketplace.

The *Gateway* case represents an ideological loggerhead. It threatens the democratic process on two levels. Not only does it create a model of contract formation that gives entire control over the terms of the agreement to one side, it also deprives the less powerful party, the individual consumer, of the only mechanism she has to directly confront behavior that is predatory, abusive or simply overreaching.Whether it is accurate or not, most individuals still believe that the courts provide access to justice in a way that membership in the National Consumers League or a letter to your Congressman does not.

Chief Judge Terry Trieweiler expressed sentiments felt by many in the face of federalization (by those ideologically committed in principle to states' rights?) of arbitration. He documents the costs to individual plaintiffs of arbitration both in terms of the expenses associated with the process and the distance

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[82] *See e.g.* §2-719 (consequential damages cannot be limited or excluded if that would be unconscionable and limitation in case of personal injury in case of consumer goods is presumptively unconscionable. Though some consider it a pyrrhic victory because the plaintiffs were still required to arbitrate, Brower v. Gateway did acknowledge the unfairness of the original Gateway arbitration provision. 676 N.Y.S.2d 569. Neither Delaware, *Westendorf*, 41 U.C.C. Rep. Serv.2d (Callaghan) 1110 (Del. Ch. 2000), nor Illinois, *Filias* 1998 U.S. Dist. LEXIS 20358 (N.D. Ill. Jan. 20, 1998), were prepared to hold that the term was unconscionable or unenforceable as an adhesion contract.

plaintiffs have to travel to arbitrate. Just as important to anyone concerned with the morality of law is the fact that the arbitrator can decide a case without regard for the law or the facts in a case. There is no predictable outcome, no procedural protection.

I agree with Judge Trieweiler. As they are used most often today, as a shield for sellers rather than an affordable and reassonable means of settling disputes, arbitration provisions are undemocratic. Speaking for the state of Montana, Judge Trieweiler admonished the federal courts and reminded them of the basic democratic principles that fuel resistence to arbitration. It is not irrationality, it is idealism:

> We believe in the rule of law so that people can plan their commercial and personal affairs... We believe that our courts should be accessible to all, regardless of their economic status, or their social importance, and therefore, provide courts at public expense and guarantee access to everyone... We have contract and tort laws. We have laws to protect our citizens from bad faith, fraud, unfair business practices, and oppression by the many large national corporations who control many aspects of their lives but with whom they have no bargaining power. While our system of justice and our rules are imperfect, they have as their ultimate purpose one overriding principle. They are intended, and continue to evolve, for the purpose of providing fairness to people, regardless of their wealth or political influence. [83]

The threat from a single consumer is small. The threat from consumers acting collectively is significant. As a class, consumers begin to have the kind of strength or power that approximates that of big business.[84] From the perspective of the

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[83] Casarotto v. Nick Lombardi and Doctor's Associates, Inc., 886 P.2d 931, 939-940 (Trieweiler concurring in his own opinion for the majority of the court); rev'd and remanded 517 U.S. 681 (1996).

[84] The criticism of class actions comes from both sides, those with the view that a procedural rule should not transfer power between economic groups. *See* John M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842

Gateways of this world, consumers, or the attorneys that represent them, are something to be feared.[85]

(1974). More recently there is disappointment and cynicism from those who believe the potential of the modern class action as an idea whose potential has been defeated by human frailty, corruption, greed. There is special concern with the creation of settlement classes. *See, e.g.* John C. Coffee Jr., *The Corruption of the Class Action: The New Technology of Collusion,* 80 CORNELL L. REV. 851 (1995); Susan Koniak, *Feasting While the Widow Weaps: Georgine v. Amchem Prods., Inc.* 80 CORNELL L. REV. 1045 (1995).

[85] Compare Judge Cardozo's discussion of human nature discussed *supra* note 69 and accompanying text, to that of Judge Friendly. In interpreting the anti-peonage statutes, 18 U.S.C.A. 1581(a) and 1584, Judge Henry J. Friendly in United States v. Shackney, 333 F.2d 475 (2d Cir. 1964) noted that " Friction over employment punctuated by hotheaded threats (by the employer) is well known and inevitable." Such threats are not, he believed, sufficient to overcome the will of an employee. And further, he thought the relative benefits and risks of interpreting a criminal statute expansively should be considered:

> It goes without saying that if defendant's conduct was what the Oro's testified and the jury evidently believed, this would have been highly reprehensible. But before deciding to make such conduct punishable with up to five years imprisonment, a legislator would wish to weigh the advantages to society in providing deterrence and retribution ...against *the risk that innocent employers might be victimized by disgruntled employees able to convince prosecutors, and ultimately juries, of their story* ..." (emphasis added)

One my contracts class expressed similar sentiments about employees. After reading Mary Rowe v. Montgomery Ward & Co., Inc, 472 N.W.2d 268 (1991)(court applied presumption that all offers of employment are at will), the student argued that the presumption was appropriate. Application of the "reasonable person" test to the words spoken by the employer or its agents to the employee would give rise to a flood of litigation by lying employees.

There is a definite class bias in these assumptions, just as there is sexism in the fear that women will file false claims harassment or rape claims against men who have spurned their attentions. Fear of people who have always been subordinate may be a natural reaction when power is transferred, even in the limited form of a right to seek a remedy for an injury. It is the fear that newly acquired power will be abused, that the class of individual who receives it cannot be trusted to use it properly. The distrust is an expression of regret, the feeling that it is inappropriate for a specific class of people to have power. If we transfer this methodology to the producer/consumer relationship, it is easy to see the dismantling of the instruments of power that were given to

There is a public policy in favor of arbitration.[86] But in court decisions in a variety of jurisdictions there is expressed a belief that arbitration should not be coerced. Agreement is required to protect the democratic process. Constructive assent, manufactured through the manipulation of the rules of contract formation and the interpretation of silence as assent (because it is read by the light of the judge's belief that he knows what is best for the consumer or for the economy), is inappropriate and undemocratic.

Gateway is a judicial carte blanche. It is not an acknowledgement by a judge of human imperfection, but an invitation to misbehave, whether that misbehavior takes the form of negligence or outright fraud. The notion of reciprocal duty, the glue that holds us all together, is dissolved.

CONCLUSION

Cases like *Gateway* are not disputes about incommensurable values. Sellers seek to avoid the application of existing legal rules that reflect the mores governing commercial behavior. This resistence, the existence of a contest, should lead us to carefully reexamine those mores, but it does not lead inexorably to the conclusion that the norms should be abandoned.

Judge Easterbrook assumes the guise of someone who is forward looking, a man who understands what the future

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consumers as a form of regret, not because false claims were being filed, but because the power ceded was perceived to be too great.

Dishonesty is a human failing and it can be found among sellers as well as buyers. Examples abound from the tobacco industry to the automobile industry to the most recent case, the tire industry. Bridgestone/Firestone tires that were ultimately recalled because of tire tread separation, but a Florida Circuit Court judge's defended her decision to issue protective orders in litigation against tire companies because she considered it "an important check on aggressive and increasingly organized plaintiffs' attorneys" she accused of "extortion by litigation." Thomas A. Fogarty, *Can Courts' Cloak of Secrecy Be Deadly?* USA TODAY October 16, 2000.

[86] See Southland Corp. v. Keating, 465 U.S.1 (1984)(FAA intended to thwart state attempts to regulate arbitration) Avedon Engineering Inc. v. The Blason-Hercules Group Ltd., 126 F.3d 1279 (10 Cir. 1997) quoting Southland citing So;

requires. While technology may change, human nature does not and legal rules govern the relationships between human beings. Whatever the future has in store, we are not well served by decisions that abandon "accepted standards of right conduct."[87] We will not be better off with rules that provide incentives for behavior that injures others, whether the injury is intentional or not.

As Cardozo instructed in his book on the judicial process: " The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."[88] Perhaps it is time to revisit the entire notion of assent in a world of form contracts. The Hills and those who place orders over the phone should be able to rely on the existing rules of law with respect to contract formation including §2-207 if it applies. Given the control that sellers have over most written contracts and the absence of any real bargaining, perhaps the best option available to us now is to allow consumers to dispute and litigate the fairness of particular tems. Unfortunately, Judge Easterbrook has interpreted contract law and the Uniform Commercial Code in a way that silences those who object to the use or abuse of the power to set the terms of a contract unilaterally.

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[87] CARDOZO *supra* note 66, at 112 .
[88] *Id.*

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