

THE AMERICAN CONTRACT SYSTEM: TODAY AND 2001

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I. INTRODUCTION

The American contract system¹ has serious problems. "Freedom of contract"² rules in a world of standardized³ forms and the absence of a viable system for handling adhesion transactions

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¹The contract system consists of these components: (1) *the sources of contract law*, which include constitutions, legislation, administrative regulations, appellate court decisions, and widely used standardized forms; (2) *the contract-making process*, which takes into account the contracting parties, the participants in the process (negotiator, technical advisors and lawyers), the degree of *actual* bargaining, and the bargaining duties created by the process (arm's length, good faith, fiduciary); (3) *the contract*, or the product of the process, ranging from one to many writings, varying in formality, completeness, comprehensibility, either individual or standardized; (4) *contract disputes resolution techniques*, including both public and private processes.

²"Contract," as used in this paper, is a set of legal rules under which the state delegates to the contracting parties the power to determine whether contracts will be made, how they will be made, and what they must contain. "Contract" is roughly equivalent to *party autonomy* (power given to the parties to make the rules), *private autonomy* (power given to private parties to make the rules), and *freedom of contract* (freedom of the parties to make the agreements they wish and in the way they wish). Contract contrasts with public controls, which, in varying ways, determine when contracts must be made, how they must be made, and what they must contain.

For some recent discussions of "freedom of contract," see Dewey, *Freedom of Contract: Is It Still Relevant?*, 31 OHIO ST. L.J. 724 (1970); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT. & COMP. L.Q. 172 (1965). Some of the many articles on adhesion contracts are set forth in note 3 *infra*.

³Adhesion contracts must be differentiated from contracts made in standardized forms. Adhesion contracts culminate transactions in which there is no meaningful bargaining over any or most of the contract terms. The terms are dictated by the dominant party. See Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). Standardized forms are created to take care of similar, if not identical, transactions so as to avoid repetitive bargaining or drafting of most or all of the terms. Contracts made on standardized forms are not necessarily adhesion contracts. The form may have been made by a trade association of buyers and sellers, or it may have been drafted after lengthy consultation with interest groups active in trade or industry affairs. See,

frustrate the expectations of at least one contracting party. The certainty⁴ so basic to contract law is slowly vanishing. Uncertainty of results⁵ and the high cost of making standardized forms produce

e.g., NEW YORK ASS'N OF COTTON TEXTILE MERCHANTS, COTTON TEXTILES SALES NOTE § 4 (2d rev. ed. 1941).

For a case in which a trade association form was considered neutral, see *United Sales Co. v. Curtis Peanut Co.*, 302 S.W.2d 763 (Tex. Civ. App. 1957). Some forms do result from tough bargaining and are drafted with the skill found in well-drawn statutes. But generally, it is accurate to assume that most standardized forms are used in an adhesion setting.

For some recent discussions of adhesion contracts, see Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962); Shuckman, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L.Q. 125 (1962); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Note, *The Adhesion Contract of Insurance*, 5 SANTA CLARA LAW. 60 (1964).

For discussions of Israeli treatment of adhesion agreements, see Comment, *Administrative Regulation of Adhesion Contracts in Israel*, 66 COLUM. L. REV. 1340 (1966); Note, *Restrictive Terms in a Standard Contract*, 7 ISRAEL L. REV. 433 (1972).

For a discussion of the English doctrine of fundamental breach, see Hickling, *One-Sided Contracts*, 108 SOL. J. 42 (1964); Leigh-Jones & Pickering, *Fundamental Breach: The Aftermath of Harbutt's "Plasticine"*, 87 L.Q. REV. 515 (1971); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964).

The Italian law is discussed in Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 AM. J. COMP. L. 1 (1962).

⁴Certainty was emphasized in a recent United States Supreme Court decision, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972), in which the Court held a forum selection clause binding on the parties in the absence of any showing that enforcement would create undue hardship.

⁵The divergences of some recent cases have made it increasingly difficult for the prudent draftsman to place reliance on the enforceability of any contract provision. Compare *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464 (5th Cir. 1972) (provision on steamship passenger ticket barring suit for personal injury unless commenced within one year upheld), with *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968) (similar provision held inadequate to bar suit), and *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. App. 1972) (disclaimer of warranties clause on back page of contract failed for lack of conspicuousness). Compare *Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971) (exculpatory clause in service station lease held unconscionable and unenforceable), with *Lechmere Tire & Sales Co. v. Burwick*, 277 N.E.2d 503 (Mass. 1972) (exculpatory clause in credit card application was to be strictly construed against drafter). Compare *Bauer v. Jackson*, 15 Cal. App. 3d 358, 93 Cal. Rptr. 43 (1971) (clause limiting carrier's liability held inadequate unless shipper given reasonable notice that greater protection available at higher shipping rates), with *Gellert v. United*

an inefficient contract-making system. Finally, in consumer transactions, the actual agreement often differs substantially from the contract.⁶ This Article will explore these problems and attempt to predict how they will be dealt with in the next century. Part II will concern itself with the role lawyers play in the contract-making process. Part III will discuss the relationship between the broad autonomy given contracting parties and increasing legal controls on contracts. Part IV will appraise the present system from the vantage points of its major participants. Part V will predict how contracts will be made in the next century.

II. LAWYERS AND CONTRACT MAKING

The high cost of legal services and the dominance of the adhesion contract have sharply reduced the participation of lawyers in the negotiation of contracts. Yet, lawyers still play a vital role in contract making. They continue to draft the important negotiated contracts, and they draft standardized agreements. While many factors contribute to the present chaotic and inefficient contract system, the education and training of lawyers assumes a crucial causal dimension. To ascertain the impact of lawyers, let us contrast contract making *without* lawyers with contract making with lawyers.⁷

A. Contract Making Without Lawyers

Let us construct two models: Model A, a transaction in which legal sanctions are unavailable or only remotely considered by the

Airlines, 474 F.2d 77 (10th Cir. 1973) (carrier may reasonably limit extent of liability by giving the shipper a reasonable choice to select the declared limit, with the compensation thereby being commensurate with the risk assumed).

⁶See Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831. See also Agger, *Unconscionable Contracts under the Uniform Commercial Code*, 109 U. PA. L. REV. 401 (1961); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

⁷Compare *Howell v. Coupland*, 1 Q.B.D. 258, 259 (1876) (involving a blighted crop of potatoes), with *United Sales Co. v. Curtis Peanut Co.*, 302 S.W.2d 763 (Tex. Civ. App. 1957) (involving a peanut crop failure caused by drought). In the first case the contract apparently was not drafted by an attorney and contained no clause dealing with disruptive events or unforeseen circumstances. The second involved a trade association form which had a *force majeure* clause. See also *Warner Bros. Pictures, Inc. v. Bum-*

parties,⁶ and Model B, a transaction in which sanctions are available and it is quite likely that such sanctions will be sought in the event of nonperformance.

Even Model A agreements are likely to be expressed in tangible form. Objective expression of an agreement tends to induce performance. Contracting parties often feel a moral commitment to agreements they have made or may not wish to gain a reputation of going back upon their word. Ordinarily, such parties will perform as promised if they are shown objective proof that an agreement was made and proof of its terms.

Tangible expression serves another important function in a Model A transaction. Suppose, as is increasingly the case today, the contract maker is a large organization. Such an organization needs an efficient communication system. Centralized management must know the extent of commitments and entitlements. Production, distribution, sales, and finance components need similar information. The proper distribution of contractual information is central to any effective internal communication system. Satisfaction of this communication function can be accomplished by a tangible, transferable manifestation of the agreement which expresses the basic performances to be exchanged by the parties. For example, in a goods transaction the contract need only contain the description and quantity of the goods, the price, payment terms, and delivery schedules. In a service transaction all that would be needed would be a description of the services, the amount and terms of payment, and the date for performance.

Now let us move to a Model B transaction in which the participants are much more likely to invoke legal sanctions in the event of dispute. In this transaction, reduction of the agreement to tangible form serves the additional function of insuring that sanctions will be available. Suppose a Model B transaction occurred in a period of minimal state controls over contract, a period best typified by the nineteenth century. Clearly, a writing which contained a clear expression of the basic performances to be exchanged would be enforceable. Such an expression would satisfy the requirement that there be manifestations of mutual assent, and in

garner, 197 Cal. App. 2d 331, 17 Cal. Rptr. 171 (1961) (writers' strike held not to have prevented, materially hampered, or interrupted filmed television series within meaning of *force majeure* clause).

⁶See Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963).

most cases consideration requirements would be obviated.⁹ Nor would a transaction without lawyers raise any "more formal agreement contemplated" problem. The Statute of Frauds would not prevent enforcement. Either the transaction would be one not required to be expressed by a memorandum or the memorandum would be clearly sufficient to satisfy the statute.¹⁰ Such agreement, clearly expressing the performances to be exchanged, would suffice to ensure the availability of legal sanctions.

Realistically, in a transaction in which there are no lawyers, the contracting parties would not go through the preceding analysis. Their concern would be with tangible evidence of the agreement to furnish objective proof of the other party's commitment.¹¹ If proof of commitment is the objective, the contracting parties will be satisfied with any writing which will make it difficult for the other party to deny the commitment or the agreed terms. Clearly, this is adequately established by a tangible expression of the basic performances to be exchanged. As in a Model A transaction, the participants in a Model B transaction may also need internal communication, and this may be an additional reason to obtain a tangible manifestation of the agreement. Under either Model A or Model B an expression of the performances to be exchanged would satisfy the reasons for expressing the deal in tangible form.

B. The Lawyer Enters The Process

In assessing the imprint lawyers make on American contracts, we must ask ourselves what clients expect of lawyers and how lawyers perceive their role.¹² Also, we must consider some aspects of legal education and the practice of law.

Certainly, lawyers and clients would agree that lawyers are expected to make the transaction "legal." Generally, contracting parties wish to have the choice of obtaining legal sanctions even if they say they will never seek them or that they consider their future usefulness quite remote. So, at a minimum, the lawyer is expected to insure that the agreement is legally enforceable, and

⁹The only possible obstacle to enforcement would be a finding that the promise was "illusory", *i.e.*, that the promisor did not obligate himself to do anything. 1 A. CORBIN, *CONTRACTS* § 145 (2d ed. 1964).

¹⁰*See 2 id.* §§ 498-501 (1950). *See also* UNIFORM COMMERCIAL CODE § 2-201 (1) [hereinafter cited as UCC].

¹¹Such an objective is exemplified by lay aphorisms such as "It will be your word against his," or "Get it in writing."

¹²*See Sweet, The Lawyer's Role in Contract Drafting*, 43 CALIF. B.J. 362 (1968).

that it complies with the increasing number of legal controls on contracts. Also, most clients believe lawyers are more adept at expression than they; the lawyer is expected to bring clarity and completeness to the agreement. But more important, for our purposes, most lawyers see their roles as extending beyond simply making an agreement enforceable and using their skills with words. This extension is crucial in evaluating the effect lawyers have upon contract making and contracts.

Shattered transactions are an important part of a lawyer's professional life. As a result, lawyers do not share the optimism of their clients at the time contracts are made. The lawyer's experience causes him to focus upon the possibility of nonperformance while contracting parties and their negotiators think principally of performance. The lawyer anticipates the occurrence of events which can disrupt his client's planning and seriously affect his client's performance. To handle such risks, he will usually include a clause which relieves his client if designated events occur which would have a serious effect upon his client's performance.¹³ Also, a lawyer is more likely than his client to consider the possibility of the other party's suffering serious losses if his client does not perform as promised. To reduce his client's exposure, in addition to clauses excusing nonperformance, the lawyer may seek to exculpate his client,¹⁴ to limit his client's liability,¹⁵ or, in a goods contract, to limit or exclude warranties.¹⁶

As for the lawyer representing a party who would suffer serious losses if the other party does not perform, his education and experience have taught him the difficulty of proving or collecting damages. As a result, he will consider and seek to insert clauses controlling the amount recoverable in the event of breach,¹⁷ and he

¹³See cases discussed note 7 *supra*.

¹⁴*E.g.*, *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (hospital exculpation not upheld); *Daniel O'Connell's Sons v. Commonwealth*, 349 Mass. 642, 212 N.E.2d 219 (1965) (soil disclaimer clause upheld).

¹⁵*E.g.*, *Leather's Best, Inc. v. The Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) (carrier's liability limited to \$500 per container); see UCC § 2-719 (1) (a).

¹⁶*E.g.*, *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962) (disclaimer of warranties provision in seller's acknowledgment of buyer's order).

¹⁷*E.g.*, *Walter E. Heller & Co., v. American Flyers Airline Corp.*, 459 F.2d 896 (2d Cir. 1972) (liquidated damages clause used to limit damages recoverable in event of breach).

will also use recitals to express the setting of the transaction to preclude any finding that his client's losses were not reasonably foreseeable.¹⁸ As for the difficulty of collecting damages, this lawyer will focus upon methods of securing performance, such as requiring that a bond be obtained,¹⁹ requiring that a solvent third party act as a guarantor,²⁰ creating a security interest in specific property,²¹ or setting up a provision authorizing his client to withhold funds as security for damage claims.²²

Also, the lawyer's legal education and experience are instrumental in his utilization of contract clauses to coerce performance, such as provisions for express conditions to payment,²³ provisions which, though disguised as liquidated damages or alternative performances, are, in effect, penalty clauses,²⁴ and provisions allowing termination.²⁵

Some contracts will create rights that will be transferred or assigned. While the client may anticipate the need to provide for a clause permitting assignment, it is the lawyer who is more likely to anticipate the likelihood that the obligor may assert defenses and it is the lawyer who will think of a clause waiving such defenses against an assignee, creating negotiability by contract.²⁶ Also, it is

¹⁸Also, recitals are often used to prospectively establish liquidated damages. *E.g.*, *Bethlehem Steel Corp. v. City of Chicago*, 350 F.2d 649 (7th Cir. 1965) (liquidated damages of \$1000 per day for delay in construction of super-highway supported by recitals that delay would cause great inconvenience to the public).

¹⁹*E.g.*, *Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 219 F.2d 645 (2d Cir. 1955) (bond conditioned upon subcontractor's payment of all labor and material obligations under contract).

²⁰*E.g.*, *Walter E. Heller & Co. v. American Flyers Airline Corp.*, 459 F.2d 896 (2d Cir. 1972) (president-guarantor's termination of employment held not a failure of condition to liability of corporate debtor).

²¹See UCC § 9-107.

²²See, *e.g.*, AMERICAN INSTITUTE OF ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, Doc. No. A-201, § 9.5 (1970) [hereinafter cited as AIA Doc. No. A-201.]

²³See, *e.g.*, *id.* § 9.4.

²⁴See Sweet, *Liquidated Damages in California*, 60 CALIF. L. REV. 84, 120-22 (1972).

²⁵*E.g.*, *Nu Dimensions Figure Salons v. Becerra*, 340 N.Y.S.2d 268 (N.Y. City Mun. Ct. 1973) (provision forbidding cancellation held a penalty clause).

²⁶*E.g.*, *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967) (contractual attempt to establish negotiability of promissory note given in conjunction with conditional sales agreement).

the lawyer who is more likely to anticipate a party's future desire to assign his contract rights or to delegate performance. Such anticipation will lead to the inclusion of a clause concerning assignment.

The lawyer knows that misunderstandings can occur, despite clear and complete contract language, and that he cannot anticipate all contingencies. His experience teaches him that contracting parties sometimes take dubious, if not dishonest, interpretation positions to avoid contract commitments. The virtual inevitability of disputes in some transactions and the strong likelihood of disputes in almost all transactions cause lawyers to consider dispute resolution. Also, legal education emphasizes dispute resolution processes. Consequently, a lawyer will seek to structure the contract, if he can, to control who will decide the dispute, where it will be decided, and what rules will be applied. To accomplish this he uses the contract to create an expert performance measurement process,²⁷ to displace litigation with arbitration,²⁸ to designate the forum court,²⁹ to designate the applicable law,³⁰ or to eliminate the jury.³¹ The lawyer's education and experience have sensitized him to the risk of false claims and charges made by the other party as a means of avoiding a commitment. To give his client maximum protection, the lawyer, in his role as advocate, relies heavily on contract clauses to give his client advantages if litigation develops.

The extent to which the lawyer will deal with these matters in a contract depends upon the relationship between the contracting

²⁷*E.g.*, AIA Doc. No. A-201, § 9.4.

²⁸*E.g.*, *J.S. & H. Constr. Co. v. Richmond County Hosp. Authority*, 473 F.2d 212 (5th Cir. 1973) (further proceedings stayed when contract required submitting dispute to arbitration).

²⁹*E.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). While the law has not always been clear on the enforceability of forum designation clauses, a recent case awarded the prevailing party attorneys' fees because the appellate attack on such a clause, in a negotiated contract, was held frivolous. *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972). See *Copperweld Steel Co. v. Demag-Mannesman-Boehler*, 354 F. Supp. 571 (W.D. Pa. 1973) (post-*Bremen* case discussing the reasonableness of a forum designation clause).

³⁰*E.g.*, *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972) (upholding district court's dismissal of action when contract provided that courts of New York would be sole forum for resolving disputes).

³¹*E.g.*, *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (N.Y. App. T. 1969) (upholding the validity of jury waiver provision on bank account signature card).

parties and the likelihood that such problems may arise. If the lawyer anticipates problems, he will include contract provisions designed to protect his client. For example, if he anticipates the possibility that the other party will claim fraud or misrepresentation, the lawyer will incorporate a clause stating that there have been no representations or, if there have been any, that they have not been relied upon.³² If the lawyer anticipates false assertions by the other party that his client's agents have made representations, he may negate the authority of any negotiating agent or incorporate a provision stating that any representations or promises made by an agent are not binding unless contained in the contract. If the lawyer anticipates that his client's agents will make an authorized commitment, he may include a clause stating that only specific persons have authority to make or modify the contract or accept substandard performance.³³ The lawyer, by reason of his education and experience, realizes that adjustments are likely to be made in contract relationships which span any appreciable period of time. If he anticipates the possibility of false modification claims or claims that his client has waived contract terms, he may seek to incorporate provisions specifying formal requirements for modification³⁴ and negating waivers.³⁵ If the lawyer can anticipate damage claims, claims of the delivery of nonconforming goods, or claims for time extensions, he may incorporate a clause setting up a notice condition³⁶ as a protection against false or delayed claims. If he feels that the statute of limitations in his jurisdiction is ex-

³²*E.g.*, *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597 (1959) (when contract for purchase of lease contained an acknowledgement by purchaser that no representations had been made by seller as to normal rents and expenses generated by the property, purchaser had no right of action against seller for alleged false representations as to operating expenses and profits).

³³*E.g.*, *C.I.T. Corp. v. Jannet*, 419 Pa. 435, 214 A.2d 620 (1965) (contract provision requiring written modification of contract terms upheld in the absence of clear proof of claimed waiver).

³⁴*Id.* Closely related to formal requirements for modification is the almost universal construction contract provision requiring that all proposed changes in design and materials be submitted in writing. See AIA Doc. No. A-201, § 12.1.

³⁵See note 33 *supra*.

³⁶*E.g.*, AIA Doc. No. A-201, § 7.4. See also Sweet, *Extensions of Time and Conditions of Notice: California's Needless Restriction of Contractual Freedom*, 51 CALIF. L. REV. 720 (1963).

cessively long and promotes delayed claims, he may insert a provision shortening the period of limitations.³⁷

The lawyer's inclusion of such protective clauses may be motivated by considerations other than those of shielding his client if problems develop. Lawyers often see themselves as procedural experts. But whether such clauses have been inserted to protect the client or to create efficient administration,³⁸ they take up a good portion of the contract and are provisions which would very likely not be included in a contract drafted by nonlawyers.

American contracts are excessively long. Doubtless, there are many reasons for this,³⁹ but at least some of the responsibility can be traced to legal education. The student is constantly told to express everything with utmost clarity. While clear expression is obviously desirable, the incessant law school emphasis on bad drafting as a prime cause of litigation often instills in students, and ultimately lawyers, the pathological desire to cover everything, including things which are unlikely ever to occur.⁴⁰ The intense competition of law school and professional practice also leaves its mark on contracts. The constant pressure to excel without, unfortunately, a sense of professional responsibility and an appre-

³⁷*E.g.*, *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464 (5th Cir. 1972) (upholding contractual provision on passenger ticket requiring that all claims against carrier be commenced within one-year period of limitation).

³⁸*See Inman v. Clyde Hall Drilling Co.*, 369 P.2d 498 (Alas. 1962). The *Inman* case concerned a provision in an employment contract creating a thirty-day condition of notice requirement. The contract also provided that judicial proceedings could not be commenced until six months after the compensation claim was filed. While these provisions could be justified on grounds of administrative efficiency, in light of circumstances the provisions appear to be designed to give the employer an unconscionable advantage in compensation disputes.

³⁹Other possible reasons are: (1) the court's requirement that "disfavored" clauses, such as conditions in insurance contracts, remedial clauses, and indemnification clauses, be drafted with extreme specificity, (2) the increasing number and specificity of public law controls, (3) substantive rules which, unless modified by contract, are unsatisfactory, such as doctrines of impossibility and frustration, and (4) elimination of uncertain factors in litigation, such as clauses designed to control disputes.

⁴⁰Many cases selected for inclusion in contracts casebooks are followed by questions which ask how better drafting could have avoided the lawsuit. While litigation sometimes results from poor drafting, other factors often cause litigation, such as the desire to create a favorable case precedent, the absence of good will, or the breakdown of a once close or friendly relationship. Admittedly, imprecise drafting often forms the basis for a claim even in disputes caused by the additional factors enumerated.

ciation of the probable often causes harsh standardized terms. Undoubtedly, some clauses relied upon by lawyers are useful and worthwhile. It is certainly desirable to plan a transaction completely and express it clearly. However, the lengths to which lawyers will go to eliminate chance and to protect their client produces the unwieldy, often barbaric contracts we see today.

III. CONTRACT AND CONTROL

Undoubtedly, adhesion recognition⁴¹ tumbled contract from the Olympian heights it occupied in the nineteenth and early twentieth centuries. However, contract remains a durable⁴² and useful legal doctrine. The key components of this doctrine should be analyzed in appraising the present and predicting the future of the contract system.

There are many possible reasons why contract dominated the nineteenth century and early twentieth century and only recently has been looked upon with disfavor. As for the nineteenth century, contract meshed well with a market economy dominated by laissez faire concepts.⁴³ A system with relatively few formal controls and easy enforceability of agreements promotes contract making and leads to more exchanges and economic activity. In addition, exchanges are encouraged if the parties believe that the deal

⁴¹Judicial sensitivity to inequality of bargaining power has had a profound impact on recent developments in the law of contracts. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Lechmere Tire & Sales Co. v. Burwick*, 277 N.E.2d 503 (Mass. 1972).

⁴²The judicial recognition of plea bargaining opens up a new field. See *Santobello v. New York*, 404 U.S. 257 (1971). For a discussion of a waiver of a jury trial and the privilege of self-incrimination in the context of plea bargaining, see Tiger, *The Supreme Court, 1965 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 19-25 (1970).

Also, for better or worse, contract concepts are beginning to play a role in regulating the relationship of college student and university. *Appelgate v. Dumke*, 25 Cal. App. 3d 304, 101 Cal. Rptr. 645 (1972); *Zumbrun v. University of So. Cal.*, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972).

⁴³See Wilson, *supra* note 2, at 173. For a modern treatment of contract as a market supporting device, see Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 813 (1961).

The parties are often better able to determine the value of the performances exchanged than is the state. The collective bargaining context is discussed in Swerdlow, *Freedom of Contract in Labor Law*, 51 TEXAS L. REV. 1, 29-48 (1972); Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467, 473 (1964).

made will receive judicial protection. Also, contract is generally more elastic and responsive to changing business needs when unconstrained by governmentally imposed controls. As for overreaching and unfair exchanges, the pastoral nineteenth century, uncluttered by mass produced forms and modern ideas of imperfect competition, assumed that such difficulties could be handled by competition.

Broad grants of autonomy to contract parties reduce state costs. The creation and policing of modern state controls is a costly process. According broad powers to contracting parties places most rule making costs on the participants. Also, dispute resolution costs are minimized when judicial intervention is generally limited to interpretation and enforcement of the express terms of the contract. Since the parties have made most of the rules, the judge is relieved from any obligation to alter or restructure their basic agreement. While he may have to interpret the rules and occasionally decide whether the rules as expressed in the written contract are the entire set of rules, his role is certainly easier than if he has to "make a contract for the parties." Giving the parties almost plenary rule making power also makes performance more likely. Those who freely participate and voluntarily commit themselves are more likely to perform without state coercion.⁴⁴

Contract can serve another important and useful function. If it is given broad scope it can operate to correct and adjust other unsatisfactory legal rules. When the contract goes beyond expressing the performances to be exchanged, it will often seek to change existing legal rules of loss distribution and dispute resolution.⁴⁵ Also, when it seeks to control remedies, it can conflict with unjust enrichment and forfeiture avoidance doctrines.⁴⁶ While we may question its legitimacy in adhesion transactions to regulate responsibility for personal harm⁴⁷ or to control the dispute resolution process, contract is a legitimate device by which parties should be able to adjust loss distribution rules in certain contexts. For

⁴⁴There is a political rationale for state coercion of promised performance in a negotiated contract context. Sanctions are imposed because of "the consent of the governed." Also, it is more democratic to allow the interested persons to make up the rules which govern their relationship.

⁴⁵See cases cited notes 25-29 *supra*.

⁴⁶See cases cited notes 22, 23 *supra*. See also *Freedman v. Rector*, 37 Cal. 2d 16, 230 P.2d 629 (1951) (holding purchaser was entitled to receive the amount of his down payment in excess of seller's damages following purchaser's breach.)

⁴⁷*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

example, tort rules have been moving toward finding professional persons, such as soils engineers, liable to their clients and to third parties for losses caused by their conduct, whether negligent or not.⁴⁸ This may look unfair to the soils engineer because of the fee he charges for his services, the state of the art of determining subsurface characteristics, the high risk of loss if he is incorrect, and the lack of comprehensive liability coverage at a price he can afford. To him the only solution may be a contract clause limiting his liability to certain specified risks. The fact that it may not be legitimate for automobile manufacturers to minimize their liability to persons injured by their defective automobiles should not necessarily mean that a soils engineer should not be able to minimize his exposure by contract for certain losses to certain persons. As another example, it is often possible that construction losses can be chargeable to a number of participants in the construction process. As between those liable to the injured plaintiff, the rules relating to contribution and quasi-contract indemnity are confusing and often irrational.⁴⁹ Contracting parties should be able to distribute these losses through express indemnification even if the result is that one person can insulate himself from liability for conduct tort law considers below the legal standard.⁵⁰

Furthermore, in civil proceedings one can seriously question not allowing attorney's fees to the prevailing party,⁵¹ permitting an unconscionably long period of time in which to commence litigation, and denying a plaintiff any damages when he cannot sur-

⁴⁸*Cf.* *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969). For a discussion of the rights of third parties, see W. PROSSER, TORTS §107, at 708-09 (4th ed. 1971). For a discussion of the rights of clients, see J. SWEET, LEGAL ASPECTS OF ARCHITECTURE AND ENGINEERING 125-26 (1970). While the case law has not yet gone to the extent of holding engineers to a standard beyond the professional standard of care, there have been suggestions that architects should be held "strictly" liable. Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361 (1967). A recent soils case would lend support to that position. *Cf.* *Avner v. Longridge Estates*, 272 Cal. App. 2d 695, 77 Cal. Rptr. 633 (1969).

⁴⁹For a few of the many difficult indemnity cases, see *MacDonald & Kruse, Inc. v. San Jose Steel Co.*, 29 Cal. App. 3d 413, 105 Cal. Rptr. 725 (1972); *Tatar v. Maxon Constr. Co.*, 31 Ill. App. 2d 352, 277 N.E.2d 715 (1972). See also *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) (articulating a comparative fault rule).

⁵⁰*E.g.*, *Buscaglia v. Owens-Corning Fiberglas*, 68 N.J. Super. 508, 172 A.2d 703 (1961) (holding that owner was entitled to restitution from contractor, for claim settled with third person, when contractor assumed duty to owner to protect persons on premises from injury).

⁵¹See D. DOBBS, REMEDIES 194 (1973).

mount the often frustrating "certainty" requirements.⁵² Arguably, contracting parties should be able to *agree* upon the recovery of attorney's fees,⁵³ the creation of a reasonable period of limitations,⁵⁴ and the allowance of an agreed measure of recovery for contract breach.⁵⁵

It is yet unclear whether any of these justifications was the reason that contract emerged and continued as a powerful legal doctrine. But the modern criticism of contract that has surfaced with the recognition of the adhesion transaction ignores the undoubted advantages of contract. The twentieth century has witnessed the explosion of mass produced standardized forms with their potential for large scale abuse.⁵⁶ Also, as modern man began to go into the market place and discover the realities of the bargaining process, he became aware of contract's encroachment upon other legal doctrines and institutions. Observers and participants witnessed the development of aggressive, highly organized advertising and selling techniques.⁵⁷ Deceptive or false representation by salesmen has become routine in transactions involving certain services and products. Also, sales and advertising literature often makes assertions not included in the formal document.⁵⁸ As a result, the reasonable expectation of the consumer often varies from the formal contract. Some sellers use contract to shield themselves from unauthorized, but often tacitly encouraged, representation. Likewise, contract is used as a shield by purveyors of unscrupulous

⁵²See 5 A. CORBIN, *supra* note 9, § 1020.

⁵³See D. DOBBS, *supra* note 51, at 201-04.

⁵⁴See UCC § 2-725.

⁵⁵See Sweet, *supra* note 24, at 142-45.

⁵⁶See articles cited notes 2, 3 *supra*.

⁵⁷See, e.g., *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452, 456 (Fla. App. 1972). Recently the Supreme Court of California affirmed an award of restitution to deceived customers in an action brought by the State Attorney General for violations of a state statute on deceptive advertising. *People v. Superior Court*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973). Also, it has been recently held that national advertising can create apparent authority in a service station dealer, *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir. 1971), noted in 33 U. PITT. L. REV. 257 (1971).

⁵⁸See, e.g., *Bauer v. Insurance Co. of North America*, 351 F. Supp. 873 (E.D. Wis. 1972) (group insurance); *Miller v. Dictaphone Corp.*, 334 F. Supp. 840 (D. Ore. 1972) (pension plan); cf. *Zumbrun v. University of So. Cal.*, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972) (college catalogs); *Standard Land Corp. v. Bogardus*, 289 N.E.2d 803 (Ind. Ct. App. 1972) (subdivision promotional material).

pulous sales literature to avoid the creation of apparent legal obligations.

There were and are legitimate reasons for mass produced contracts. They are essential to a society which mass produces goods and uses mass methods of advertising and distribution. They are also essential for proper operation of large scale enterprises with their need for efficiency and risk control. But contract gave large scale contract makers immense power and many abused it. Recognition of abuse of power caused public controls to erupt from legislatures,⁵⁹ administrative agencies,⁶⁰ and courts at every governmental level.⁶¹

To look at the present and predict the future, an exploration of the range of controls available should be pursued. While they overlap, it is useful to divide legal controls into those which regulate the process of contract making and those which involve the content of contracts.⁶²

As to process, a system could be initiated under which the state would enforce *all* agreements and promises however made. At the other extreme, only state-made contracts could be enforced or even permitted. Between these extremes, in order to receive state sanctions, the state could require that: (1) contracts be written or memorialized in a designated concrete form; (2) the contract be the result of good faith bargaining; (3) contract terms in the writing be brought to the attention of and explained to the weaker party; (4) the parties to a contract be represented in the forma-

⁵⁹At the federal level, recent examples are the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1) (1970), dealing with employment discrimination, and the Consumer Protection Act of 1968, 15 U.S.C. § 1601 *et. seq.* (1970). California has extensively regulated retail installment sales, CAL. CIV. CODE § 1801 *et. seq.* (West 1973); health studio contracts, *id.* § 1812.80 *et. seq.*; swimming pool construction, *id.* § 1725 *et. seq.*; and credit cards, *id.* § 1747 *et. seq.*

⁶⁰At the federal level, see *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973) (truth-in-lending); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) (order of FPC); *Thorpe v. Housing Authority*, 393 U.S. 268 (1969); *Zale Corp. v. FTC*, 473 F.2d 1317 (5th Cir. 1973) (truth-in-lending); *N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys.*, 473 F.2d 1210 (2d Cir. 1973) (truth-in-lending); *Rehart v. Clark*, 448 F.2d 170 (9th Cir. 1971) (Navy regulation used to interpret enlistment contract).

⁶¹*E.g.*, *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

⁶²This differentiation is used in *Nu Dimensions Figure Salons v. Becerra*, 340 N.Y.S.2d 268 (N.Y. City Mun. Ct. 1973).

tion stage by a lawyer or by a public official such as a notary; (5) the contract be approved by a state official empowered to regulate certain transactions.

The first alternative is, in essence, the traditional nineteenth century system with principal reliance on the Statute of Frauds. The second is largely formulated for use in specialized relationships.⁶³ The third is used increasingly and is what could be called the "notice" form of protection.⁶⁴ In order for the contract to be effective, there must be knowing consent to its terms. In theory, by clearly informing a party of what he is getting, the market will enable him to shop around for the best deal.⁶⁵ Competition, then, will insure that the exchange is reasonable. This is often the first step in public regulation of a contract. As we are beginning to see, this approach is often inadequate and only a stepping stone to more comprehensive regulation. The fourth is used rarely in this country⁶⁶ and the fifth only in a limited, but increasing, number of transactions.⁶⁷

As for controls over contract content or substance, at one extreme, the state could dictate the entire contract. At the other, it could enforce any agreement the parties have made as long as the requirements of the process have been met. Even in the high water mark of contract, the nineteenth century, there were some controls over content.⁶⁸ Between these extremes the law could single out certain contract clauses and subject them to a standard of

⁶³See L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 449-51 (3d ed. 1972).

⁶⁴See *Fuentes v. Shevin*, 407 U.S. 67 (1972); cases cited note 5 *supra*.

⁶⁵See *N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys.*, 473 F.2d 1210 (2d Cir. 1973).

⁶⁶In Texas, under certain limited circumstances, an agreement to arbitrate will not be enforceable unless the parties have obtained the advice of counsel and their signatures appear on the contract. TEX. REV. CIV. ANN. art. 224 (1973).

⁶⁷For example, many transactions affecting energy sources require approval in whole or in part by the Federal Power Commission. See *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Monstanto Co. v. FPC*, 463 F.2d 799 (D.C. Cir. 1972); *Farmland Indus. Inc. v. Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670 (D. Neb. 1972).

⁶⁸For example, contracts for an illegal purpose, usurious contracts, and contracts without consideration would not be enforced. As to specific clauses, neither penalties nor unreasonable restraints would be enforced.

reasonableness or deny their enforcement.⁶⁹ Contracts particularly susceptible to abuse could be singled out for comprehensive controls.⁷⁰ Legislatures are increasingly prescribing much of the content of such contracts. Whenever such contracts are controlled, legislation usually states what is permissible and what is prohibited. However, legislation rarely dictates the terms of the contract.⁷¹ Sanctions for noncompliance can vary from nonenforcement of the illegal portion,⁷² denial of enforcement of the entire agreement,⁷³ limitation of remedies in an illegal agreement,⁷⁴ and, ultimately, imposition of penal sanctions for noncompliance.⁷⁵

From this brief overview, it is apparent that our present system comprehends a blend of contract and control. Part IV will seek to more closely explore some facets of today's system and Part V will, hopefully, provide a glimpse into the status of contract making in the year 2001.

IV. THE PRESENT SYSTEM APPRAISED: EMPHASIS UPON STANDARDIZED FORMS

An appraisal of the present system of mass produced forms entails: first, looking at the system through the eyes of some of its participants; secondly, taking a look in depth at a typical case; and finally, making a few concluding observations.

A. Views Of Some Participants 1. The Lawyer Drafting a Form

Increased public controls have made drafting a nightmare. In order to do a competent job, the lawyer must check many potential

⁶⁹*E.g.*, *Kaye v. Orkin Exterminating Co.*, 472 F.2d 1213 (5th Cir. 1973) (employment contract placing unreasonable restraints on prospective reemployment held invalid); *Insurance Center Inc. v. Hamilton*, 218 Ga. 597, 129 S.E.2d 801 (1963) (clause restraining franchisee's future sale of business held invalid); *Cockerill v. Wilson*, 51 Ill. 2d 179, 281 N.E.2d 648 (1972) (contract limiting terminability of associational charter held unenforceable).

⁷⁰See statutes cited note 60 *supra*.

⁷¹See High, *Consumer Regulation in Texas—A Rejoinder by an Economist*, 50 TEXAS L. REV. 463, 470 (1972); Note, *Standard Form Contracts*, 16 MOD. L. REV. 318, 337-342 (1953).

⁷²See UCC § 2-302.

⁷³*Id. Cf.* *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

⁷⁴*E.g.*, *Anco Inv. Co. v. Spencer*, 292 N.E.2d 726 (Ill. 1973) (seller allowed to recover cost of goods sold even though contract failed for lack of signature).

⁷⁵*E.g.*, *People v. Superior Court*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973) (civil penalties for misleading advertising).

sources of legal controls. In addition, he must worry about the lack of uniformity between states. He wonders how he can possibly comply with varying state laws when his client's products are marketed on an interstate basis. He longs for some sort of federal system or at least uniformity of state laws.

The lawyer also has other difficulties, especially if he is inexperienced in drafting the type of contract he has been asked to prepare. He would like a source of information that would reduce his drafting time by pinpointing problem areas and providing appropriate language. Also, he would like information on business custom and usage in varying types of commercial transactions, because parties who do not have a fixed idea on a point are willing to go along with what is "usually" done. The content of form books rarely keeps up with practice. The forms that exist are cumbersome and poorly drawn. If the lawyer is part of a large drafting organization, such as a corporate department of a large law firm, he may find contracts that have covered similar problems which can help him. However, even such organizations would find an informational system covering the points mentioned useful. Some conscientious draftsmen are concerned about their professional responsibilities as lawyers. They may worry about participating in drafting contracts which violate state rules or are unenforceable.

Yet to the lawyer, the biggest problem is the uncertainty of enforcement of some clauses and some contracts he drafts.⁷⁶ If the legal controls are specified legislatively, he can comply if he so chooses. However, many recent controls have come from court decisions using vague terms such as "unconscionable" or "contrary to public policy."⁷⁷ While many draftsmen do not worry about enforceability, either out of indifference or a belief that the problem can be deferred until difficulties arise, the conscientious lawyer does not know whether what he drafts will be enforced. Even if he is unaware of or is willing to disregard his professional responsibility, he may entertain doubts about participating in a system which permits the strong to coerce the weak into accepting clauses which violate common decency.

2. *The Forms User*

The party who has requested an attorney to prepare a standardized form realizes that, although mass produced forms are less

⁷⁶See cases cited note 5 *supra*.

⁷⁷See cases cited note 61 *supra*.

expensive than individual drafts, they do not come cheaply. Legal fees for drafting are high, especially if the form is, as is typical, drawn by a large law firm or by highly paid in-house counsel. In order to prepare for drafting a standardized form, the lawyer must spend a considerable amount of time gaining an understanding of the transaction, checking old forms, and finding the often applicable public controls. As a result, many drafts are often needed for a good standardized form. Also, the user is becoming increasingly aware of the more frequent need to revise such forms, both to respond to new controls and to stay "competitive." The perceptive user who looks at his legal costs will want answers to the "benefit" side of a cost-benefit analysis. Although effectiveness data on standardized forms is difficult to find, it might be helpful to consider one problem from a cost-benefit standpoint, the vexatious nonmatching forms transaction.⁷⁸

Suppose the seller submits his form and refuses to assent to the buyer's, while the buyer will sign only his buyer-oriented form. Suppose the user (either buyer or seller) asks his attorney whether the forms are examined if a dispute arises. It is likely his attorney will inform him that the representatives of each side will attempt to adjust the dispute relying mainly on commercial practices, good will, and good faith without advertent to the "fine print." The attorney will probably inform the user that even if he, the attorney, were brought into the picture, he would seek to handle the matter with the attorney for the other party by the use of common sense and what he would call "common-law" rules. If the dispute ends in court, the attorney will inform the user that the transaction is likely to be governed by the terms upon which both forms have agreed and the balance will be controlled by the Uniform Commercial Code.⁷⁹ Suppose the form user asks his attorney to justify the continued use of forms when, in reality, they are not looked to and are not likely to govern the transaction if litigation develops. The attorney will respond that there is no harm in using the forms and in rare cases, especially in dealing with an inexperienced or dishonest businessman, they may be of some value. Most commercial users would not be impressed.

⁷⁸See *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39 (E.D. Ill. 1970), in which the court described the problem as "the legal abyss created in contract formation by industry's perennial battle-of-the-forms." *Id.* at 41. See also *Application of Doughboy Indus., Inc.*, 17 App. Div. 2d 216, 233 N.Y.S. 2d 488 (1962).

⁷⁹See UCC § 2-207.

Suppose the form seeks to substantially reduce the user's risk exposure by the use of exculpation, liability limitation, disclaimer of warranties, and the like. Here there can be danger in using the form. If a clause seeks to control initial liability for harm to persons and there is inequality of bargaining position, it is not likely that the clause will be enforced. But here the cost factor is not limited to the unlikelihood of enforcement. Clauses of this type may be taken too seriously by nonlawyer employees of the form user. This can increase the cost of settlement procedures, incur ill will, and cause a large court award. Also, public exposure of their use can lead to more repressive public controls. A less scrupulous user might be persuaded that it is helpful to use such clauses since many matters never get to an attorney and, as a result, claims will be discouraged or avoided. However, sophisticated form users are becoming more aware of their responsibility to the public and are more likely to appreciate the danger of using these contract provisions.

Suppose the client asks about transactions which begin with advertising literature or brochures and culminate with a "formal" agreement. A lawyer who is asked whether the formal contract controls the "deal" will have to answer that the law is increasingly giving legal effect to the promotional and advertising literature.⁶⁰ Dispute-control clauses, such as selecting the forum court⁶¹ or designating a shorter period of limitations,⁶² will be enforced only if reasonable. While this may be better than the public law rules, reasonableness as a standard does *not* provide the certainty clients expect from contract.

A forms user who is given honest answers will conclude that many printed terms will be enforced only if they are reasonable and, in the case of an adhesion contract, brought to the attention of the weaker party and, even then, only if they do not offend public policy.⁶³ With this devastating assault on the once all powerful written document, the user will begin to wonder if it is worth the cost and the effort.

⁶⁰See cases cited note 58 *supra*.

⁶¹*E.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972).

⁶²*General Elec. Co. v. Lexington Contracting Co.*, 292 N.E.2d 874 (Mass. 1973) (provision limiting time period for commencement of action for breach held valid). See also UCC § 2-725(1).

⁶³See cases cited note 5 *supra*.

3. *The Forms Receiver*

How does the system look to the members of the public who must face mass produced forms daily? Most receivers of adhesion contracts would not understand them if they had the time and inclination to read them. The rare receiver who took the trouble to read it would almost never find himself dealing with a person authorized to change it. If he went to others who supply similar services or goods, he would face similar forms. The receiver knows that anything on the form is likely not to be in his best interest. Yet he will sign the form and hope for the best. If he is told that legislatures, administrative agencies, and courts are protecting him, he will be cynical. He doubts that the rules will be followed. If a consumer is articulate and willing to fight or retains a lawyer, he can prevail. But the form will continue to be used. As to the possibility of governmental sanction of the violators, the forms receiver will either assume a "fix" or that wrong-doers, shielded by their batteries of lawyers, will run circles around well-meaning enforcement officials. If the forms receiver is shown the laws that can protect him, he will reply that vindication of his legal rights will cost him more than what is at stake. If told that class actions will shape up unscrupulous businessmen, he will assume that the lawyers are likely to end up with all the money.⁸⁴

In addition to a "what's the use" attitude toward the fine print, the average receiver of such forms will complain vociferously about the fraud and deception of businessmen and their salesmen. These receivers contend that promises and representations are often made, but are either not included in the agreement or, if included, not performed or honored by the other party.⁸⁵ If asked why he did not see that these promises and representations were incorporated into his contract, he will say either that he trusted the other party or that he knew it would be useless to ask that the form be changed. If the receiver seeks enforcement of these promises or representations, the form will be a serious obstacle. In such a setting the form is a weapon to protect the dishonest.

Finally, the receiver will complain that the form does not tell him where to go or whom to see if he does not get what was promised or is unable to obtain satisfaction from the seller. While the aggressive consumer may retain a lawyer if he can afford one or

⁸⁴*Cf.* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), cert. granted, 94 S.Ct. 235 (1973).

⁸⁵*See, e.g.*, Nu Dimensions Figure Salons v. Becerra, 340 N.Y.S.2d 268 (N.Y. City Mun. Ct. 1973).

see a public official, many will do nothing because they do not know where to go.

4. *The Judge*

How does the present system look to a judge called upon to deal with forms? A strong contract doctrine is attractive. It is easier for the judge to enforce the contract before him than to "make a contract for the parties" or decide which clauses are unconscionable or offend public policy. But the conscientious judge recognizes that the adhesion transaction has changed, if not obliterated, the underlying assumption of contract, that the agreement was arrived at through arm's length bargaining. Such a judge was probably never happy when asked to enforce harsh clauses that he believed were improperly obtained. As a result, reluctant as he may be to intercede, a judge probably welcomes increased public controls. But mushrooming public controls make the judge's research task more difficult. While it is burdensome enough to merely collect all the legislative controls, many of the statutes require that he determine what is reasonable, unconscionable, or against public policy.⁶⁶ He may not receive much help from the attorneys on these matters, and the rules of evidence are often restrictive. Furthermore, the judge also realizes that increased public controls mean longer contracts with an increasing likelihood of inconsistent language. The judge may often welcome the power that adhesion recognition has given him, but he is likely to desire greater assistance from the legislature and the bar in exercising that power.

5. *The Legislator*

The perceptive legislator, while acknowledging the need for controls, is beginning to recognize the limitations of legislation. Political pressure upon the legislative process often results in meaningless compromise, such as the enactment of largely inadequate "notice" controls. Also, the legislator wonders whether even sensible reform, which is not easy to create, will have any effect on the problem without extensive and costly policing. He recognizes that the frequent legislative compromise—good reform on paper with no funds appropriated to insure compliance—often disad-

⁶⁶Compare *Lechmere Tire & Sales Co. v. Burwick*, 277 N.E.2d 503 (Mass. 1972) (adhesion contract construed against drafter), with *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (adhesion contract held unenforceable).

vantages honest businessmen. Moreover, he may possess misgivings as to the efficacy of control as a device to limit competition.

Our perceptive forms legislator recognizes that the feeling of accomplishment which accompanies passage of consumer forms legislation can create a substantial danger. The danger is that one will ignore more basic causes of inequities in contract making and unfair contractual risk distribution. Finally, the legislator is asked to deal with many pressing social problems. Does control over contract forms take priority over crime, public welfare, taxation, and environmental problems?

B. A Typical Forms Case

*Weaver v. American Oil Co.*⁸⁷ exemplifies a typical forms case. In 1956, Howard Weaver, a forty year-old filling station employee with one and one-half years of high school education, learned that American Oil Company had a filling station available for lease. Weaver told Campbell, an agent for the oil company, that he had worked part-time in three filling stations and that he had sufficient funds to finance the inventory. Shortly thereafter, American Oil agreed to lease the station to Weaver. After the inventory was taken, "Campbell took a lease from his pocket, laid it on a table and said 'sign.' Weaver signed."⁸⁸ This was the only conversation relating to the lease. Evidently, Howard Weaver had not read the lease nor did Campbell call his attention to Clause 3, an exculpatory and "hold harmless" clause.⁸⁹ The lease was renewed each year

⁸⁷276 N.E.2d 144 (Ind.), *aff'g on other grounds* 261 N.E.2d 99 (Ind. Ct. App. 1970), *noted in* 6 IND. L. REV. 108 (1972).

⁸⁸261 N.E.2d at 101.

⁸⁹Clause 3 read:

Lessor, its agents and employees shall not be liable for any loss, damage, injuries, or other casualty of whatsoever kind or by whomsoever caused to the person or property of anyone (including Lessee) on or off the premises, arising out of or resulting from Lessee's use, possession or operation thereof, or from defects in the premises whether apparent or hidden, or from the installation, existence, use, maintenance, condition, repair, alteration, removal or replacement of any equipment thereon, *whether due in whole or in part to negligent acts or omissions of Lessor, its agents or employees*; and Lessee for himself, his heirs, executors, administrators, successors and assigns, hereby agrees to indemnify and hold Lessor, its agents and employees, harmless from and against all claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys' fees incurred by or imposed on the Lessor in connection therewith) for such loss, damage, injury or other casualty. Lessee also agrees to pay all reasonable expenses and attorneys' fees

until 1961 through the use of the initial 1956 assent procedure. In 1962 Homer Hoffer, an employee of American Oil, came to Weaver's station to repair some gasoline pumps. During Hoffer's postrepair demonstration, he sprayed gas over Weaver and his employee, Donald Miller. The gasoline ignited, burning both Weaver and Miller.

Each brought an action against Hoffer and American Oil for personal injuries. American Oil instituted an action for declaratory judgment and requested the trial court to determine whether the exculpatory and indemnification provisions of Clause 3 were binding. The trial judge received evidence of Weaver's educational and business background, the size and structure of American Oil, and the fact that American is a wholly-owned subsidiary of Standard Oil of Indiana. The judge also admitted evidence relating to the way in which the lease was presented to Weaver and signed by Weaver. The judge noted that Weaver's net yearly income from the operation of the filling station ranged from \$5,000 to \$6,000, and that the indemnification provision imposed upon Weaver "a potential liability far greater than, and completely out of proportion to, the benefit flowing to [Weaver] from . . . [the] lease agreement."⁹⁰ After listening to evidence of the respective size and experience of the parties and the risk entailed in the crucial clause, the trial judge concluded nevertheless that the clause was enforceable against Weaver.

The Indiana Court of Appeals recognized the adhesive nature of the clause. But the court, in agreeing with the trial court on the indemnification provision, noted that liability insurance was available, generally used, and could adequately protect Weaver from risk of liability to third parties, including American. However, the court did have trouble with the exculpatory clause. The judge noted that public liability insurance would not protect Weaver from injuries to himself. The court of appeals then stated:

Traditionally, a contract is thought to be the product of the free bargaining of parties who meet as approximate bargaining equals. In this context, courts are extremely reluctant to declare contracts void as against public policy, because if there is one thing which, more than an-

incurred by Lessor in the event that Lessee shall default under the provisions of this paragraph.

276 N.E.2d at 145 (emphasis added).

⁹⁰*Id.* at 152.

other, public policy requires, it is that *men of full age and competent understanding* shall have the utmost liberty of contracting, and that their contracts *when entered into freely and voluntarily* shall be held sacred and shall be enforced by courts of justice. . . .

Unlimited and unchecked "freedom" of contract, however, treats modern industrial and commercial problems as if they were a matter of two neighbors bargaining over the price of a horse in the 19th Century—a desirable and Utopian approach, but often unrealistic in terms of 1970 commerce.⁹¹

How should the court have dealt with this adhesion contract? While other solutions were available, it held that the validity of an adhesion contract must be dependent upon the weaker party's possession of full knowledge of the contract terms, and erected a rebuttable presumption that sufficient comprehension could not be present in an adhesion transaction.⁹² Since there was no showing that Weaver was aware "of the clause or of its implications," the court concluded that the exculpatory provision was not enforceable.

A petition to transfer to the Indiana Supreme Court was granted. The supreme court, over a strong dissent,⁹³ refused to enforce either the exculpatory or the indemnification aspects of Clause 3.⁹⁴ The supreme court concluded that it was inconsistent to enforce one part of Clause 3 without the other. Evidently, it was unconvinced by the court of appeals' argument that one risk was usually insurable while the other was not.

After sketching the usual adhesion contract background the court stated that "[t]he superior bargaining power of American Oil is patently obvious and the significance of Weaver's signature upon the legal document amounted to nothing more than a mere formality to Weaver for the substantial protection of American Oil."⁹⁵ The supreme court, while noting that section 2-302 of the Uniform Commercial Code relating to unconscionability was not applicable, stated that this was an "unconscionable contract."⁹⁶

⁹¹261 N.E.2d at 103.

⁹²*Id.* at 104.

⁹³276 N.E.2d at 148 (Prentice, J., dissenting).

⁹⁴*Id.* at 144.

⁹⁵*Id.* at 146.

⁹⁶*Id.*

The court opined that no sensible person would make such a contract unless he lacked mental capacity or was under extreme duress. Moreover, it was impressed with the disparity between the obligation Weaver assumed under Clause 3 and the \$5,000 to \$6,000 a year he earned working seven days a week at long hours. The court also noted that the clause was in fine print and contained no title heading. The *Weaver* court concluded:

It seems a deplorable abuse of justice to hold a man of poor education, to a contract prepared by the attorneys of American Oil, for the benefit of American Oil which was presented to Weaver on a take it or leave it basis.

. . . .

The burden should be on the party submitting such "a package" in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein. . . . Only in this way can justice be served and the true meaning of contract preserved.⁹⁷

To be enforceable, according to the court, clauses of the type included in the Weaver-American contract must be knowingly and willingly made.

The dissenting judge stated that adhesion contracts were limited to those transactions which were not subject to negotiation and concluded that this transaction did not satisfy the adhesion test. The dissenting judge recognized the economic disparity between Weaver and American and the former's limited educational and business background. But, amazingly, he found no indication "that the printed lease provisions were not subject to negotiation or that, with respect to this particular lease, Defendant was not in a bargaining position equal to that of American."⁹⁸ In addition, the dissenting judge concluded, with the now familiar litany of dissenting judges in such cases, that this was a matter for the legislature.

The reader should note that American is unlikely to redraft the clause because the language is *not* deficient. It was drafted about as completely as it could be drafted, although perhaps it could have been written in a more lucid and understandable fashion. The astute attorneys for American will probably conclude that the

⁹⁷*Id.* at 147-48.

⁹⁸*Id.* at 154.

Indiana Supreme Court merely invited them to use a better *notice* technique in safeguarding the validity of such clauses. One might easily envision a memorandum from the attorney for American to all personnel of American who negotiate such leases. This memorandum would instruct the agents who negotiate such leases to direct the attention of prospective lessees to Clause 3 and to explain to them the import of the clause, perhaps even suggesting that the lessee obtain insurance.⁹⁹ The memorandum might go further and suggest that the agents have lessees initial or sign opposite Clause 3 to show that the matter has been brought to the lessees' attention.

In any event, suppose American can comply with the notice requirement and force such clauses on prospective lessees. A more difficult question is whether the law should permit a contract to allocate risks in this context. Of course, if the prospective lessee were intelligent, educated, and knowledgeable in business matters, he could handle both the exculpation and indemnification aspects of this transaction. He could, as the Indiana Court of Appeals suggested, obtain public liability insurance to handle third party liability.¹⁰⁰ As for losses to himself, he could secure health, disability, or business interruption insurance. However, it is quite probable that if the lessee has the clause pointed out and explained to him, he will not bargain any differently than did the lessee in the *Weaver* case.

Suppose further that the lessee were to be injured and unable to recover from American or an insurance carrier. Probably *Weaver* would go on public welfare. Surely this is a legitimate matter of state interest, and the State can decide that *Weaver* (and the State) should not take this risk.

Suppose the Indiana Supreme Court were to hold Clause 3 void as against public policy either because of the adhesive nature of the transaction, or because enforcement might encourage American to be careless. Would American still insert Clause 3 in its leases?

Suppose American's attorney were asked by his client whether American should continue to use Clause 3 in its leases. Even if the attorney stated that it was not enforceable, suppose he were

⁹⁹See *Boryk v. Argentinas*, 332 F. Supp. 405, 406-07 (S.D.N.Y. 1971) (lessor relied on memo advising prospective lessees of necessity for liability coverage).

¹⁰⁰261 N.E.2d at 102.

asked whether there was any harm in using it. The attorney might state that he could see no harm in using the clause. If a claim were made, and if the claimant were represented by an attorney, the attorney might point out the unenforceability of such a clause. In that case, the clause would not be relied upon in negotiations or in litigation. But the attorney might reason that not all claimants are legally represented and, even if the claimant were legally represented, the claimant's attorney might not be aware of the unenforceability of the clause. In such a case the clause could be of some value to American. For that reason, the attorney might conclude that there is no harm and possibly some benefit in using the clause. The attorney might even convince himself that clause would not be used if a legitimate claim were made against American but only if a false claim were presented.

It is most unlikely that counsel for American would consider the legal ethics involved.¹⁰¹ Should an attorney advise a client that such a clause be used or participate in the creation of a contract with such a clause? If the clause is used, the contract can frustrate loss distribution rules, exert unfair control over the litigation process, and destroy the reasonable expectations of the weaker contracting party. In this situation, the general ignorance and disinterest in legal ethics is compounded by the failure of the ethical canons to deal with this problem specifically.

What can we learn from Howard Weaver's troubles? First, and most obviously, courts are not sympathetic to exculpatory and indemnification clauses in an adhesion setting. Secondly, courts are paying considerable attention to the bargaining context and the way in which contracts are made. The Indiana Supreme Court did so, and it is not a court noted for radical departures from existing law. Thirdly, the "notice" technique of handling adhesion transactions is of doubtful value in this context.¹⁰² American and other forms users will simply adjust their contract making techniques to ensure that unfair provisions are made conspicuous and apparent to prospective forms receivers. In addition,

¹⁰¹The American Bar Association's Code of Professional Responsibility fails to deal explicitly with the propriety of drafting such clauses. The Code states that the lawyer should refrain "from all illegal and morally reprehensible conduct." ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Ethical Consideration* 1-5 (1969). "Misconduct" is defined to include "fraud" and "conduct that is prejudicial to the administration of justice." *Id.* *Disciplinary Rule* 1-102. Arguably, "misconduct" could be interpreted to include the use of contract clauses which the lawyer knows to be unenforceable.

¹⁰²A notice system presupposes some competition and the ability or desire to shop around. In many adhesion transactions this is not present.

even if clauses of this sort are unenforceable without regard to notice, such a rule may have a limited impact on contract making practices. If it is void as against public policy, there should be sanctions to insure that such clauses are not oppressively used. Finally, contract should not play *any* role in loss distribution in this context.¹⁰³ Such losses are too important to leave to an adhesion transaction.

C. *Some Observations on the Current System*

Clearly, contract can no longer be given its prior high and exalted status. It still serves a legitimate function, and it is often better left alone than saddled with meaningless or cumbersome state controls. But the awesome power it can create in today's world of mass produced forms is too susceptible to abuse. It has become clear that the usefulness of alternative controls, including their respective limitations, must be carefully scrutinized. Notice controls, as a rule, make little sense in today's market. We must control the contracts *most* subject to abuse and the clauses *most* likely to frustrate orderly administration of justice and loss distribution. When we do enact controls, they should be: (1) clearly expressed, (2) self-executing and not left to the party who is being controlled, (3) policed properly, and (4) reviewed periodically. In addition, we desperately need a recording system which can accurately memorialize and store the events relevant to the contract formation process. To sum up, the present system is occasionally oppressive and often inefficient.

V. THE SYSTEM IN 2001

Assuming that (1) the present system has serious defects, (2) these defects will be considered serious enough to warrant drastic change, and (3) the technology described will be available, it is appropriate to consider how the system will function in the next century.

A. *Negotiated, Tailor-Made Contracts*

There will be a modest number of tailor-made, negotiated contracts. They will memorialize nonroutine transactions, either

¹⁰³A look at auto accident risk distribution indicates that "no fault" is almost with us. Beyond the horizon we can see that national health insurance or some form of compulsory private health care insurance will replace much of tort law. Interestingly, "no fault" insurance will broaden the scope of contract law since most of the disputes will be centered around an insurance policy—the paradigm of adhesion contracts!

quite important or unimportant, in which each party has relatively equal bargaining power. If important, the stakes will justify having attorneys draft the agreement. The traditional Nineteenth Century notions of contract make sense in such agreements. Interpretation should be confined to honest effectuation of the probable or actual intention of the parties. Gap-filling through implication should only be used when necessary to clarify terms which the parties thought too obvious to require expression or to give effect to unexpressed intention. Only when disruptive and reasonably unforeseeable events arise should the dispute resolution process make a conscious allocation of risk.

According contract considerable, if not plenary, scope in such transactions will not eliminate formal rules. Rules comparable to the Statute of Frauds and integration aspects of the parol evidence rule will continue to exist. However, rules of form will be altered to accommodate the different methods of recording information and formalizing agreements which will be common in the next century. For example video tape may be used to record the actual formalizing of a negotiated contract.¹⁰⁴ While such contracts dealing with important transactions will generally contain the entire agreement, problems could develop over asserted oral agreements made at the time the contract is signed. A better system of recording the events leading up to or at the time of making the formal agreement will assist the adjudication of such disputes. The less important individualized transaction would also profit from a system of recording events or contracts. Often, such contracts may not be complete and the use of technology to record and store events could provide an accurate memorial that would aid in dispute resolution.

There will be other forms of state control even in negotiated transactions. The state will allow only minimal tampering with public law rules relating to dispute resolution. The law of contract has gone too far in this direction and its power in this field will be sharply curtailed or eliminated. Only if the public rules are unclear, will reasonable, bargained provisions be given effect.¹⁰⁵

In addition, in the next century there will be less need for contracting parties to deal with rules for dispute resolution. Juries

¹⁰⁴See *Ellis Canning Co. v. Bernstein*, 348 F. Supp. 1212 (D. Col. 1972) (tape recording satisfied Statute of Frauds).

¹⁰⁵*E.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See Comment, *Enforceability of "Choice of Forum" Clauses*, 8 CALIF. L. REV. 324 (1972).

will very likely be eliminated in resolving commercial disputes and used only as expert fact finders. As a result of this and for other reasons, the dispute resolution process will be more accepted and trusted, making clauses relating to rules of evidence, burden of proof, remedies, and other clauses designed to compensate for deficiency in or distrust of the administration of justice unnecessary. Also, greater confidence in the public dispute resolution system should persuade lawyers of the twenty-first century that they need not cover every possibility nor anticipate every possible event. This may be expecting the millenium, but even today lawyer-draftsmen are beginning to realize that they cannot cover nor anticipate everything and that they must have confidence in the dispute resolution system.

Some negotiated contracts are of great importance to the state and will require another form of public control. Even today, some negotiated transactions must, realistically, be approved by public officials.¹⁰⁶ In the next century there will be more negotiated contracts which will require approval by public authorities. For example, contracts between space user associations and space suppliers will require approval by public authorities if they affect a sufficient number of users. Similarly, negotiated contracts such as group insurance plans that affect a sufficiently large number of persons will likewise require public approval. When approval is required, the twenty-first century will develop efficient methods of reviewing important negotiated contracts. The contract will be transmitted to the approving authorities through computers which will scan the contract, determine whether it is consistent with public rules, and single out questionable contracts and clauses for closer scrutiny. A principal disadvantage of present approval controls is delay. Technology will facilitate rapid approval controls. Such an approval system will be designed to protect the confidentiality of the arrangements made, provide a system for recording and storing such contracts, and assist public policy-makers in making resource allocation decisions.

There will be tailor-made, negotiated contracts which are not important enough to require approval. While marketing methods in the next century may virtually eliminate less important negotiated transactions, contract is a durable concept. Less important negotiated contracts will be filed for information, planning, and recordation purposes even though they need not be approved.

¹⁰⁶See note 67 *supra*.

The contemporary contract making system lacks a storage and retrieval technique which can assist those who draft negotiated contracts. Lawyers need a better check list system, data on what are customary ways of handling certain commercial problems, and specimens of drafting language. Negotiated contracts of the kind described, filed in an efficient storage and retrieval system, will provide valuable, nonconfidential information to contract makers.

B. Mass Produced Contracts

Prediction of future developments in the realm of form contracts necessitates a brief consideration of certain features of the present system. There are some transactions in which weaker parties cannot bargain on anything, such as consumers dealing with public utilities. But there are many transactions in which the *basic exchange terms* are, to a greater or lesser degree, specifically "agreed to."¹⁰⁷ One party often "accepts" the other party's standard form for various reasons, such as an inability to bargain, an unwillingness to bargain, lack of time to bargain, no one with whom to bargain, a feeling that it is useless to bargain, similarity of standardized terms used by all competitors, or trust in the other party and his form. The usual standard form, in addition to specifying the performance exchange, deals with administration, nonperformance, remedies, and disputes. Mass produced forms are used because they spread the cost of contract making over many transactions, save bargaining time, and control risk uniformly. Also, they are expected to obtain maximum protection for the forms user, as in a mortgage transaction, or to reduce liability for the user, as in a seller's sale of goods form.

Some of the current justifications for certain standardized provisions will not exist in the next century. Uniformity of law relating to contracts, improvement of rules for dispute resolution, elimination of contract as an instrument for controlling initial risk distribution, a greater sense of moral obligation on the part of lawyers who draft mass produced contracts—these factors *and* assertion of public law rules relegating contract to its proper domain will mean that contracts will concentrate on the basic exchange. Those who provide essential or commonly used consumer commodities or services¹⁰⁸ will be considered public utilities. At a

¹⁰⁷See Slawson, *supra* note 3.

¹⁰⁸The modern conception of "necessaries" is expanding to cover such items. See *In re Weaver*, 339 F. Supp. 961 (D. Conn. 1972) (color television exempt); *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. App. 1972) (automobile).

minimum, the state will dictate what we today consider the "boiler plate" or the standardized items. An increasing number of commodities and services will be, at least intermittently, totally regulated by rationing and price controls. But there will be a large residue of bargaining permitted on basic terms, especially in transactions involving commonly used consumer goods and services as well as living space beyond basic minimum needs. The consumer will select from different types of goods or services for which the pricing authorities or, if the price is not controlled, the market will set a range of prices. However, once the price is determined, the other terms will be determined by public authorities.

Other types of commodities and services not important enough to justify complete standardization of terms will be subjected to some controls. For example, a limited form of public control upon real estate broker agreements may be necessary because such agreements generate an unusual amount of misunderstanding, litigation, and, occasionally, oppression. For that reason, it will be necessary for rules to be developed which will provide a fair risk allocation, avoid misunderstanding and let the parties know where they stand. This type of control will be illustrated in the following examples.

To sum up, negotiated contracts will have minimal legal controls as long as they do not affect public interest. Mass produced contracts, involving essential or commonly used consumer commodities and services, will be dictated by public authorities, either totally or to the extent of major standardization of key terms. Other mass produced contracts not falling into that category will have legal controls designed to eliminate the worst aspects of oppression and render the contract making system more efficient.

C. Some Illustrations

1. Negotiated Contracts

Negotiated, tailor-made contracts will be divided into important contracts affected with a public interest and those which are not important enough to require close governmental control. As an illustration of the former, suppose a manufacturer makes a twenty-year contract with a natural gas supplier under which the latter will supply the former with natural gas. Future regulatory agencies will totally control production and use of energy resources. Such a contract in the next century will require prior approval by the regulatory agency. To avoid delay such contracts will be fed into a computer for transmission to a master computer located at the regulatory agency. The receiving computer will be programmed to determine whether the contract meets the standards set by the

regulatory agency. If so, notification of approval will be transmitted in a matter of minutes.

If the computer determines that the contract does not meet agency standards, the computer will report this back to the contracting parties and indicate the changes required for compliance with agency regulations. If these changes are acceptable to the contracting parties, the changes will be fed into the computer and the contract approved. If the proposed changes are not acceptable to the contracting parties, the reasons given by the contracting parties will be fed into the computer for evaluation. In most situations, an agreement will ultimately be reached by computer. In rare cases in which this cannot be accomplished, a television conference will be held, or, if needed, a hearing scheduled to resolve the differences. Submission of the agreement will provide data to the regulatory agency which will be vital in making policy decisions. Such a storage system will protect the confidentiality of information contained in the approved contract.

Many provisions that are found in contracts today will not have to be included or will not be allowed in contracts of the future. As a result, contracts will deal principally with the basic performance to be exchanged, excuses for nonperformance, and contract administration.

As a further example, consider the negotiation of group insurance agreements in the next century. Group insurance is currently generating problems because of conflicting documents, *i.e.*, sales literature, individual policies, and master agreements.¹⁰⁹ Such policies will have to receive governmental approval, just as those which deal with energy resources described earlier, even though the master policy may have been negotiated between a large employer or a strong association and the insurance company. Such group policies affect too many people to be left to the determination of the contracting parties. Such agreements will not have their terms dictated by the state, but they will be approved by the state in the same manner as energy purchase contracts.

Consider also the evolution of the long term commercial lease in the year 2001. Subject to time and place variations, contracts for the lease of commercial space do not involve substantial public interest considerations. Frequently, such a transaction will be formalized by a mass produced contract. For example, contracts for

¹⁰⁹See *Bauer v. Insurance Co. of North America*, 351 F. Supp. 873 (E.D. Wis. 1972) (failure to notify defense rejected when insurer failed to bring notice period provision to insured's attention).

the use of office space in which the supplier and user have relatively equal bargaining power and utilize a tailor-made commercial lease will not usually require public approval. However, the agreement will be filed, its contents stored on computer tape, and it will be fed to regional agencies empowered to collect this information for planning and informational purposes. In a period of space scarcity, greater public control might be needed. In such a case, an approval system would be installed.

2. *Mass Produced Contracts*

First, let us look at contracts for commodities or services *not* essential to life or commonly used by consumers. Assuming that real estate brokers in the next century perform a role similar to today's broker, and that private property still exists, suppose a property owner wishes to hire a broker to find a buyer for his property. Let us look a bit more closely at today's system in order to predict how awareness of today's problems and the availability of technology can rationalize the transaction. Generally, brokers today use a mass produced form. Ordinarily such forms are drafted by broker associations or by lawyers retained by high volume brokers. As a rule, the property owner does not retain a lawyer to review the broker-oriented form. Broker-owner disputes are common and often result in litigation.¹¹⁰ Brokers use contracts to deal with revocation by the owner, owner sales of the listed property, and the owner's sale of the property after the listing has expired to a buyer introduced to the owner by the broker. The owner may not wish to pay the broker if the broker finds him a buyer and the deal is never consummated due to default by the prospective purchaser.¹¹¹ Owners may also resist payment of the commission when the broker makes a quick sale. Also, owners become unhappy when the broker decides to concentrate his efforts on more attractive listings. In any event, the broker transaction is one in which, due to the frequent absence of good will bargaining, the broker looks largely to contract (his own and the contract for the sale of the property) as a means of protecting himself.

How will broker transactions be handled in the next century? Suppose the owner and the broker agree on the owner's selling price

¹¹⁰See 1 A. CORBIN, *supra* note 9, § 50.

¹¹¹*E.g.*, Bernard Klibanow & Co. v. Shafer, 21 Ill. App. 2d 392, 276 N.E.2d 446 (1971) (real estate broker held entitled to commission notwithstanding nonenforceability of purchase agreement).

and the amount of commission, as well as the duration of the broker agreement. Broker and owner will go to a convenient computer center. They will feed into the computer the basic elements of their deal. The computer will ask questions of each party to apprise them of the possible pitfalls. The computers will also inquire whether any representations have been made in the areas which have proved troublesome in prior similar transactions.

If all the matters are resolved, the computer will print out the contract containing the basic exchange elements and including specialized provisions designed to control foreseeable points of controversy. The computer will also print out the name of an official with whom a dissatisfied party can consult. That official will be given authority to resolve disputes informally between the parties, subject to an appeal to an informal tribunal. This tribunal will consist of representatives of the public, homeowners, and brokers. In essence, there will be industry arbitration.

The computer will be able to print out terms for varying types of deals. For example, the parties could make a transaction under which the broker could receive maximum protection—something on the order of broker contracts today—but he would receive a lower commission. At the other extreme, the computer could print out a contract under which the broker assumed considerable risks in exchange for a higher commission. As an illustration of the latter, the broker could receive a higher commission only if the deal went through. The number of variations could not be infinite, but there would have to be sufficient flexibility for a workable system. The state's interest in such a transaction will not be sufficient to require that a government agency program the computer. Instead, the state will appoint a committee composed of private citizens representing different interests to ensure a broad spectrum of public inputs into the programming process.¹¹² Alternatively, local persons desiring to improve the system might set up such a program themselves, with or without state financial support.

Such a system could also use video tape techniques to make a record of the person who appears before the computer for identification purposes and also to provide a record of what transpired before the computer. In essence, such a system would be a high technology version of the best aspects of the European notary system.

Another transaction which will have to be rationalized is goods distribution. Today, the process is in a state of chaos. Buyers and

¹¹²See Note, *Standard Form Contracts*, 16 MOD. L. REV. 318 (1953).

sellers refuse to sign any form other than the ones prepared by their own lawyers. Such forms typically are one sided. The buyer attempts maximum protection while the seller tends to limit his exposure to almost zero. Businessmen, at least at the outset, rarely look to the standard terms, and their lawyers only utilize them when all other avenues for settling the dispute vanish. Today's businessmen and their lawyers who recognize the irrationality and chaotic nature of the system sometimes draft industry-wide agreements or master agreements between buyer and seller designed to cover many similar transactions for a fixed period of time. However, such industry or master agreements are difficult and costly to formulate. The irrational nonmatching forms system is used because the alternatives do not look any better and old habits die slowly.

By the twenty-first century, businessmen and their lawyers will decide that it is not worth the effort to draft such forms. Goods ordering will be done through computers. The state will encourage, and perhaps compel, groups of buyers and sellers to negotiate and conclude standardized rules for such transactions. Again, many of the clauses presently used will not be necessary or perhaps may not be valid in the next century. But there will still be a need for rules to govern the relationship between the parties. And these rules are likely to go beyond the basic performance exchange to encompass orderly administration, remedies, and allocation of certain risks. These provisions will come out of a computer center when the buyer and seller feed into the computer the elements of their transaction. The computer will be programmed by representatives of buyers and sellers aided by public interest groups with a stake in commercial policies.

As to transactions involving essential or commonly used consumer commodities and services, suppose a twenty-first century consumer purchases an appliance like a television set. Here again, many of the provisions which appear on today's standardized mass produced contracts for consumer durables will not be necessary or permitted. Policy makers will be primarily concerned with the production of a document informing buyer and seller of their respective rights under the agreement and providing an equitable method of orchestrating the performances to be exchanged. The buyer will go to an appliance distribution center and choose the item he wishes to purchase. The price of the appliance will either be set by the seller (perhaps subject to some bargaining), or set by the state. Once item and price are determined, he will go to a small computer in the distribution center. The computer will ask questions designed to determine whether the buyer knows what he is getting and

what he is promising to do. Also, the computer will be programmed to print out warranties¹¹³ and credit terms and inform the purchaser to whom he should bring his complaints. Public authorities will program such transactions. Video tape will record the computer interview. All of the data relating to the transactions will be fed into a data bank which will be used for economic planning purposes.

Life insurance, at least in our economy, is an essential consumer service. At present, the insurance policy is a long, unreadable document primarily designed to control the scope of the insurer's risk with the result that the insured rarely knows what he is buying with his premiums. It is the classic illustration of what is becoming common in mass produced contracts; the standardized form is only looked to after the problem arises.

Here compulsory contracts will be produced by the state. The person desiring to purchase a policy will go to a computer-equipped insurance procurement center to obtain information and acquire some basic understanding of the insurance agreements available. Just as in the real estate broker transaction, there will be need for flexibility with regard to such factors as coverage, exclusions, and premiums. However, those terms which are important to the insured will have to be brought to his attention. Obviously, he should know the basic risk protected against, but in addition, he should know what he should do if a loss occurs and the public official he should contact if his claim is not being properly processed. All these items will appear processed in his computer print-out. To avoid communication problems and misunderstandings, a video tape of all conversations will be made and stored, in addition to the computer communication data.

Another essential consumer commodity is living space.¹¹⁴ Today, the market determines whether the tenant will have any significant power over the amount of rent or the duration of the lease, let alone other terms. Even if he does have some bargaining position, he is not likely to alter the standardized form.

¹¹³Israel recently created, by administrative regulation, a mandatory television warranty clause. See Comment, *Standardized Terms of Guarantee for T.V. Sets*, 7 ISRAEL L. REV. 147-48 (1972).

¹¹⁴American legal thought has begun, in many respects, to classify housing as a public utility. See *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 871 (D.C. Cir. 1972); *Chicago Housing Authority v. Harris*, 49 Ill. 2d 274, 275 N.E.2d 353 (1971); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1972).

In the next century, individual space users will have their leases made by computers either located at the office of a public or private space supplier or at a nearby computer center. Rent will, depending upon the economic situation and particular locality, be controlled by the state or governed by the market. The user and the supplier's agent will feed into the computer the items to which they have agreed and the computer will ask questions to ensure that both parties, principally the user, fully comprehend the basic terms of their bargain. After these are established, the computer will print out the basic deal and information relating to an informal dispute resolution process. Also, the computer will print out standardized terms of approved space use programmed by public, or, in the case of higher rentals, quasi-public agencies which will include representatives of users and suppliers. The transaction will be recorded on video tape and stored.

Where users form an association, an agreement will be made by the association and the space supplier which will be similar to our present collective bargaining labor agreements. The state will either require good faith bargaining or establish procedures for compulsory arbitration. Also, such an agreement will have to be submitted and reviewed by a public agency through a computer process similar to the system for approval of group insurance agreements previously described.

VI. CONCLUSION

At best, the current contract system is cumbersome and inefficient. At worst, it is oppressive and overreaching. While contract as a social and legal institution is durable and indispensable, institutional and social changes coupled with recognition of the deficiencies of the present system will generate drastic changes in the next century.

First, some things such as judicial administration and most loss distribution will be beyond the power of contract, except in truly bargain transactions. Secondly, contracts will be shorter and more comprehensible with emphasis upon communicating the basic exchange of performance. Only in negotiated contracts will contract be allowed to go further, and even here there will be limits. Thirdly, legal controls will be pervasive, but of varying types, from recording and approving contracts, to the dictation of minor or, in the case of some transactions, all the terms of the agreement. Finally, technology will develop techniques for recording events, promoting communication, developing transactional flexibility, operating public controls efficiently, and storing and retrieving data needed for social and economic planning.