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CONTRACT AS THING

*Arthur Allen Leff\**

In a large proportion of consumer transactions, paper passes between the parties.<sup>1</sup> The content and coverage of this paper varies widely, from a mere identification of goods and price all the way to the highly detailed retail installment sales contract. Many of these pieces of paper say extremely important things, especially about goods quality, and the parties' duties and remedies.<sup>2</sup> It is that paper which will be the subject of this paper.

My aim, however, while hardly unpretentious, is quite constricted. Granted that the present legal response to these papers is a mess, I do not aim to suggest any solutions. I intend instead to try to show how that current mess is rooted in our current way of thinking about these "contracts," and to propose a new way of thinking, a new metaphoric framework *for* thinking, about consumer-transaction "contracts."

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1. Though certainly not in all. By at least one criterion, gross number of individual transactions, the most prevalent consumer deal in the paperless over-the-counter or off-the-shelf cash sale. But paper-accompanied transactions are certainly a material part of the consumer-purchasing market, especially if one includes sales-slip transactions.

2. Actual surveys of the "typical" content of these forms, with analysis of what kinds of clauses are to be found, are rare. I have in my possession a study completed in May, 1969, of the fifty responses received to 200 form solicitations made more or less randomly to 200 merchants in three cities. This paper, prepared by John Sibley, of the Yale Law School class of 1969, includes such an analysis and tabulation, and I would be glad to send a copy to anyone who wants it.

### *Classification and Metaphor*

To get to that new mind set (and explain the critical significance of those quotation marks in the last sentence) it will be necessary to describe how we got to where we now are. And to get that far along, we will first have to make an excursion into the arid country of legal classification, a trip which may turn out, like a fourteen-day tour of Europe, simultaneously superficial and tedious. The point of embarkation is a question: why would one (even within the ramparts of quotation marks) characterize those pieces of paper which pass between those parties as "contracts"?

To call a thing a contract is to make a legal classification. It is to carry out that most basic step in what is sometimes called legal reasoning (and what is confused, often, with legal logic).<sup>3</sup> It is to make a move in the mind game which, to coarsen a lot of distinctions, goes something like this: given that I cannot efficiently treat this thing as *sui generis*, with what other thing or group of things can I best associate it for less-than-individual treatment.

As the crudity and non-specificity of that statement should certainly signal, classification, legal or not, is a sticky business. As G.E. Moore once put it, "Everything is what it is, and not another thing."<sup>4</sup> In other words, you cannot make classes the easy way, by putting together identical things. There are no identical things. Identity (that darling of logicians) is solely an intellectual construct: an identical thing is a thing which would be another thing except that it isn't. All that is perfectly clear. All that, in fact, is pretty trivial.

What is not always as clear, or as practically trivial, is the effect that this unreality of identity has on the classes the process creates. What it means, in effect, is that there is no such thing as a thoroughly homogenous class. To say that X is a member of the species Y is just to say that there is a way of looking at and talking about X which emphasizes its Y-ishness. There is, to use a currently modish phrase, a "family resemblance" between X and the items already "in" Y.<sup>5</sup> It does *not* mean that X is identical with any particular member of this class Y, because Y<sub>1</sub> is not identical with Y<sub>2</sub> or Y<sub>3</sub> or any of the individual members of the class Y either. All classification decisions

3. See O.C. JENSEN, THE NATURE OF LEGAL ARGUMENT 9-16 (1957) for a notable discussion of these processes, much more illuminating than my truncated version.

4. G.E. MOORE, PRINCIPIA ETHICA (1st paperback ed. 1960). The remark appears on the page facing the title page, and is attributed to Bishop Butler.

5. See L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, ¶¶ 65-67 (G. Anscombe trans. 1967).

are, as far as the total class is concerned, choices among metaphors. X is *like*  $Y_1, Y_2, Y_3 \dots Y_n$  the way  $Y_1$  is like  $Y_2, Y_3, Y_4 \dots Y_n$ .<sup>6</sup> Even if, therefore, there is a common element of likeness, a discernible family resemblance upon which a classification decision may usefully be made, not even these happy families are all alike. The minute you shift your attention from the common element upon which your classification is based to some other, previously ignored, your classification explodes. Or at least it ought to.

It is, of course, exceedingly rare, especially in legal classification, most especially when the classification is at the level of generality that the "contract"—"not contract" decision represents, to classify by only one resemblance. But there is a very sharp limitation upon the number of classificatory criteria one can formally use. Let us say you are classifying bugs. Your criterion for classifying is to count legs; more than six legs to one pile, six or fewer to another. At that point you will have just two classes. If you add to the process another criterion, say blackness versus color, you will produce four classes, (1) black—6 or less; (2) black—more than 6; (3) not-black—6 or less; (4) not-black—more than 6. Choosing three criteria will create eight sub-classes,<sup>7</sup> four will make 16, five will produce 32 and ten will get you 1024.<sup>8</sup> To put things briefly, things can pretty quickly get out of hand when great refinement of classification is attempted. Thus in practical reason it would be common to classify phenomena into relatively crude categories, that is, group them on the basis of relatively few family resemblances.<sup>9</sup>

What follows from this is that most classificatory families have very many features that vary from member to member. One may get the nose and ears right, and maybe eye shape and brow height too, but cheekbones will point every which way, and teeth will snaggle randomly. Much of the time this makes no difference. Very crude discriminations are quite sufficient for equally crude purposes; if you have a spider collection and an insect collection, and you want to separate the day's catch temporarily, just counting legs will do nicely.<sup>10</sup>

6. But not *necessarily* in any other way. One who has said of his mistress "Red as a rose is she," need not be on the lookout for thorns, or remember to mulch and water her frequently (except, perhaps, pursuant to another set of metaphors).

7. ABC, ABC, ABC, ABC, ABC, ABC, ABC, ABC.

8. The formula is a pretty simple one: classifying subjects with respect to  $n$  criteria in mutually exclusive and exhaustive pairs will yield  $2^n$  classes.

9. I must add here, without getting into any hassle about how the mind "actually works," that people regularly assign subjects to classes much faster than I or they can describe how they do it.

10. And if you're looking to pick up Fanny Schwartz' unmet son Morris at the airport, eyes,

. But do for what? Why all this bother? Why classify at all? To promote intellectual and operational efficiency.<sup>11</sup> Picture a pile of lumps brought up from a coal mine. How does one separate them into piles? Well, if you're interested in heat, you separate the coal (i.e., that which will burn) from the rocks (which won't). If you're interested in fitness for different types of furnaces, you screen the lumps for size. If the combustion end-product is critical for your purposes, you might grade the coal lumps by sulphur content. If you were planning a fancy photograph, you might arrange piles by color and shape. And if you were just getting together some ship ballast, you most likely would treat all the lumps as "the same". Assuming that no two things are identical, some things *are* (by some particular set of criteria) *like* other things. On the further assumption that like things should be treated in like manner,<sup>12</sup> identifying likeness makes possible the generation of rules, i.e., statements about behavior (intellectual or practical) with respect to more-than-one-member sets. Once there is—stated, perceived or felt—a purposive aim and a classificatory criterion (or more) associatable with it (empirical causation being one of the most common associations used), classification becomes "useful" *to that end*.

Now this process, while seemingly simple (especially when grossly simplified examples are used to illustrate it), is frequently so complex as to be, finally, almost a mystery. Neither purposes nor raw material are so often so simple; think of all the people or even all the women, you have known. But the great power of the classificatory process lies in the fact that identification criteria for class membership are frequently different from, and easier to use than, the purposive aim which the classification was formed to serve. In the coal example, for instance, the purposive criterion might be burnability, but the recognition criteria would initially (and sufficiently for most purposes) be grossly sensory. Briefly, one knows what coal *looks* like and also that coal burns; hence to find out if that lump will burn one has only to look at it, not to light it.

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ears, nose and hair style will most likely be plenty. In fact, nose alone might be enough, depending on the nose and the airport. Cf. L. WITTGENSTEIN, *supra* note 5, at ¶ 71.

11. Actually, this utilitarian answer is at most only part of the story. I suspect that people classify for the same reason that tigers hunt and most animals copulate, which is *not* solely to have food and children, respectively. It is a terrible mistake, in assessing the powers of ends, to overlook the aesthetics of getting there.

12. On the operational level, that assumption may be empirically tested: if like treatment is given to A and to B, and such treatment eventuates in result X for both A and B, then A *is* (in that sense) like B. In other words, a "correct" classification has been made. But the "should" in the text should not be taken as an ethical "ought." As such it is just an assumption, and an unsupportable one at that.

Moreover, there is often an additional bonus paid by grouping individuals into classes. This segregation (physical or conceptual) frequently results in the perception for the first time of similarities, the classifying efficiency of which is greater even than the original recognition criteria upon which the class initially was based. Go back to the lumps of coal. Let us say that the aim of their classification was to separate high-sulphur from low-sulphur coal. Let us assume further that there is a chemical reagent which, when rubbed on the surface of any lump, will fizz in the presence of sulphur. The test is expensive, but the results are accurate. So you rub, listen, separate, and end up with two piles. Having done so, you notice that the high-sulphur pile is much lighter in color than the low-sulphur one. Now after sufficiently testing to eliminate accident, you may well find you have come up with a new, previously unsuspected association for future classifications, this time between coal *color* and sulphur oxide pollutants which, moreover, lends itself to more efficient classification technique (e.g., by automated colorimeter scanning) than the reagent-fizz criterion. The classification itself has generated another (and "better") classifying criterion. And it has eliminated any need to use the original (reagent-fizz) criterion. In other words, it is frequently the case that one will discover, without necessarily knowing or understanding the associative mechanism involved, that objects with one thing in common have other things in common too, and that these other things are more practically useful identifying criteria than the ones first used.<sup>13</sup>

Thus, classification is a powerful intellectual device for efficiently identifying nonidentical things and concepts which may *for certain purposes* be treated identically. And like most such intellectual devices, it is powerfully dangerous too. First, the connection between identification criteria and the desired end of the classification may just be wrong. After all, that connection is ordinarily just an empirical one which means (with respect to classes) a statistical one, and empirical observations and statistical generalizations do frequently turn out to be wrong. This applies, of course, both to the initially chosen identification criteria and to the new internal correlations which become apparent among members of a class after classification.

Second, even if one's empirical observations are *more or less* correct, the correlation between identification criterion and end may be less

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13. A model of the mechanism which generates this statistical correlation helps, of course, to validate its accuracy. Knowing what moves around what and from which direction does enhance one's certainty of where the sun tomorrow will "rise".

precise than others which have been or could be used. In our coal example, color may indeed identify threshold sulphur content with 90% accuracy; the reagent-fizz technique may have a 99% rate.

Third, and closely allied to the correlation slippage, is the problem of artificial class homogenization. Now note that this homogenization is one of the principal purposes of classification as an intellectual device. One is trying to ignore differences. Nonetheless, there does seem to be a tendency, once the identification is made, to ignore differences even after they become relevant to one's purposes. This is indeed "just" a sloppy classifying job, but a very tempting slip. Once one identifies and, more important, *names* a class member by that membership, it is easy to treat the individual member not as *a* member which *belongs to* a class, but as a sort of composite average of all the members of that class, *i.e.*, as a non-individual for *all* purposes. If, for instance, one exempts "automobiles" from execution (on the ground that it is good policy to allow debtors to retain transportation), one *might* also exempt a rare antique non-functional automobile. Having used a structural and visual identification criterion roughly to identify a kinetic purpose, it is easy to lose sight of the purpose.<sup>14</sup>

Last is the discernible fact that some identification criteria, even though not sole criteria for that particular classification, tend to overwhelm others in determining inclusion or exclusion. In other words, the purposes to be served by particular classification A may correlate very well with the confluence of identification criteria x, y and z. And indeed there may be some correlation between x, y and z too, that is, if x, or y or z is present, the other two are more likely than not also to be present. But the correlation between the purpose of class A and x *or* y *or* z singly may be much lower, perhaps approaching randomness, and certainly lower than the correlation between the purpose of class A and x, y *and* z together. This situation is pregnant with the threat of intellectual abortion. For it seems to me that when purposive classification is based on the confluence of many identification criteria, there is a tendency to rely on less than all of them to make classification decisions, even though one's feeling of safety (*i.e.*, sense of correlation exactness) is based only on all of them together. Moreover, a single identifying criterion relied upon when less than all are is not necessarily that which *singly* correlates most highly with the aim of the classification.

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14. Of course, that might still be an administratively rational decision, like letting a few lumps of high sulphur coal slip by if the alternative and more accurate test would double coal prices. The point here is not that all slippages like this are errors, but only that some are.

I will not, of course, be able to prove these tendencies; they are, after all, just empirical generalizations (this time about thinking patterns) and demand empirical evidence which I frankly do not have. But I will offer at least one rough-hewn pile of evidence for them: a history of the classification of the paper passing between the parties to a consumer transaction, the consumer-deal "contract".

### *Contract as Contract*

What belongs to the class "contract"? The "official" definition gives some clue of the difficulty of that question by answering it with breathtaking circularity . A contract is "a promise or set of promises for the breach of which the law gives a remedy . . . ." <sup>15</sup> In fact, asked generally that way, the question defies less begging answers. A lot of things are contracts, or at least a lot of them have from time to time and presently ended up being somewhat subject to contract principles. But like all classifications, "contract" has a purposive element. It is, as always, extremely doubtful that one can come up with a purpose, but a tight cluster is not too much to hope for. To follow Professor Kessler's lead in this (and to implode his admirable and already admirably tight summary) the common law's category "contract" was developed as a method of segregating, for a particular and predictable treatment, contemplated trading transactions between free-willed persons in an assumedly free enterprise, free market economic system. <sup>16</sup> Given this relatively shadowy "aim," there arose a few class-identifying criteria which, when present in sufficient confluence, made things look more contracty than not.

These identifying criteria are, of course, in the form of gross distinctions between alternative possibilities. <sup>17</sup> First of all, contracts seem to be some species of interpersonal behavior (as opposed to person-thing interactions). <sup>18</sup> Second, the interpersonal behavior

15. RESTATEMENT OF CONTRACTS § 1 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 1 (Tent. Draft No.1, 1964).

16. See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629-31 (1943).

17. These may be set up as A-A distinctions, but in fact each of them is a softer-edged subtraction than that, much closer, in fact, to A<sub>1</sub>, A<sub>2</sub>, A<sub>3</sub> . . . A<sub>3</sub>, A<sub>2</sub>, A<sub>1</sub> than to A-A in almost any real-world instance.

18. But note the possibility of *implying* an actual promise out of certain activities toward non-persons, for instance, by accepting goods knowing they are not gifts. See the exemplary cases *Day v. Caton*, 119 Mass. 513 (1876), *Austin v. Burge*, 156 Mo. App. 286, 137 S.W. 618 (1911), and *Louisville Tin & Stove Co. v. Lay*, 251 Ky. 584, 65 S.W.2d 1002 (1933) collected in L. FULLER & R. BRAUCHER, *BASIC CONTRACT LAW* 365-68 (1964).



demand for a contract seems to be more or less communicative<sup>19</sup> (rather than directly effective, like a punch in the mouth).<sup>20</sup> Moreover, the communication, to look contracty, ought to have a lot of future tense in it, and bear somewhat on the speakers' expected role in that future.<sup>21</sup> Next, bargain and trade seems to smell more of contract than beneficence; there is the continual pressure to separate deals from gifts.<sup>22</sup> Next is the limitedness of contract. There seems to be something significant to contract in the bordered relationship, "the deal," as opposed to more long-term, non-limit-bound interpersonal relationship like husband-wife and father-son.<sup>23</sup> Last (and keep a close and critical eye on this move, for it will become very important to the argument anon), closely allied to the trade-bargain idea, is the process aura of contract. Contract seems to presuppose not only a deal, but dealing. It is the product of a joint creative effort. At least classically, the idea seems to have been that the parties combine their impulses and desires into a resulting product which is a harmonization of their initial positions.<sup>24</sup> What results is neither's will; it is somehow a combination of their desires, the product of an ad hoc vector diagram the resulting arrow of which is "the contract".<sup>25</sup>

And, naturally, there is one more identifying criterion of "contract" which cannot safely be overlooked. The criteria heretofore mentioned had to do with contract as a process. But that process frequently results in a refined product, *a* contract, a piece of paper with words on it. Everyone knows that not every "contract" is a writing, but some are, and for classification purposes seeing a writing is certainly one factor in pushing the decision to rather than fro.

Now notice, I have picked out only a few identification criteria for the category "contract." I would certainly defend the proposition that the written product of a process of communication between persons about future activities of at least one of them in exchange for

19. But consider the whole objective-subjective contract controversy. See I. A. CORBIN, *CONTRACTS* § 9 (1963).

20. Which, of course, like all "action," is at least partly communicative too. One can picture innumerable situations in which that would mean, among other things, "I reject your offer".

21. That is perhaps the only clear message from the Restatements. See note 15, *supra*.

22. See I. A. CORBIN, *CONTRACTS* § 4 (1963). See also § 131 for the indifferent results of attempting this separation by consideration doctrine.

23. I am trying, of course, to keep from falling off the brink into the status-contract swamp, but that I am in fact hanging over it by my fingernails ought to be mentioned.

24. For this aspect blown up to the very limit of pretentious expression, see G. HEGEL, *PHILOSOPHY OF RIGHT* 57-58 (§¶ 72-75) (T. Knox trans. 1942).

25. Trading (I'll give . . . if you'll give . . . ; I'll give up . . . if you'll give up . . .) is one of these harmonizing methods.

something from the other would be more likely to be classified as "contract" than the result of negating *all* those factors. I would also defend the proposition that while none of these factors is necessary to such a classification, all of them, as shadowy as they are, are important.<sup>26</sup> I would not for a moment contend, however, that I have isolated all of the relevant classifying criteria (that is, that even all my criteria together are necessarily sufficient), or that I have most effectively described the ones I have sensed and stated. Nonetheless, it seems to me that one could predict the legal classification of certain transactions quite precisely with reference to these relatively few criteria and not nearly so well by ignoring any of them.

It would be a mistake, however, to think that the classification "contract" has stayed forever static, with one set of identification criteria, or that transactions bearing the then relevant hallmarks have never escaped. Whatever the purpose of the particular classification "contract", the purpose of classification itself is to promote intellectual and practical efficiency. It has frequently happened that certain kinds of happenings have begun to resemble each other so much more than they resembled the "average" contract that they have split off for special treatment much more suited to the solution of their own, narrower group of recurrent problems.<sup>27</sup> Certainly that happened to labor contracts<sup>28</sup> and insurance contracts,<sup>29</sup> and, most pertinently, to sales transactions.<sup>30</sup> What seems to have happened again and again is that some transaction type<sup>31</sup> moved too far over the end of the scale<sup>32</sup>

26. I find it particularly striking that it is with respect to these particular  $A_1, A_2, A_3, \dots, A_3, A_2, 1$ , distinctions, between past and future, gift and trade, creating and created, status and deal, for instance, that so many contractlaw problems fall. Most of the grand conflicts in the field, mutual assent, past consideration, variation of ongoing transaction, consideration, and so on turn out to be voyages into those *maria incognita* charted only by the above dots. See also note 17, *supra*.

27. See L. Friedman, *Contract Law in America* 15-26 (1965).

28. See Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969). The major burden of this article, in fact, is to question whether this "emanicipation" of "labor contract" from "contract" has not been overdone.

29. See N.Y. INS. L., especially §§ 140-74.

30. See UNIFORM COMMERCIAL CODE (1962 Official Text) [hereinafter "U.C.C."] art. 2; UNIFORM SALES ACT (1906), 1 & 1A UNIFORM LAWS ANNOTATED (1958). And note that even that most enthusiastic of generalists, Samuel Williston of Harvard, found it necessary to write two treatises, one on contracts and the other on sales.

31. On the significance of transaction types, that is, repetitive dramatic situations at a factual level more precise than "contract" or even "deal," see Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939); Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U.L. REV. 159, 160 n.2 (1938).

32. See notes 17 and 26, *supra*.

on one or more identification criteria and developed one or more additional high frequency internal correlations, so that it was recognized that a new something had come into existence.<sup>33</sup> At any rate, what is most interesting for present purposes is that many long years ago precisely such a reclassification movement took place with respect to consumer transactions.

### *Contract as Contract of Adhesion*

The movement of thought about consumer transactions seems to have come about because of empirical pressure upon one particular criterion for contractness—joint creative process. The following factual situation was increasingly presented: A and B met to enter into a transaction. They talked about the price and identity of the goods, and maybe about a few other things. These terms they might indeed create between themselves. But then one of the parties would submit to the other a piece of paper covering several, perhaps many, other actually or potentially important terms of the deal. The dickered and discussed terms were added to that paper, and that paper then became “the terms of the transaction.”

Now notice that this type of transaction did *not* differ from the previous horse-trade model in that once all terms were argued over, while later on only a few were. In *both* kinds of deals, only some of the terms were discussed. But in the horse-trade deal what was left out was covered by statute, custom or legal implication; in the new pattern, what was not discussed was covered by the proffered document. That does not mean that under the pre-modern deal all the terms were necessarily less onerous to the buyer. Some, indeed, were beastly.<sup>34</sup> But the process of filling in and filling out a deal not by one party's will, but by the legal and political process, tended to lessen the possibility of monolithic one-sidedness; buyers were occasionally also powerful classes (e.g., buyers of farm commodities), and what they won for themselves tended to slip over into other trades too, to protect the farmers, for instance, when they bought at retail. What the institution of the retail-form-pad sale created was the possibility of special

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33. Consider also, for instance, quasi-contract, at least in part a device for dealing with non-donative, non-coercive but non-agreement transactions, that is, a mechanism for correcting enrichment stemming from neither gift, force, fraud, or bargain.

34. See, for instance, the common-law rule putting risk of “innocent” destruction of the goods on the holder of the title, 2 S. WILLISTON, SALES § 301 (1948), despite the immense burden that puts upon a buyer out of possession with respect to losses the causes of which are unclear. UCC § 2-509 is more realistic and particularistic, though results rarely differ

governing rules for each transaction-type. The rules became custom-made rather than customary.

Thus in any sector of commerce where, in the circumstances, one party could impose most of its own terms, could unilaterally create *most* of the rules of *that* game, there was nothing to prevent highly disproportionate "contracts" from being created. These circumstances were, of course, those which decreased single-transaction market power more or less permanently and radically for one of the classes of usual parties. What the specific circumstances creating that power to impose terms, whether sanctioned monopoly, lawful or unlawful oligopoly, lack of mobility and information, lack of interest (because each deal was too trivial to think about, or the imposed terms covered contingencies too hypothetical to engage attention) or what all else will not concern us here. I will just take as a premise that there grew during this century an increasing number of transaction types in which most of the terms of the transaction were imposed by one of the parties on the other, rather than created between them or left to customary coverage.<sup>35</sup>

Naturally, there were a number of responses to this state of affairs. It would be an egregious error to suppose that those one-sided contracting processes and the one-sided contracts which resulted, were allowed to pass unnoticed and unmitigated by the law. The tight textual regulation of insurance policies combined with enthusiastic *contra proferentem* interpretation, for instance, was (and is) such a response still in the course of development.<sup>36</sup> Fraud and duress were stretched, consideration doctrine was mangled.<sup>37</sup> But there was (and is) an

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35. Actually I have no empirical evidence that the frequency of this type of transaction has increased over, say, the last fifty years or so. But most people seem to assume so, *see, e.g.*, L. VOLD, *SALES* 447 (2d ed. 1959), and it seems certainly reasonable (given the increase in marketer concentration) to believe that it did. More important, there is no evidence that this move toward standardized contracts has in the net decreased social welfare, at least in any reasonably materialistic sense of the term. First, it is often the case that the form pad, as one-sided as it may be, does not present a deal as awful as one the free-willed but weak-minded can get for himself by dickering. In addition, it can unashamedly be argued that mass production has increased everyone's welfare (as defined here) and that mass production needs mass distribution. *See* Llewellyn, Book Review, 52 *HARV. L. REV.* 700, 701-02 (1939). But even assuming that all that is true, and that this new marketing pattern is, finally, "better" than dicker-distribution, it is so only "in the net" and "finally". Individual unpleasantness might (and does) still flow from this statistical good, and if it could be mitigated without any doomed attempt to return to an unrecoverable (and partially imaginary) past, and at bearable cost, that would be (and is) a respectable legal job.

36. *See, e.g.*, *Lachs v. Fidelity and Casualty Co. of New York*, 306 N.Y. 357, 118 N.E. 2d 555 (1954) on what you don't "know" even if the words are "there". *See* *Wyatt v. Northwestern Mut. Ins. Co. of Seattle*, 304 F. Supp. 781 (D. Minn. 1969) for a very recent garden-variety example.

37. *See* UCC § 2-302, Comment I.

enormous conceptual difficulty in dealing thoroughly and systematically with the problem: since *all* contracts to some extent involve terms created by only one party, how do you meddle with one-sided contracts without destroying the basic rule that one is bound to the terms of "his" contracts?<sup>38</sup>

The conceptual move was to create a new category, once again by exploiting linkable differences within a necessarily non-homogenous class. The scholars, in a really dazzling series of discussions,<sup>39</sup> created from the residuary category "contracts," the new subcategory "contracts of adhesion." Their basic insight was a simple and elegant one: there is a critical difference between a bargaining process and an on-off light switch. In the typical consumer-goods deal, for instance, the consumer must take the whole deal (or most of it) as a deal, or leave it, all of it. Assuming that the seller is not a true or effective monopolist and the goods or services are not vital to life, the consumer does, in theory, have an option: he *can* flip the switch either way. But he is not presented with any rheostatic alternative which would permit him to vary the quality of the deal between the on-off poles. Surely, argued the commentators, there is a difference important enough between the dickered deal and the adhesion deal to justify a new category—contracts of adhesion—to be treated by the courts differently than plain old residuary-category contracts.

As an analytic device this new category was a brilliant coup. As a practical matter it has been, I think, a disaster. Fifty years after the first extended development of the adhesion doctrine,<sup>40</sup> and twenty-five years after its most elegant and powerful discussion,<sup>41</sup> the consumer-purchase transaction is still stumbling about, a diagnosed disease seeking a nostrum. Various patent remedies are still being applied like mustard plasters—public policy,<sup>42</sup> fundamental breach,<sup>43</sup>

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38. RESTATEMENT OF CONTRACTS § 70 (1932).

39. See Isaacs, *The Standardization of Contracts*, 27 YALE L.J. 34 (1917); L. PRÄUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937), reviewed by Llewellyn, 52 HARV. L. REV. 700 (1939); Kessler, *supra* note 16; Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Sales, *Standard Form Contracts*, 16 MODERN L. REV. 318 (1953); 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); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172 (1965).

40. Isaacs, *supra* note 39.

41. Kessler, *supra* note 16.

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

43. See Meyer, *supra* note 39.

unconscionability<sup>44</sup>—and like such plasters, they seem to irritate more than they cure. There is presently no powerful legal theory successfully grappling with one-sided consumer deals.<sup>45</sup>

Why? Because, among other things, the phrase “contract of adhesion” fails to rivet the reformers’ (and judges’) attention on what is really at issue. In fact, “adhesion contract” turns out upon examination to be one of those magical language-game products like “darkness visible” or “incorporeal body,” by the use of which one “describes” non-states of affairs (the principal historical use of which has been, interestingly enough, for descriptions of the theologically ineffable).

The intellectual process which led to “contract of adhesion” is, at least with hindsight, and in terms of my earlier classification discussion, relatively easy to describe. Prior to creation of the adhesion-contract category, “the law” had been guilty of a common misclassification technique. Seeing that consumer transactions were communicative (rather than, say, physically coercive), mercantile (rather than charitable or donative), and bounded (rather than status-relational), and so on,<sup>46</sup> “the law” continued to class them as contractual. This overlooked the fact that *these* “contracts” were not the product of a cooperative process, but the creation (essentially) of only one of the parties. In other words, “the law” was classing consumer transactions as contracts on the basis of less than all the criteria which actually shaped that particular class. The adhesion contract theorists corrected that particular error. They detected the non-process nature of some “contracts” (including consumer transactions) and thus created, so they thought, a new category, roughly speaking “that which would be a contract except that no bargaining process really shapes it.” For describing such a beast the phrase “contract of adhesion” is not half bad. Its picture, such as it is, is one not of haggle or cooperative process but rather of a fly and flypaper.<sup>47</sup> Thus the phrase focussed on the fact that whatever

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44. See *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (D.C. Cir. 1965).

45. There are those who argue that the unconscionability doctrine, UCC § 2-302, is just such a theory. See, e.g., Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969). See Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. \_\_\_\_ (1970) for a particularly evangelistic argument. (As of the writing of this, this last article had not been published, but Professor Murray was kind enough to permit a final manuscript copy to be shown to me.)

46. See “Contract as Contract,” TAN 15-33, *supra*.

47. See Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 504 n.67 (1967) for the probable etiology of the term “contract of adhesion.”

protection against overreaching and unfairness a process of cooperative creation might be supposed to give, an adhered-to document gave no such protection. Assuming that contract law is in some complex way tied up with belief in the good-maximizing powers of the market, itself based on the assumption that people know better what is of value to them than any state or other guardian, unbargainable deals were critically different from dickered deals.

But that insight got the commentators only half way. Once they had isolated the fact that there was no contracting-process protection in adhesion deals, their metaphor was exhausted. For if their new legal griffin was not an ordinary barnyard type of animal, it was still *some* kind of "contract," that is, an undertaken obligation which the law would ordinarily enforce. It might be an exotic animal indeed, but it was still an animal—to be fed, watered, and treated more or less like a cow. But *when* enforce these adhesion contracts? Certainly the phrase "*contract* of adhesion" doesn't push the answer "never" briskly forward. And the economics of the mass distribution of goods make that a commercially absurd answer anyway.<sup>48</sup> Certainly not "always;" the whole purpose of the addition of "of adhesion" was to negative that possibility (and in effect reserve it for plain old unmodified "contract"). But if clearly not "never" or "always", then when? The new metaphor gave (and gives) not the slightest color of any answer to that question. The new metaphoric category, since carved from the older category of "contract," and left with all the smell of freedom-of-contract enforceability clinging to it, was naked of any substantive criteria for evaluating the central problem: what is a "bad" contract?

### *Contract As Thing*

There was (and is) however, a ready-made new category for adhesion deals (including consumer-goods deals) which stayed overlooked, despite the fact that it fits better than "adhesion contract", the identification criteria of this new class of deals. Consider this phony historical paradigm.<sup>49</sup> Let us say that once upon a time all goods were custom made in the presence, and sometimes with the assistance, of the intended purchaser, who oversaw every detail. When the goods were not satisfactory, and the buyer complained to the authorities, he was

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48. See note 35, *supra*.

49. Freud's primal-horde myth, Freud, *Totem and Taboo* in 13 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1, 141-46 (J. Strachy tr. 1955), is my stylistic source for expression via non-historical historical parables.

regularly met with the answer that if he didn't like the way the thing was being done he should have said something then. Occasionally, when the craftsman was granted a royal patent of monopoly, or even when he achieved it "naturally," the rule would be relaxed. But in general the buyer was held to what he had helped to create or acceded to knowingly. Then a new method of production grew up. Men made things in closed factories and brought them to market. Their innards and construction were completed when the buyer came upon them. The goods proliferated and no man could be expert as to all of them. In such a situation the old "rule" would begin to look silly, and one could foresee (after some fencing over disclosure levels and the varieties of fraud and quasi-fraud) the creation of two legal categories, plain old goods (maybe now called "custom made goods") and "goods of adhesion." The focus of legal attention would nonetheless remain upon the nature and quality of the goods and certain rules would become natural candidates for adoption: "no junk," or "fair average quality," or "no hidden defects." The criteria of "goodness" could not possibly be rigid, but quality and access to knowledge about it would be the subject of the inquiry.<sup>50</sup>

Now consider one particular modern consumer transaction, the purchase of that most ubiquitous consumer good (or consumer "better" or consumer "best" perhaps, considering the advertising framework), the automobile.<sup>51</sup> Start with the scenario; we'll look more closely at the props in a moment.

*The curtain rises on a typical new automobile showroom, this one for products of Tyrannosaurus Motors. There are the usual tacky little salesmen's tables ranged against the rear wall, the usual banners on the walls ("Tyrannosaurus is Rex;" "Put a carnivore in your garden"), the ubiquitous colored brochures on every flat surface. Downstage left is a rumpled middle-aged man (call him "Mark") devotedly circling a huge car, occasionally giving it a cautious pat or gentle rub, emanating the taut glow of a man uncertain at what point courting might be treated as indecent liberties. Downstage center is a neatly dressed man of roughly the same age with a carefully trimmed mustache. He is trying, though not very hard, to appear as if he is staring out into space, but he knows, and Mark knows, and we know, that he is*

50. See B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 181-82 (1962) for an early actually historical instance of such a focus.

51. Insofar as the automobile purchase is atypical, involving as it does an expensive chattel over which consumers do take some care, it cuts against the points I am trying to make. That is why I chose it.



*following the scene with the eyes of a father with seven daughters and a shotgun watching the parlor couch from the upstairs landing. Mark opens and slams the car door once more, kicks the left front tire fondly but firmly, and sighs piteously. The other man immediately approaches:*

Salesman: May I help you?

Mark: Nice car.

S: A Beauty.

M: Powerful.

S: 385 HP. Big horses.

M: Expensive.

S: Not for what you're getting. *(There follows at this point, as a cadenza, a more or less detailed description, mostly in terminology that would make an analyst blush, of the delights of possession and use. This culminates with . . .)*

M: How much?

S: *(clipped)* \$4,782.37.) *At this point, the tone of both takes on a kind of chanting, ceremonial air, the performance of a ritual investiture between coreligionists.)*

M: From happy Harry I can get it for \$4,600, plus \$300 for my '62 Pteradactyl.

S: \$4,300 net? You're talking cash?

M: Twenty-four months I'm talking.

S: *(Suppressing what is either a smile, or the yawn of a predator, and pointing toward one of the "desks" upstage)* Come, let's talk. *(They sit down together and one can hear only a low confused murmur, with occasional single words and phrases standing out, like "dual exhausts," "superchargers", "whitewalls", "genuine leatherette" and "roof frescoes." At last:)*

S: OK, that'll come to \$4,782.37 plus financing. You want it? *(Or in Latin, spondesne.)*

M: OK. When can I pick it up? *(I.e., spondeo.)*

S: For midnight puce, you'll have to wait till next Friday. Now, if you'll just sign these papers . . .

M: *(Signs)*

Now notice, there has been a lot of bargaining, usually much, much more than my truncated script indicates. But it has been over two things, price and standard variations in the product. In fact, there is only one element of the deal that has not been the subject of any contracting process: the contract. And what does that look like? It looks like a contract. But when one stands far enough back from the whole deal, from the whole process of goods buying, what one sees is

a unitary, purchased bundle, of which the product, say a car, is just the most tangible (and, oddly enough, the *most* mutable) thing. One goes out and acquires the whole "set" which is a "deal on a car," and of the interchangeable subsets (object, extras, contract), it is in fact arguable that the contract is *more* of a "thing" than the goods which are sold pursuant to it.

Why then do people continue to call a certain thing a contract instead of a thing? What impels one to classify an X among the preexisting category "contracts," especially since so many of the family resemblances among contracts center on the physiogomy of bargain, agreement, dicker, process, mutability, becoming.<sup>52</sup> If that is so, why would people, very well aware of the non-bargained genesis of a consumer contract call it a contract? After all, the *key* insight about "contracts of adhesion" was that they were products of non-bargaining, unilaterally manufactured commodities.<sup>53</sup> Because as a thing, an object, it looks like the referent of the *noun* form of the word "contract;" it looks the way the *product* of the process of bargaining so often looks. What happened, it seems to me, is that of all the indicia which determine whether a thing is a contract or not, the most irrelevant—the physical appearance of the thing as a thing—turned out to be the most powerful. This thing, the consumer contract, just happens to look like the result of what in the consumer-contract context is a nonhappening,<sup>54</sup> the consumer contracting process.<sup>55</sup>

### *Practicalities*

What, if anything, might be the practical consequence of shifting the metaphoric framework within which consumer-transaction law develops from "contract" (of adhesion) to "thing" ("product")? Assuming for the moment the accuracy of my critical distinction between the classes "contract" and "thing", that a thing presents itself

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52. See "Contract as Contract," TAN 15-33, *supra*.

53. Or, to be more accurate perhaps, contracting is to adhering what J. Press' custom suits are to its rack suits. Neither are either perfectly fixed or perfectly alterable, but the distinction is plain—and the necessary price differential is even plainer.

54. It is even more ironic, perhaps, that even to the extent that there *is* a happening leading to the consumer contract, it is in any event to a large extent shielded from effective judicial scrutiny by the vestigial parol evidence rule.

55. See [text after note 14], *supra*. In short, while everyone knows that not all contracts are writings, it was not fully appreciated how important it was in this context to recognize that not all writings were contracts either, even if commercial, bounded, future-regulating, etc. Or still another way to put it is that not every pair of identification criteria are, in fact, necessarily related to each other with any overwhelming correlation, even though each one singly may correlate highly with the classification itself.

as what it is, to take or leave, while contract implies the final phase of a process, it should not be a real jaw-dropper to suggest that regulatory and remedial strategies might vary depending upon whether one thought one was regulating process or product. There are, it seems to me, only three general strategies for regulating consumer transactions; you can focus your attention on the parties, the dealing, or the product. For current purposes,<sup>56</sup> the critical strategic decision seems to be between deal control and goods control. (Let me interject here, lest you all think me mad, that I am aware that it is not writ large in the heavens that one cannot mix techniques.) Now, keeping in mind the nature, factual and legal, of the usual consumer-goods (or services) transaction, deal control is ordinarily a stupid option; it is silly to seek to shape and control the contours of a process that does not take place. That does not mean that fraud, duress (both classical and "business duress"<sup>57</sup>) or even "procedural unconscionability"<sup>58</sup> are totally irrelevant to the consumer-goods field. It's just that such approaches are beside the point most of the time; it's like bandaging a cut on a broken leg. The normal, non-pathological consumer sale,<sup>59</sup> is one in which a form is proffered by a non-monopolist selling non-life-essential goods pursuant to no huge quantum of lying, and in which that form is signed because no one is particularly interested in the sub-set of the whole package which is the contract. In such a context, how does one go about regulating the contract as a process. By facilitating more bargaining? But that is absurd (1) because, as Llewellyn saw as early as anybody,<sup>60</sup> the mass produced contract is complementary to, and has the same economic utility of, the mass-produced product; (2) most "objectionable" clauses of a consumer contract have only contingent, often highly contingent, importance, and no buyer not represented by a lawyer (whose job it is almost wholly to think about things which are not going to happen) is going to think much about them;<sup>61</sup> and (3)

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56. It is conceivable that one could regulate consumer transactions by "regulating" the parties, for instance putting consumers under some kind of tutelary disablement, or licensing merchants for honesty and competence. But for a host of reasons which I will not enlarge upon here, I do not consider person regulation a viable approach to consumer-contract regulation.

57. See Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

58. See Leff, *supra* note 47, at 489-508.

59. There is certainly enough law to deal with lying and coercing. But unless one expands lying to include "inculcating desire by appealing to man's worst instincts through advertising," and subsumes form-padding under duress, most transactions are not, in *that* sense, pathological.

60. Llewellyn, *supra* note 35, at 701-02.

61. Contrast the law's treatment of penalties with its avowed policy not to take account of adequacy of consideration. Part of the source of that disparate treatment is that consideration is what *will* happen; penalty is treated by the parties much more lightly, as what most likely (or at least hopefully) will not. See 5 CORBIN, CONTRACTS § 1057 (1964).

even if the unrepresented consumer were interested, it is unlikely that he would have the necessary sophistication for such consideration. (One should not forget that even when a contract is hammered out *mit sturm und drang* by large law firms on behalf of industrial and financial giants, both principals "adhere" to most of the resulting document.) I would argue that so long as one is bemused by the word "contract," even when it is intelligently modified by the cognomen "adhesion," it is likely that one will sometimes seek to impress his controls on a process which does not exist. This type of misfocus is already patent. It may be seen, for instance, in § 2-302 of the UCC<sup>62</sup> and its issue § 5.107 of the UCCC,<sup>63</sup> both dealing with unconscionability; in UCC § 2-207<sup>64</sup> (on the battle of the forms); and in the continuing line of feeling that a large or conspicuous piece of writing (as contrasted with meaning) is sufficient, within a bargaining universe, to be the subject of that bargaining.<sup>65</sup>

What would happen, however, if one pushed the straddle that "contract of adhesion" represents off the wall in the other direction and made a quantum leap to the other regulatory focus, product control? What would happen, that is, if one did actually think about consumer contracts as things?

First of all, that would open up the law's long tradition, accelerating of late, of direct, explicit governmental control of the quality and safety of products. Autos now have mandatory seatbelts,<sup>66</sup> milk is bereft of its tubercles,<sup>67</sup> and outright poisonous substances are barred from the marketplace.<sup>68</sup> Even less reified "things", *when seen as products*, have been regulated as to quality for quite a long time. Life insurance contracts,<sup>69</sup> for instance, have been in effect written by deputy insurance

62. UCC § 2-302.

63. UNIFORM CONSUMER CREDIT CODE § 5.108 (1969 Revised Final Draft) [hereinafter cited as UCCC].

64. See Macaulay, *Contract Law and Contract Research (Part II)*, 20 J. LEG. ED. 460, 465 (1968).

65. See, e.g., how the UNIFORM COMMERCIAL CODE defines "conspicuous" as "so written that a reasonable person . . . ought to have noticed it. . . . Language . . . is 'conspicuous' if it is in larger or other contrasting type or color." UCC § 1-201 (10) (emphasis added).

66. See 15 U.S.C. §§ 1381-1425 for automobile and tire safety standards.

67. See STATE OF NEW YORK. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS, tit. 10, ch. I, part 3 (N.Y.S. Dep't. of Health, Sanitary Code, Milk and Milk Products).

68. In fact, it is even possible to ban a drug which, while it won't kill you, is unlikely to help you much either. See 21 U.S.C. § 355.

69. I do not wish to press this point too hard, but it seems to me very likely that along with the economic and social forces which have shaped the techniques for controlling insurance agreements, there has also functioned the fact that an insurance contract is a "policy," that is, that the most common label does *not* bring one up against the magically misleading word "contract" at all.

commissioners for years.<sup>70</sup> Nor has this quality-control device always required legislative action. The initial peculiar treatment of injurious foods in sealed packages<sup>71</sup> has almost ripened into the general "dangerous instrumentality" rule of the Restatement (Second) of Torts.<sup>72</sup> And even contract law, even traditional contract lore, is not wholly crippled as a mechanism for reific thinking. There is the frame-of-reference of "illegality" and its cousin, "against public policy," as a basis for decisions that some contract terms, no matter how they got into the contract, are too lousy to enforce.<sup>73</sup> When the static of *Henningsen*<sup>74</sup> subsides, for instance, one can hear the clear whinney of the unruly horse.<sup>75</sup> But "public policy" is so powerful a cure that wise physicians shun it. And illegality is a pretty slender reed, mostly because of the historical restrictions built into it. Generally, though with exceptions, the "harm" of the provision must be more substantial than getting a lousy deal, and it must be visited upon either some discernible person other than the parties, and maybe on the public generally.<sup>76</sup> In any event, the baggage that one totes along with "illegality" is presently too heavy for modern travel, and it is a deal-killing, not a deal-shaping technique anyway.

Not that I am suggesting for a moment that one *must* view a contract as a thing in order to regulate its content. In a few places that is openly done in the UCC,<sup>77</sup> and it is done much more frequently in the UCCC, which has two whole parts devoted to "illegal" provisions,<sup>78</sup> and even a few sections devoted to stipulating precise and mandatory language.<sup>79</sup> But I am willing to argue that viewing a contract as a product facilitates such a strategy, and, much more important, makes it necessary for the draftsman actually to think about what he is trying to do.<sup>80</sup>

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70. See N.Y. INS. L. § 154 (approval of life, accident, health and annuity contracts); see also § 155 with its five pages of standard provisions.

71. See 1 S. WILLISTON, SALES §§ 241-42 (1948).

72. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

73. See 6A A. CORBIN, CONTRACTS § 1375 (1962).

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

75. See 32 N.J. at 403-08, 161 A.2d at 94-97.

76. 6A A. CORBIN, CONTRACTS (1962) is wholly devoted to the ins and outs of this powerful, arcane and peculiarly limited concept.

77. See UCC §§ 2-318, 2-725(1), 9-318(4).

78. UCCC art. 2, pt. 4, and art. 3, pt. 4 (§§ 2.401-2.416, and 3.401-3.409, respectively).

79. See, e.g., UCCC § 2.503(2).

80. Unlike the situation with respect to § 2-302 of the UCC, as I have previously and stridently argued. See Leff, *supra* note 47, especially at 557-59.

See "Conclusion," TAN 103-04 *infra* for limitations upon this direct quality-control technique.

But talking about contracts as things, as "part of" the goods being sold, opens up another regulatory road. The pervasive weapon of the common law for controlling the quality of goods, at least to the extent of giving redress when the goods were abnormally shoddy or dangerous, has not been statutory or regulatory specification, but warranty. If nothing is said at the sale, said the law, the goods must be of fair average quality (which, I assume, turned out, most of the time, to be "minimum bearable quality") within the trade. Notice the delicious involutions of that development. Warranty law is at least initially *contract* law; much of its seamier history, for instance privity and disclaimer doctrine, comes out of that particular displacement of metaphor.<sup>81</sup> But out of that naissance came the word (and the field) "warranty". If something was said about the quality of the goods, that "contract" governed. But if nothing was said, what *was* said? That there were no huge surprises in store for anyone who bought this particular member of that general class of goods. In other words, that the goods were more or less what they purported to be.<sup>82</sup>

It is with respect to this mysterious "purporting" which *things* can apparently manage that there arises, it seems to me, a critical change in how one views a consumer-sale document *qua* thing rather than *qua* contract. The transformation is quite subtle, so subtle in fact that it may not exist. But this is what I have in mind: there is a fantasy deeply imbedded in the rites of linguistic use (of which contract interpretation is a branch) that words convey the information which they "mean".<sup>83</sup> If you can see and read a sentence, you have possession of the message. That does not mean that the law has made no provision for communication breakdown. At every stage of the communication process—sending set, medium, receiving set—critical malfunctions have been recognized. There are fine-print cases,<sup>84</sup> back-of-the-form cases,<sup>85</sup> foreign language cases,<sup>86</sup> illiteracy cases,<sup>87</sup> mental incompetence

81. Of course, it depends on how one places one's "initially". If one picks a very early "initially," it was first tort, then contract, and now, maybe, tort again. See 1 S. WILLISTON, SALES §§ 195-96 (1948).

82. The current statutory embodiment of warranty comprises UCC §§ 2-312-2-318. The statutory story told there is more complicated than, but not at odds with, my shorthand summary.

83. I say this in the face of the powerful, well known, and extensive efforts to correct this simplistic notion. See, e.g., 3 A. CORBIN, CONTRACTS §§ 532-60 (1960); Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939 (1967).

84. See Vogel & Bernstein, *Fine Print*, 21 BUS. LAW 544 (1966); Note, 63 HARV. L. REV. 494 (1950).

85. See, e.g., *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955).

86. See, e.g., *Fricke v. Isbrandtson Co.*, 151 F. Supp. 465 (S.D.N.Y. 1957). See also *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Dist. Ct., Nassau County, 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (Sup. Ct. 1967) (Spanish-speaking consumer and salesman, English contract).

87. See, e.g., *Dysarz v. Janczarek*, 238 Mich. 529, 213 N.W. 694 (1927); *Caton v. Wellershoush*, 77 Pa. Super. 331 (1921).

cases,<sup>88</sup> drunkenness cases<sup>89</sup> and so on. But these cases are all seen and felt as somehow exceptional, to be understood against the background rule: if *words* become available to a consciousness capable of receiving them *as words*, then the *meaning* of those words is deemed also to have been conveyed. And "meaning", in such a formulation, refers to what they eventually unambiguously say.<sup>90</sup> This, of course, is quite a natural way to regard words; it is, in fact, hard to think about them any other way.

When things "purport" however, the communication process is "seen" quite differently. Things are not usually regarded as bearers of messages (the way hemoglobin "carries" oxygen compounds), but rather as messages themselves. They are, are amenable to the senses, and what they convey to the senses is *what* they are. Thus, for instance, judges thinking warranty did not always assume that just because a product was "there" it disclosed everything about itself that one would like to know.<sup>91</sup> Not only are parts of things inaccessible to all the senses, but not even everything *about* things "in the open" is disclosed to sight—or to the touch, smell, hearing and taste. There are, in fact, things about things which are opaque to the senses under all circumstances. There are other things which are opaque except under special sense-increasing circumstances.<sup>92</sup> But critically, what the judges realized was that the actual circumstances of the examination, including the situation, experience and knowledge of the buyer, determined what in fact the object, the product, "said" about itself. When the subject was a thing, rather than a contract, the question became what a reasonable (this?) purchaser knew or ought to have

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88. See RESTATEMENT (SECOND) OF CONTRACTS § 18C (Tent. Draft No.1, 1964) and cases cited in Comments b-f.

89. See *id.*, § 18D and cases cited in Comments b & c.

See also, for a somewhat broader view, UCC § 6.111(3)(e), which describes as one of the factors to be taken into account by the administrator in determining whether to seek an injunction against a pattern of seller activity as "unconscionable," whether the "respondent has knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors."

90. But see note 83, *supra*.

91. See, e.g., *Rinaldi v. Mohican Co.*, 225 N.Y. 70, 121 N.E. 471 (1918) (cited in 2 F. HARPER & F. JAMES, *Torts* § 28.20 at 1581 n.13 (1956)) for a clear statement of how even looking, if not correctly motivated, will not "disclose" certain important facts about a thing.

92. For instance, metal fatigue, needing X-ray examination for discovery.

known under the actual circumstances. There was no pretence that objects were, just by being "seeable," omnidisclosive. This concept, often warily circled by the latent-patent defect terminology,<sup>93</sup> seems to have made it possible for the judges to focus somewhat more precisely on the actual position of the particular "receiving set" for the message, rather than merely lopping out crude chunks of competence like "insane," "illiterate" and "drunk".<sup>94</sup>

The differing impulse of the courts when approaching "contract", however, seems to have led to a different implicit "rule": subject to (a) gross defects in transmission of the words *as words* (small type, back of form, foreign language); and (b) the gross defects in the "receiving set" set out above (insanity, minority, sometimes illiteracy), a contract means that which it finally unambiguously means upon examination. But that view of meaning conveyance, of words as affective happenings, makes sense, *if at all*, only when the words are viewed as either the result of, or at least the basis for, a process of coming about. If, however, a particular contract is a mass-produced inalterable thing, then the words that make it up are just elements of the thing, like wheels and carburetors. They do not have, at least not common to the parties, any history or any future.

Perhaps another way to put this groping distinction is to say that a proposal for or product of a discussion is different from a label. If a label doesn't actually convey its message on the spot, in the actual conditions where it is to function, then it does no good at all. Certainly if a rule of law demanded a warning on a product it would give pause to a judge if the bottle said "Respiratory Depressant" rather than "Poison,"<sup>95</sup> or bore the Christian Omega of death rather than the Skull-and-Cross-Bones. And this unease would be hardly alleviated by the prominence or size of the type face. Certainly also, in a warranty case, if the manufacturer's defense against an electrocuted buyer's claim was that there was a wiring diagram on the front of the product which "clearly" showed the uninsulated power input snuggling against the metal door frame, the bookmaker's book would be heavy against the manufacturer.<sup>96</sup> And the odds would seem almost equally good if

93. See 77 C.J.S. *Sales* § 315 at pp. 1158-59 (1952).

94. See RESTATEMENT (SECOND) OF CONTRACTS §§ 18-18D (Tent. Draft No.1, 1964). See also note 56, *supra*.

95. For a very recent negligence case in which a warning label which in fact *did* verbally warn of possible death from use of the product was nevertheless (quite rightly) held to be insufficiently scarifying under the circumstances, see *Griffin v. Planters Chemical Corp.*, 302 F. Supp. 937 (D.S.C. 1969).

96. Cf. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897): "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."



pasted to the front of the door were the label "Voltage through door: 220." Only when the label said something like "DANGER—Wiring Fault—Do Not Plug In Until Corrected By Electrician" would one start betting on the defendant.

If indeed there is some such distinction in legal approach to "contract" messages and "thing" messages,<sup>97</sup> that would tend to explain, at least in part, certain otherwise extraordinary regulatory decisions to allow words which do "say" a warning to be a warning without regard to commercial realities, so long as the *word* delivery is sufficient. There leaps to mind the warranty-disclaimer section of the UCC,<sup>98</sup> pursuant to which "there are no warranties which extend beyond the description on the face hereof" will exclude all warranties of fitness, and pursuant to which, presumably, "There is no warranty of merchantability" will exclude that one—so long as the words are in writing and conspicuous (which means "in larger or other contrasting type or color").<sup>99</sup> Or look at the effect of the subliminal smell of contracting process in the most recent piece of consumer-protection drafting, the UCCC. One section provides<sup>100</sup> in its material part as follows:

(1) In addition to *contracting* for a security interest in the goods sold, a seller of goods in a consumer credit sale may secure the debt arising from the sale by (a) *contracting* for a security interest in goods previously sold to the buyer by the seller if there is an existing security interest in the goods held by the seller; . . . (emphasis supplied)

Now, this is the provision that is apparently designed to deal with the *Williams v. Walker-Thomas*<sup>101</sup> type of problem. How does it deal with it? Well, it seems to contemplate a little negotiating session between openminded dealers like the Walker-Thomas folks, and young sophisticates like Mrs. Williams, and, Heaven help us, over a contract provision in the permissible, and therefore presumable, form:

From and after the date hereof, Seller shall have a security interest in all goods heretofore sold to buyer to secure payment for said goods and for the goods sold to the buyer hereunder.

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97. Even to approach *proving* such a distinction one would have to have examined and described with fantastic insight and precision a vast body of decided cases—latent-patent cases, contract interpretation cases, fine print cases, and so on. I have not done so.

98. UCC § 2-316.

99. UCC § 1-201(10).

100. UCC § 2.408.

101. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

Fantasyville.<sup>102</sup>

If, on the other hand, one is not thinking "contract" or "agreement" at all, it seems more likely that one will demand something on the order of a warning label. If cross-collateral clauses are to be permitted at all, they should be treated as a latent danger and labelled as such. With one's mind tuned that way, while one might continue to demand "conspicuousness" for the words, one would also require conspicuous meaning, e.g.,

*Caution. If you don't pay on time for what you just bought, we may be able to take back everything we ever sold you.*

### Conclusion

The approach I have been touting is to think about the paper-with-words which accompanies the sale of a product as part of that product. This classificatory shift may perhaps have two effects. First, it would provide a better conceptual framework for direct governmental quality controls. When things are too dangerous or too worthless the government *does* directly intervene. There is no reason why that intervention should not take place as directly with respect to contracty things.

But the limitations of any quality-control approach must be considered, however briefly. Even if one does approach a contract as a thing, it is not so terribly easy to tell when even things should be regulated. One does not solve the evil-defining problem merely by approaching it as a species of goods-quality control. Bluntly, what kinds of clauses ought to be illegal? Certainly the answer is not "harsh ones". Almost all deal breakdowns are going to have harsh effects on one of the parties, and it is certainly not clear that ball harshness should be absorbed by the party able to spread the impact over all purchasers. It is not irrefutably clear that stable contract makers ought *necessarily* pick up the tab for those whose contracts break up. For among other things, this quality-control technique has important economic (and, therefore, social) costs. If carried forward with any vigor, no lawful contract could descend in "fairness" or "safety" below a certain qualitative minimum. In certain situations that would have the same effect as some building codes: the cheapest one can get is more expensive than one can afford.<sup>103</sup> One is less able to trade off

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102. In fairness to the draftsmen of the UCC, it must be pointed out that they have eliminated, in § 2.409, the most vicious aspects of cross-collateral clauses. But note that they have done so by direct quality-control of the contract, not by playing with the "contracting" process.

103. Consider also, as another instance, the proposals that wage-garnishment be totally

quality or risk for price even if one wants to and is aware of what one is doing. In brief, the government-quality-control technique is a replacement for market-set quality and price levels and mixes. Whether the fundamental market-economy postulate, that individuals most often know what they want better than a government does, is empirically sound or not, there is certainly evidence that governments tend frequently to make an unacknowledged conflation of the two wildly different concepts "what they want" and "what is good for them," with numerous repressive effects.<sup>104</sup> Strict quality control is, after all, a regulatory approach the basis of which is "I don't care if you want it; you can't have it." This is highly justified when what you want is a poison, when a slip in making your own decision as to what is "good for you" is fatal. It may be justified for lesser risks when the market is, in fact, highly imperfect. As the price of an error becomes more and more merely economic (rather than organic), and the market becomes more subject to normal competitive correctives, this intrusion becomes more and more noxious. While this new metaphor may thus suggest a newly applicable frame of reference—governmental goods-quality control—it does not without more make any of the hard decisions about when and how to use it.<sup>105</sup>

Hence attempts *not* directly to regulate quality, but instead to increase the availability and quality of the information upon which buying (market) decisions are based, have good sense behind them. I have tried to indicate that the metaphoric shift here proposed has a subtle but important effect upon the workings of *that* regulatory device

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forbidden, e.g., Kerr, *Wage Garnishment Should Be Prohibited*, 2 PROSPECTUS 371 (1969), i.e., to turn all wages into spendthrift trusts.

104. See, e.g., 26 U.S.C. §§ 4742(a) and 7238 on marihuana.

105. Even after identifying the "unfair," in other words, there still remains the difficulty of describing and producing the fair, and this general problem is certainly not limited to the consumer-protection field. See H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 27-35 (Paperback ed. 1968) for a discussion in the context of labor policy.

Some experience with true goods-quality control is, however, suggestive. When the government mandates the quality of goods, the practice seems most effective and least objectionable when the threat is of a harm both serious and irreversible, like death or crippling from an ill-conceived drug. See notes 66-68, *supra*. In the consumer-contract area, the harms are never quite that dramatic, generally being limited to no more than the value of the bargain, but it may be intelligent to focus one's regulatory efforts in this context on losses beyond the value of the bargain (for instance, disclaimers of warranty affecting personal-injury claims, or contractual collection devices which cost the debtor much more than the debt). It is indeed possible that the courts, attempting to give content to UCC § 2-302, have adopted such an approach without being aware of any general principle informing their thus far *ad hoc* approach. See Murray, *supra* note 45, for a burgeoning but not quite expressed awareness of the significance of beyond-the-bargain clauses when adhesion contracts run against the unconscionability clause. I hope to expand a little on the idea in an article scheduled to appear in 31 U. PITT. L. REV., number 3.

too. Briefly, I have argued that viewing a consumer contract as a thing might in time lead to a perception of disclosure not in the old contract-interpretation terminology but in a more realistic context, more attuned to what happens at retail, to the ultimate production of more *actual* information disclosure. Certainly such a shift would not solve all the problems either. Many people don't read contracts at all; even a clear one won't help them. And some people would sign a contract even if "THIS IS A SWINDLE" were embossed across its top in electric pink. But assuming that the new metaphor would produce fuller *message* disclosure, at relatively small information cost, it might well increase the power of the market itself to control the price-quality mix.

And there is one last limitation upon the utility of this suggested metaphoric transformation which must finally be mentioned. While my suggestion has been wholly serious, I am quite aware of the fragility of this kind of effort. Language has never been much of a match for sense perceptions except as an analytic, and analytics have a way of being quickly swallowed up in the resurgant real world of synthetics. One of Hohfeld's great contributions to legal analysis, for instance, was the suggestion that some things, like "property," were not really, at law, "things" at all, but force fields. Intelligent discourse, he argued, should not be directed towards deciding to whom a thing belonged, because there was no thing to belong; there was only a bundle of forces demanding, for sensible talk, a sort of vector analysis with time coordinates.<sup>106</sup> With some historical distance, one can see that the partial but undeniable failure of that powerful suggestion to take hold was not primarily a product of Hohfeld's untimely death, or of some basic vice in his analysis, but more of the fact that a farm, for instance, bundle of powers, privileges, rights, etc. or not, persists in the consciousness as "dirt with boundaries". In like manner, a consumer contract of adhesion *looks* like a classic bargained contract. A consumer contract is *not* a thing, at least not the way cars, cows and couches are things, and no rhetoric is going to convince anyone for long that it is. Thus the real hope of an exercise like this is necessarily more modest than any total sensory transformation. It can aspire at most temporarily to smash the semantic box in which our current thinking is locked. The next step, and the harder one, is crafting a better cabinet out of materials really available in a real world.

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106. See, e.g., Hohfeld, *Faulty Analysis in Easement and License Cases*, 27 YALE L.J. 66 (1917), applying Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning* 1 & 11, 23 YALE L.J. 16 (1913) and 26 YALE L.J. 710 (1917).