I. COST BARRIERS TO LITIGATION CREATE A FREEDOM FROM CONTRACT

A. The Vanishing Contracts Trial

In an important sense, there is a great deal of freedom from contract. Many, and probably most, parties to contracts disputes do not litigate or even threaten to do so. Some know that if they went to court...
renegotiate their deal, and one side can give up its rights when the letter of the deal would burden the other. This may not please the one surrendering rights, but it may be the best solution available. Kagan suggests that the decline in debt collection cases coming before the courts can be explained in part by what he calls “systemic stabilization.” This involves “the development of large-scale economic and social institutions that ameliorate the conditions that cause individual conflicts or that provide collective, administrative remedies (as contrasted to case-by-case legal remedies).” We can look for such institutions that cope with potential contracts cases.

Nonetheless, the explanation for the decline in contracts filings and trials may be only that they do not pay in light of their costs. Samuel, reasonable certainty, Hadley v. Baxendale, and the difference in value rule of Peevyhouse v. Garland Coal & Mining Co. all undercut recovery of very real but unquantifiable intangible losses. Also, a major reason a party does not perform a contract is that he or she or it is broke. A judgment may give you only a worthless claim in bankruptcy. Thus, the contract cases worth litigating form only a very limited subset of all the contracts disputes, and even a victory in court may produce no more than a settlement. Of course, to call being priced out of the market for a contracts trial a form of freedom from contract may strike many of us as ironic. In that sense, I also have a freedom from contract to buy $100,000 automobiles or multimillion dollar houses. I confess that I had never before thought of the salaries at the University of
offer can reflect a careful appraisal of the seller's legal position. Other settlements, however, involve great freedom from contract. Instead of looking to respective rights and duties created in the past, the parties, or their lawyers, may seek a new solution to the problem that now confronts them. The seller may redesign the product. The price may be modified. The terms of the contract may be altered. A new contract could be created. The seller could包袱 the costs of the new product. The buyer could bargain for the changes in the contract terms. In any case, the parties are not bound by the old contract terms and can seek a new solution to the problem.

Wayne Atwell, an analyst at Morgan Stanley, said that in

new processes or additional costs to meet the quality requirements, that's their issue to manage."
B. ADR: Big Corporations Take the Pledge

Another likely explanation for the decline in contracts case filings and trials is the rise of alternative dispute resolution (ADR). ADR refers to a wide variety of processes and institutions, and they are very hard to study in any depth because privacy and secrecy are one of the attractions of many types. There are many forms of court-annexed ADR that are now common place, but there are a wide variety of institutions that exist very much apart from the courts. "Equitable Law..."

bar and business world," and they include retired judges, former CEOs of major corporations, and former cabinet officers. Thomas Stfanowich, the head of CPR, describes a process of dispute resolution that is very different from the enforcement of contract rights:

Instead of receiving evidence and arguments and judging disputes, [the CPR Distinguished Neutrals] actively facilitate discussions of issues by the parties themselves, often meeting..."
Some initial resistance to the pledge was overcome when the companies realized that it did not involve arbitration, which many view as expensive and time consuming as litigation. Some lawyers question the nonbinding nature of the pledge, but many business people can that however, some rough estimates. CPR studied 291 corporations between 1990 and 1992. The corporations collectively saved $153 million on court costs, including legal fees, by settling through private mediation in disputes where more than $5 million was at stake. More recently, CPR
is clearly wrong and litigation may be warranted. ADR involves giving up your rights.40

The CPR pledge means that when a major player in American, if not international, capitalism faces a potential dispute with another major player, there is a process in place that can provide a wide freedom from legally enforceable contract. Of course, the potential for contracts litigation remains if creative solutions cannot be found, but potential litigation often acts as an incentive to find a solution to problems rather than a vindication of rights. As Bryant Garth tells us: “the elite have a full array of alternatives, including the federal courts, which they can use for tactical and other reasons.”41 And we must remember that a dispute between these parties often would be the kind of case that we embalm in our casebooks. These are the major firms who have complex contracts and who have access to lawyers. These are the repeat players.

to get almost all contracts carried out in an acceptable fashion if not precisely to the letter of the contract documents. When relationships collapse, often it would be better to leave the parties where they are rather than to engage in costly and time consuming litigation.43 Moreover, Professors Scott and Stephan in their article in this Symposium point to experiments in social psychology that suggest:

Without coercive enforcement, reciprocal fairness generates high levels of performance. But once the interaction is based by coercion, reciprocity declines and overall performance is reduced. These experimental results suggest that self-enforcing motivations based on reciprocity and explicit, coercive incentives may indeed be in conflict with each other.
As I have detailed elsewhere, I admire Scott's work greatly, and I learned much from Scott and Stephan's article about international agreements. Scott draws on the ideas of relational contract theory. He looks to empirical work and social science beyond economics. He recognizes that his approach might have significant costs in certain types of cases. He is suggestive rather than dogmatic. However, as I have said before, I am not totally convinced. As I read Scott and Stephan, I kept saying "yes, but . . . ." I also kept reflecting that they may be right.

I can find examples that support their arguments, up to a point, in my own research. For example, I reported:

Even where agreement can be reached at the negotiation stage, carefully planned arrangements may create undesirable exchange relationships between business units. Some businessmen object that in such a carefully worked out relationship one gets performance only to the letter of the contract. Such planning indicates a lack of trust and blunts the
Another of my informants expressed his views about coercion when matters reached the stage of dispute resolution:

[I]f something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't go to lawyers if he wants to stay in firm's product] when he has no use for it." A lawyer with many large industrial clients said,

Often businessmen do not feel they have "a contract"—rather they have "an order." They speak of "cancelling the order" rather than "breaching a contract." When
Even the chairmen, chief executives, and biggest shareholders of 

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The contract litigation process may also maintain a vague 

game of threat that keeps everyone reasonably
remedies" when idiosyncratic investment creates incentives for opportunistic behavior. Whitford continues: "A legal realist might argue that a judge armed with promissory estoppel and quantum meruit remedies can do almost anything she could with expectation damages." This is particularly true in situations where such doctrines as mitigation, Hadley v. Baxendale, or proof with reasonable certainty limit consequential damages.

Scott has called for a very different approach to contracts cases than we find in Article 2 of the Code. He criticizes the uncertainty involved in the present law, and he studied decisions under this statute and found that they did not work out problems and create certain default rules. In short, he found that every case turns on its facts. When we add in the costs of litigation and the delay often involved, I have suggested, however, that the present situation may be the best of a collection of bad

option to enforce the transaction under the agreed-upon terms supplemented with terms that are the most favorable (within reason) to the defendant." He offers an example where a landlord and tenant leave the amount of the rent to be agreed. He then says: "Imagine that the reasonable monthly rent for such property varies from $3000 to $5000. He says that if the landlord sought enforcement, the price would be $3000; if the tenant were the plaintiff, the price would be $5000. While I like Ben-Shahar's argument, I think that determining the most favorable (within reason) terms for each parties often will be difficult. At the least, this uncertainty may support my case that we are providing incentives to settle rather than litigate in many situations. If courts were to follow Ben-Shahar's proposal, many would rather buy their way out than invest in the uncertain task of finding the most favorable term for the other side. Of course, some would be unable to afford to litigate or seek a settlement and would just have to drop the
means of filling the incomplete contract... Finally, the presence of sunk costs and bilateral monopoly will mean that "both buyer and seller are strategically situated to bargain over the disposition of any incremental gain whenever a proposal is made to adopt by the other party."  

She and Scott reach very different conclusions. I think she makes a good case for the approach we find in Article 2 of the Code. However, we still have to add to her argument that often the chance that a court liability, but business marches on in the absence of much law. But the lawyers are there, and my colleague Kathryn Hendley tells us that there may be far more contract law in Russia today than we might think. Moreover, I like protecting some reliance on contracts whether or not the parties thought that their deal was legally enforceable. I think that in all but a few situations, people expect at least a minimum standard of good faith when they are in negotiations. I am persuaded that American contract law often comes close to what Friedrich Kessler and Edith Fine describe as the continental European approach in their article, Culpa in Contract: Good Faith, and Freedom of Contract.
If circumstances changed so that developing the optioned property made economic sense, he or she would have done so. Even a situation of mixed motives would present problems.

For example, the album notes to *Ella Fitzgerald Sings the Duke Ellington Song Book* say: "Ella and [Norman] Granz have become close friends: on the basis of a handshake and no contract, he has been her
chance that Fitzgerald might be able to sue would undercut Granz strong sense of obligation to her. But, as always, I could be wrong.

and White differed sharply. Zeidenberg did not accept White’s judgment. Zeidenberg saw himself as the good guy in the drama. To him, ProCD was the villain.
ProCD had translated telephone directories into digital form, and it sold a collection of CD-ROM disks with the results. It charged consumers a lower price than it charged businesses. The U.S. Supreme Court had decided that telephone listings in an ordinary telephone directory could not be copyrighted. 19 This informal avenue for copyright

Suppose a consumer bought a Gateway computer, and let us assume that it was completely defective. Easterbrook's opinion would tell the consumer that she or he had made a contract to arbitrate because she or he had opened the box in which computer was shipped and not returned
desired effect. Whatever your view about the ProCD case as a matter of policy, there is also a process issue: we have a lengthy opinion by U.S. District Judge Barbara Crabb that analyzes Wisconsin law on this point in great detail. She is one of the most able judges on the federal bench. Easterbrook never tells us what is wrong with her opinion about Wisconsin law, and his analysis of that law says little more than that Wisconsin has enacted the Code. Then he proceeds with an analysis of that statute in an opinion that White brands as "slippery." Whatever

any other person or agency. I like his argument. Gateway can defeat the expectations of its customers only within limits and only so far. I remind you that American Motors sold almost a half million Renault Alliances and Encores. They got a reputation as having poor transmissions and suspensions and sales stopped cold. The market can work.

Indeed, although they come to much the same result, I like Ian Macneill's approach much better than Easterbrook's.
And are consumers as innocent and unaware as we proconsumer contracts teachers paint them? Do not most people in America know about fine print and roughly what it says? During her comments at this Symposium, Professor Jean Braucher objected to the many references to a speaker's intuition. When in a tight spot, just make up the data; this is, after all, the classic law professor's way. Leaving a new form of hard

woman’s panties. There is another one from that magazine that shows a form contract that ends “so stop whining, sign or don’t sign, but face reality for once in your life, because this is the way the world works, pal.” Again, these cartoons would not be funny if most of the audience did not recognize the situation. Many Americans, if not most, know that we are surrounded by fine print, and it says whatever happens
Moreover, products such as computers, are rated by websites,\textsuperscript{120} special magazines,\textsuperscript{121} as well as Consumer Reports. In March of 2004, that magazine reported "a recent survey of more than 48,000

\textit{Reports} offers a chart that shows that Gateway is second from the bottom in machines needing repairs during the years 1999 to 2003. Almost fifteen percent of its machines needing repairs were
can put things right or who can talk knowledgeably with the person on
the other end of the help line.\textsuperscript{128}

Indeed, we can ask what difference it would have made if ProCD
and Gateway had taken heroic measures to communicate to potential
customers that only a limited license to use a product was being sold or
that disputes would have to go to arbitration. Professor Russell
Korobkin points out: "[d]ecision research does provide a basis . . . for
predicting that terms found in form contracts frequently will be non-
salient to most buyers."\textsuperscript{129} With apologies to Braucher, my intuition is
that most consumers would have read past the most clear disclosures
possible about these topics without thinking about them.\textsuperscript{130}

\textsuperscript{128} A columnist with the \textit{Financial Times} reported e-mail responses to his
report of problems with his new Dell computer.

Many of my new e-mail friends understand that money means leverage.
Since computers ignore shareholders at their peril, they recommend making
complaints through the investor relations department, not the customer or
technical divisions . . .

Equally, this being America, connections matter . . . I am deeply
grateful to several respondents in Texas, who offered to bring my case to
Michael Dell's personal attention, claiming to know him, his wife or the
lawyer who helped him incorporate in the first place.

\textsuperscript{129} Yet I return to my argument that our present inconsistent judicial
reaction to hidden form contracts such as Gateway's original one may,
and I repeat may, be the best that we can hope for as computer prices
fall. But I would want to know whether the arbitration and warranty
coverage puts in place some incentive for the seller to avoid disputes and
handle those that do result in a tolerable fashion. The original Gateway
clause was a pure sham. But it was declared unconscionable,\textsuperscript{131} and
journalists and academics jumped on Gateway.\textsuperscript{132} Gateway then tried to
fashion an arbitration clause that looked fair,\textsuperscript{133} and the one it now uses
is fairly close to that used by Dell.\textsuperscript{134} Both use the National Arbitration
Forum's ("NAF") procedures\textsuperscript{135} that at least look like dispute resolution
rather than evasion.

The NAF makes an elaborate case for its services at its website.\textsuperscript{136}
It has posted, among many things, its "Code of Procedure," a
"whitepaper" called "Arbitration vs. Lawsuits," a collection of "What
the Courts Say About the Forum," and "Arbitration Bill of Rights with
Commentary." One NAF marketing document\textsuperscript{137} states:

\textsuperscript{130} literate than most, but this is not necessarily so. See Alan M. White & Cathy Lesser

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company because of the desire to be selected in future arbitration proceedings. The appellate court said:

We . . . are not prepared to say without more evidence that the 'repeat player effect' is enough to render an arbitration agreement unconscionable. However, given the low threshold of substantive unconscionability in this case we find the lack of mutuality as to arbitrable claims together with the disadvantages to the employee in using NAF as the arbitration

Rather, it permitted a Federal court to publish its onerous arbitration term and to denominate it as "unconscionable." Either Gateway was poorly advised with respect to the effect of the term on its business or, more likely, it concluded that even a reported judicial decision parsing its form contract would have virtually no impact on its business.
the FTC has regulated the typeface and clarity of auto leasing deals.\textsuperscript{154} The \textit{Wall Street Journal} tells us:

(N)early a dozen automotive financing companies are fighting lawsuits from African-Americans who allege that the policies regarding not disclosing that dealers may mark up finance...
warns that "beliefs that one social class 'gets too much,' rapidly convert the psychology of exchange from that of goods to that of harms." It is one thing if some do better than others when they play by the rules of the game. It is something else if those who come out on top do so by tricking others and having their deceptions supported by the legal system. It is easy to overstate the importance of the law of contracts. Relational sanctions and private governments do most of the work of protecting expectations and reliance. Contract law in practice is a flawed product that costs too much in most situations. Nonetheless, law can matter. The chance that a court might upset outrageous behavior by a transactor makes some contribution to the trust necessary to make any economic system work.162

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"\ldots\text{... I do not mean to suggest that trust in public...}"