



Osgoode Hall Law Journal

Volume 22, Number 1 (Spring 1984)

Article 2

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Citation Information

Macneil, Ian R.. "Bureaucracy and Contracts of Adhesion." *Osgoode Hall Law Journal* 22.1 (1984) : 5-28.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol22/iss1/2>

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Bureaucracy and Contracts of Adhesion

Abstract

Under the political theory of the liberal state, there is no adequate traditional justification for contracts of adhesion. Professor Macneil seeks to locate their legitimacy in the nature of modern bureaucracy. He demonstrates how this mode of legitimation sets limits for government intervention. In his conclusion, Professor Macneil emphasizes the significance of his analysis for a fuller understanding of the validity and the complex operation of contracts of adhesion.

Keywords

Adhesion contracts

BUREAUCRACY AND CONTRACTS OF ADHESION*

BY IAN R. MACNEIL**

Under the political theory of the liberal state, there is no adequate traditional justification for contracts of adhesion. Professor Macneil seeks to locate their legitimacy in the nature of modern bureaucracy. He demonstrates how this mode of legitimation sets limits for government intervention. In his conclusion, Professor Macneil emphasizes the significance of his analysis for a fuller understanding of the validity and the complex operation of contracts of adhesion.

I. INTRODUCTION

Standard form consumer contracts, or “contracts of adhesion,” pose a very serious problem for the political theory of the liberal state. In that theory, only two justifications exist for applying rules to anyone, both founded on consent. One is individual or contractual consent, whereby individual manifestation of a willingness to be bound in relatively specific ways constitutes submissions to rules (sometimes hereafter called “liberal contract”). The other is collective consent, whereby democratic state processes yield the application of rules by the sovereign.¹

Before turning to the relation between these two justifications and contracts of adhesion, a number of the characteristics of such contracts should be noted. Although some of their content, for example, the goods to be taken and the price to be paid, is usually known to the consumer to some degree when the contract is made, many of the terms in the documents are not. In short, consumers do not read long documents. They do not, therefore, consent in the sense of understanding that to which they are consenting. Moreover, no one can honestly say that consumers *ought* to read long documents of this kind. The many

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* James L. Lewtas Lecture on Commercial Law, Osgoode Hall Law School, October 13, 1983. Except as noted the text has been kept close to the lecture as given; footnotes are added. I should like to express my appreciation for comments received after the lecture at Osgoode and at the Faculty of Law, University of Windsor, where an earlier version was presented, and from Roderick Macneil.

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¹ To the extent that other justifications for the liberal state are asserted, the argument in this article may not apply. Not only, however, does this duality seem to capture the essence of most liberal justifications, but it is the presupposition underlying the most recent examination of the theory of adhesion contracts; see Rakoff, *Contracts of Adhesion: An Essay in Reconstruction* (1983), 96 Harv. L. Rev. 1174. As well as the key earlier works, Professor Rakoff treats those of Llewellyn, Kessler, Leff, and Slawson. See *id.* for citations to these works.

courts which over the years have casually or not so casually said that ignore the fact that if consumers actually did such a foolish thing the modern economy would come to a screeching halt.

The delightful case of *McCutcheon v. David MacBrayne Ltd.*,² is illustrative. It involved the shipment of a car via the only boat line serving the island of Islay in Scotland. As Mr. McCutcheon said of the twenty-seven paragraphs of conditions in MacBrayne's shipping documents, "Och well, the reading and understanding would be taking half a day, and then we would be missing the boat altogether."³ Extrapolating from a small Hebridean island to the larger world, imagine the disaster at the Toronto airport, even on a slow day, if each customer insisted on reading — or worse, reading and understanding — all the terms on which the ticket is offered by the airline. These are not, of course, just the relatively few words that can be crammed on the ticket itself, but the whole body of bureaucratic regulation incorporated by reference and considered essential to the management of relations between a bureaucratic airline and its customers. Obviously, any court saying that consumers "ought" to read the terms of long contracts of adhesion can only be making a very poor joke.

Nevertheless, in *McCutcheon*, Lord Devlin accepted — pensively, but without serious question — that had the shipping documents been signed or read, McCutcheon would have been stuck with the twenty-seven paragraphs of small print. This was so even though Lord Devlin clearly believed that no one in his right mind would read those paragraphs. Yet the fundamental idea of liberal contract is not just to choose to be bound in some undefined way, but to choose with some degree of precision how and to what one is bound, or at least to be

² [1964] 1 All E.R. 430, [1964] 1 W.L.R. 125, [1964] Scots L.T.R. 66.

³ There is some poetic license in this "quotation." It is a vernacular synopsis of Lord Devlin's account:

The appellant, Mr. McCutcheon, described the negotiations which preceded the making of this formidable contract in the following terms:

"Q. Tell us about that document; how did you come to sign it? A. You just walk in the office and the document is filled up ready and all you have to do is sign your name and go out. Q. Did you ever read the conditions? A. No. Q. Did you know what was in them? A. No."

There are many other passages in which Mr. McCutcheon and his brother-in-law, Mr. McSparran, endeavour more or less successfully to appease the forensic astonishment aroused by this statement. People shipping calves, Mr. McCutcheon said (he was dealing with an occasion when he had shipped 36 calves), had not much time to give to the reading. Asked to deal with another occasion when he was unhampered by livestock, he said that people generally just tried to be in time for the boat's sailing; it would, he thought, take half a day to read and understand the conditions and then he would miss the boat. In another part of his evidence he went so far as to say that if everybody took time to read the document, "MacBrayne's office would be packed out the door." Mr. McSparran evidently thought the whole matter rather academic because, as he pointed out, there was no other way to send a car. *Supra* note 2 at 435-36 (All E.R.), 132 (W.L.R.), 69 (Scots L.T.R.).

reasonably able to do so. Thus the liberal requirement of consent to those terms is far from met in *McCutcheon*, even if the documents had been signed or read.⁴

Nor would collective democratic consent have justified binding McCutcheon to the unknown world of those twenty-seven paragraphs. It is true that MacBrayne is a socialist enterprise owned by the State. Hence MacBrayne might have asserted that the islanders, through their voice in Parliamentary elections, consented to anything Parliament allowed its creature, MacBrayne, to put in its shipping document. But MacBrayne has never had the nerve to take this position. It concedes that its relations with customers are of a private, contractual nature.⁵ Indeed, one of the ironies of life for those dependent on MacBrayne is that its behaviour is indistinguishable from that of any capitalist monopoly. I daresay many people would say the same of Air Canada.

Thus it appears that neither branch of liberal legitimation justifies binding consumers to the small print of long adhesion contracts. This appears to force a choice between the only two possible legal results consistent with liberal legitimation. One is that the legal system ignores liberal theory and goes ahead anyway, sticking the consumer with unknown terms, subject to such limiting doctrines as substantive uncon-

⁴ In an important recent article, *supra* note 1 at 1177, Professor Rakoff limits contracts of adhesion to the following "model":

- (1) Printed form with many terms purporting to be a contract.
- (2) Form drafted by or for one party.
- (3) Form user routinely enters numerous transactions of type represented by form.
- (4) Except for a few identified terms, e.g., price, form presented on take-it-or-leave-it basis, explicitly or implicitly.
- (5) Adherent signs the document.
- (6) Adherent enters few transactions of type represented by form, at least compared to form user.
- (7) Principle obligation of adherent "in the transaction considered as a whole" is the payment of money.

The keystone of Professor Rakoff's model contract of adhesion is the fourth characteristic, that of take-it-or-leave-it; characteristics (1) — (3) and (6) are simply factors leading to the form user's being able to adopt a take-it-or-leave-it position. Characteristic (5) is a mere matter of form, and there is no hint in any of Professor Rakoff's discussion that it is important. Characteristic (7), a highly problematic one, is discussed, *infra* note 30.

Professor Rakoff's model omits, among other things, the absence of reading and of understanding as essential elements. This is so not because he believes that reading and understanding usually occur, but because their absence is not essential to the points he makes. These absences are "simply normal concomitants of the use in our type of society of contracts of adhesion as defined by the model stipulated above." *Id.* at 1179-80. The occurrence of reading and understanding do not eliminate the problems he sees with enforcing adhesion terms.

⁵ "The drafting party neither holds nor conceives of itself as holding a distinctively public office." Rakoff, *supra* note 1, at 1212-13. As will be seen, I believe that all bureaucracies, public and private, do in fact and law hold distinctively public offices conferred on them by society and its formal manifestation, the State.

scionability, fairness, etc., as the court sees fit to use.⁶ If this illiberal route is not followed, the only alternative — under the two liberal legitimations discussed earlier — appears to be to erase MacBrayne's twenty-seven paragraphs. But someone must supply the terms governing whatever subjects those paragraphs covered when they came into issue. In liberal theory that someone can only be the state — the legislature, the administrators, the courts, or some combination.

There is, however, an alternative analysis both solving the problem of legitimation and focusing on the really important questions in contracts of adhesion. That analysis starts with the idea of bureaucracy and, in particular, three aspects of modern bureaucracy: the nature of modern bureaucratic organizations, the bureaucratic effect of modern goods and services, and consumers as bureaucratic functionaries. Following a discussion of these, I shall explore their relationship to contracts of adhesion and liberal theory.

II. BUREAUCRACY

A. *Nature of Bureaucracy*⁷

Bureaucracy, as the term is used here, is a particular form of governance of human affairs dominated by reasoned and detailed planning.⁸ A bureaucrat is anyone participating in the affairs so governed. It may be noted that bureaucrats thus defined are a far larger class than the term commonly implies. The word usually evokes images of paper-shufflers. But here it includes the bulldozer operator, the plumber, and the carpenter just as much as it does the construction supervisor and the architectural engineer and the lawyers who put together the construction contract and the city planners approving the construction and the wheeler-dealers, public officials, and elected politicians who filled up at the public trough to finance the project. Above

⁶ *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.), a Llewellynesque case, is an example of this very common North American approach, which is treated by Professor Rakoff, *supra* note 1 at 1190-97.

⁷ This section has been revised since the Lewtas lecture; it is now essentially the same as the revision of a similar section in another lecture, *America, Bureaucracy, and the Legal Profession*, forthcoming.

⁸ Reasoned and detailed planning of human affairs by non-bureaucratic governance is also possible.

It is a safe bet that a sizeable part of any audience thinks of bureaucracy mainly in terms of *public* bureaucracy, and that some think of it mainly pejoratively, in terms of *bad* public bureaucracy. Most emphatically I have neither such limitation in mind. I mean no less than any bureaucracy, private as well as public — whatever that distinction means, (see *The Public/Private Distinction* (1982), 130 U. Pa. L. Rev. 1289 *et seq.*) and good as well as bad — however you measure goodness and badness.

all, the term "bureaucrat" encompasses everyone as consumers. We are all bureaucrats most, if not all, of the time.

Bureaucracy refers both to a generic form of governance — a concept — and to any particular bureaucratic organization. Thus the Toronto-Dominion Bank is a bureaucracy, York University is a bureaucracy, Osgoode Hall Law School is a bureaucracy, Ontario Hydro is a bureaucracy and Parliament is a bureaucracy. All of Canada is a bureaucracy — an immensely complex one, of course, and the whole world economy is an even more complex bureaucracy. These usages — the general concept and the particular application — reflect the inter-linked nature of bureaucracy in a world in which it is the overwhelmingly dominant form of social organization.⁹ Turning now to that form, we can see what factors differentiate modern bureaucratic organizations from other forms of human governance.¹⁰

The characteristics of a modern bureaucratic organization may be summarized by seven salient features: Interconnections and boundaries; purposes and goals; specialization and fragmentation; planning; control; individual duties and rights; external bureaucratic effect.¹¹

1. Interconnections and boundaries

Bureaucratic organizations are always interconnected with other bureaucratic organizations and with people, thus forming part of an

⁹ It was not always thus. The medieval church, for example, was a relatively advanced bureaucracy at a time when many of those with whom it interacted were not otherwise governed very bureaucratically. Similarly, the early railroads were even more advanced bureaucracies when most of their customers were heavily bureaucratic only in dealing with railroads and a few others, such as government.

¹⁰ As will be seen, each element of bureaucracy as here defined is as old as man himself, although they all took quantum leaps in pervasiveness with the agricultural revolution and the development of civilizations. What this Article is treating is, in essence, the consequences of more quantum leaps resulting from the age of "enlightenment," the industrial revolution, and all their accompaniments and aftermaths. We are thus not strictly speaking of bureaucratic and non-bureaucratic, but of relative levels of bureaucracy.

¹¹ The following discussion is much influenced by Max Weber and Herbert Simon. But modern bureaucracy is obviously different from prototypical Weberian bureaucracy, and modern bureaucrats are often different from prototypical Weberian bureaucrats. Weber viewed bureaucrats largely as those who are basically full time specialists internal to the organization. As a description of early Prussian bureaucracy this may have been a useful limitation, but certainly its narrowness obscures our vision of Weber's time, and even more so of our own. In today's bureaucratized world everyone, like it or not, is a bureaucrat virtually all the time. But except as employees and, for many, as TV watchers, we seldom act "full time" in any particular specialty, but engage in countless part time bureaucratic specialties, *e.g.*, driving our cars, shopping in supermarkets, listening to our stereos, using our refrigerators, staying in Holiday Inns, being hospital patients, etc. While the part time character of most of our bureaucratic activities most certainly affects the nature of our bureaucratic roles, it makes them no less bureaucratic as the term is used in this paper.

ever changing relational configuration.¹² Because of this interconnectedness it is, strictly speaking, inaccurate to refer to anything less than the entire world economy as "a bureaucratic organization." Anything less than that, such as York University or Canada, is always only a part of a larger bureaucratic organization. Looking in the opposite direction, we cannot separate individual people from any part of a bureaucratic organization with which they have ties sufficiently close to interest us. The interconnectedness of all parts of the bureaucratic structure with other parts and with the lives of people does not and cannot produce some kind of melded Universal Mind and Purpose. People remain people, and parts of the worldwide bureaucratic organization remain separated parts or centres within the overall organization.¹³ Because of this, it is convenient to speak of parts of the worldwide bureaucracy as if they were separate bureaucratic organizations.¹⁴

Because of the combination of separateness and interconnectedness, bureaucratic organizations have internal and external boundaries. External boundaries separate their goals, their people, and their things from other goals, other people, and other things. Although the nature of the external boundaries takes many forms, such as those established by General Motors' property rights and by the legal rights of its creditors, some forms of external boundaries are always present.

As soon as bureaucratic organizations are recognized to be composed of separate but interconnected centres,¹⁵ the idea of internality arises. Some goals, things, organizational sub-centres, people, are now thought of as being inside the organization. Because of this, internal boundaries are generated which separate the goals and things of the bureaucratic organization from the goals and things of organizational sub-centres and, most importantly, of the organization's own people.¹⁶

¹² Roderick Macneil's phrase, letter to author (October 17, 1983). In terms of relational contract theory, bureaucracies are a species of contractual relation. See I. Macneil, *Values in Contract: Internal and External* (1983), 78 Nw. U. L. Rev. 340.

¹³ The idea of a single worldwide bureaucracy is consistent with, but does not depend upon, Wallerstein's ideas of the world economy. See Wallerstein, *The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis* (1974), 16 Comp. Stud. in Soc. & Hist. 387. Acceptance of the existence of a single worldwide bureaucratic organization is not essential to acceptance of the propositions in this Article. Recognition of the United States or Canada as single complex bureaucratic organizations will suffice.

¹⁴ It is, of course, also very dangerous. This is particularly so when we reify parts of the organization — as we always do to some degree — into names such as Apple, The Canadian Navy, and The University, because it is very easy to forget their intense inter-connectedness with other organizations.

¹⁵ It matters not whether they are identified as bureaucratic organizations or only parts of a larger bureaucratic organization.

¹⁶ Boundaries between subcentres of bureaucratic organizations may be external for both parts; for example, a law faculty and a faculty of arts and science in the same university. Or,

Both internal and external boundaries are, *inter alia*, physical, psychological, social and legal. Because of interconnectedness, both kinds are also permeable, and somewhat artificial. Consider, for example, the idea of "company time." When an employee checks into work, his time until he checks out is owned by the company. But there is no way that his time can cease to be his time as well as the company's, no way in which his time can be so separated from his psyche that it becomes company time and only company time. This permeability also exists in the external boundaries between centres in larger bureaucratic organizations; witness, for example, the constant flow of personnel between regulatory agencies and their regulatees.¹⁷

2. Purposes and goals

The bureaucratic organization has purposes and goals. For example, the purposes of Osgoode Hall Law School are teaching, research, and public service. But all those connected with the organization also have their own purposes and goals. These are never more than partially in accord with those of the organization. The divergence is extremely important, because the permeability of the boundaries between the organization and the individuals makes complete separation of organizational goals from individual goals impossible. Inevitably, the individuals will do a great deal to manipulate the organization in order to achieve their own goals rather than the putative goals of the organization. To put it another way, in varying degrees every person — however mighty or lowly — in the bureaucratic organization captures it and turns it to his own purposes.

3. Specialization and fragmentation

Both the people and the things in the organization are *highly* specialized — the people in training, skills, and activities, even states of mind — the things in function, structure, appearance. This specialization both reflects and causes the highly specialized work product of any modern bureaucracy; law offices are not hospitals, automobile plants are not professional football stadiums. But those are gross categories

boundaries may be external for one and internal for another; for example, the boundary between a law faculty and its university is external for the law faculty and internal for the university. For most if not all of the purposes of this Article, the important fact is the existence of boundaries, not whether they are internal or external.

¹⁷ It may be noted that the sentence in the text is phrased in terms of a single bureaucratic organization comprising the regulated and the regulator. The example refers to the United States experience; perhaps Canada is blessedly backward on this score.

and hardly capture the picture; it would be better to say neurologists are not neurosurgeons, transmission mechanics don't do mufflers, and running backs, at least in American football, do not throw forward passes, or when they do it is considered some kind of minor miracle when one is completed.¹⁸ Specialization has been intensifying for a thousand years or more in the western world, and continues to increase today, apparently at an ever increasing rate.

With specialization inevitably comes fragmentation, specialization itself being a fragmentation of effort. But the fragmentation of effort causes fragmentation of other kinds. Among these are fragmentation of organization, of roles, of social solidarity, of interest, of outlook, and of personality.

4. Planning

Partly because of specialization and fragmentation, and partly for other reasons — such as technological demands *per se* and the living dynamic of bureaucracy itself — everything about the bureaucratic organization tends to be highly planned.

a) *Goals and purposes*

Planning covers not only overall goals and purposes but also very specific subjects, such as the specific work product itself. A look at the shelves of any supermarket, or even more, the display windows of Radio Shack, will demonstrate the latter point.

b) *Structures and operations*

Next, the means by which goals and purposes are achieved — the operations and the connections between operations — are highly planned. The automobile assembly line epitomizes both the result of such planning and this phenomenon itself.

c) *Roles*

Roles are also heavily planned. This planning is encompassed in the very names of jobs: word processor operator, lathe operator, accountant, electrician, electronic assembler (with countless gradations), etc.

5. Control

a) *Supervision*

Since accomplishment of organizational goals requires that plans actually be carried out, performance of tasks pursuant to the plans is

¹⁸ I think; I have watched little football for a long time, and even when I watched it was not with what might be called a high degree of sophistication.

normally supervised to assure compliance with them.

b) *Coercion*

Supervision implies the right to use coercion, the nature and limits of which are themselves typically planned and also subject to supervision.

c) *Techniques*

Modern bureaucracies use two fundamental techniques to control behaviour. One is the use of a wide range of communication media, especially documentary but increasingly electronic. The second is the use of forms of capital the bureaucracy acquires or produces. All of us are familiar with both techniques, but the importance of the form of capital itself as a means of bureaucratic control is rarely expressly recognized. And yet it is the most effective of all. A building, an assembly line, an airplane, a typewriter, a word processor, a highway, a bulldozer — all of these and infinitely many more specific forms of capital are among the most effective techniques bureaucracies have to control behaviour of their bureaucrats. Unlike other forms of communication, in large measure capital not only communicates, but, as will be seen,¹⁹ carries its own coercion right along with it. Thus, the greatest law makers and law enforcers in the world today are not people, but products.

d) *Vertical and horizontal*

Control in a bureaucracy is exercised both hierarchically, between numerous levels of authority, and horizontally, through co-ordination and co-operation among relative equals. Formal control is typically hierarchical, as is true of much informal control. On the other hand, a great deal of *informal* control is either horizontal among equals or self-imposed. These dual characteristics of vertical and horizontal control permeate all aspects of the activities of the organization.

6. Individual rights and duties

The effect of individuals' having planned and supervised roles, subject to limited organizational rights to coerce, is the creation of individual duties and rights, with correlative rights and duties of the organization.

7. External bureaucratic effect

The bureaucratic patterns just described are not limited to the internal conduct of the organization. The *only* way in which a bureaucratic organization can deal with persons and things seemingly outside

¹⁹ See text, *infra* at notes 20-23.

its boundaries is bureaucratically. A bureaucracy is as incapable of *nonbureaucratic* behaviour in relation to outsiders as it is to insiders; it thus imposes bureaucratic patterns on anyone dealing with it, irrespective of *why* they are dealing with it.

B. *Bureaucratic Effect of Modern Goods and Services*

Goods and services have always had effect on the lives of their users beyond the obvious ones relating to their main purposes.²⁰ The introduction of the heavy plow in medieval Europe, for example, did not simply increase the quantity of crops produced in heavy soils. It also caused major changes in organization of work, in land use, in land ownership, and in the social structure. Modern goods and services are no exception, and it should come as no surprise that bureaucratically planned and produced goods and services cause bureaucratic behaviour among their users. It was this phenomenon to which I referred when I said that use of particular *forms of capital* is one of the two chief techniques of bureaucratic control.

It may help to refer to a specific example and its relation to three key elements of bureaucratic behaviour: specialization, planning, and control. It is an appropriate one since the Maple Leafs had their opening home game just last night.²¹ It is the Zamboni, the machine used to smooth ice rinks. The Zamboni is, of course, a highly specialized product, virtually useless for anything except one narrow function. I suppose in a pinch it could be used for a bathtub, but any use other than smoothing ice rinks is extremely marginal.²² When whoever makes such decisions for Maple Leaf Gardens elects to buy a Zamboni, its very presence at the rink constitutes detailed planning of the behaviour of Gardens employees. Both what it will do and what it will not do governs their behaviour. An employee will drive it, not pick it up and use it like a shovel or a mop — and not just drive it, but drive it the way a Zamboni has to be driven, which is quite different from driving a sports car or a big rig or a forklift. Moreover, the workable speed of the Zamboni effectively plans *when* it will be used. Unlike mechanisms available before its invention, it is fast enough to do a whole rink between periods of a hockey game. But it is not fast enough to smooth the

²⁰ The comments, *supra* note 10, that man has always been bureaucratic also pertain to the bureaucratic effect of goods, even of the most simple kind.

²¹ October 12, 1983; the Leafs tied.

²² After I gave the Lewtas lecture I was told that the Toronto Blue Jays had recently used a Zamboni to pick up water from their baseball field. Even the most specialized equipment can always be found to have *some* other uses!

rink during a timeout. Thus it will be used between periods, but not at timeouts. Nor is the Zamboni agile enough to get in and around hockey goals; thus its operation plans the activities of at least a couple of other employees who must remove the goals and the pins holding them in place and return them after the Zamboni has done its job. Undoubtedly, a Zamboni expert could say much more along these lines, but what has been said is enough to illustrate the point.

We look at capital like Zambonis, computers, buildings, washing machines, etc., as objects to produce goods or services we find of value. And so they are. But so mesmerized are we with this view that we forget that they are also means of planning and its communication, and not just communication, but command, and not just command but enforcing command. It is virtually impossible to over-emphasize this point. Not only is a Zamboni a planner, a communicator, a commander, and an enforcer, all rolled into one complex object, but it is incredibly efficient on all those scores. Once it is acquired and an employee is trained to operate it and told when the rink should be smoothed, the planning, communicating, commanding, and most of the enforcing is virtually self-executing. In short, a Zamboni is a miniature bureaucracy all in itself, and an exceptionally effective one.

Obviously, the forms capital takes will vary greatly in their capacity to perform these bureaucratic functions. Relatively simple tools like hammers perform such functions in very limited, although real, ways; complex tools like petrochemical plants in very extensive ways. The Zamboni is somewhere in a vast middle on this score. But few, if any, of the tangible things belonging to bureaucratic organizations lack this capacity altogether. This fact is closely connected with the third subject to be mentioned before dealing directly with the question of legitimation of adhesion contracts.

C. *Consumers in the Role of Bureaucratic Functionaries.*

Consumers are bureaucratic functionaries in many ways. For example, every time a person goes into a supermarket, takes goods off the shelves, puts them into the cart, takes them to the checkout counter, removes them, and keeps an eye on the cash register, that person is performing bureaucratic tasks which a generation or two ago were performed only by employees of the store. That the customer — a part-timer — is doing it rather than the sales clerks — full-timers — alters not in the slightest the bureaucratic nature of these functions or that they are part and parcel of the *customer's* work for the store.

This particular consumer participation in the bureaucracy of the supermarket occurs *before* the goods of the bureaucratic supermarket

cross over its external legal boundary and become the consumer's goods. In other instances — for example, the treatment of a patient in a hospital — the consumer's participation in the bureaucracy occurs contemporaneously with acquisition of the services. In others it comes *after* acquisition of goods. But the consumer's acting as a bureaucratic functionary is by no means dependent on the point at which he acquires ownership of the product. Indeed, the time of acquisition is largely irrelevant in terms of understanding how the consumer becomes a bureaucrat. What *is* relevant is that the goods and services supplied to consumers exercise bureaucratic control over consumers throughout the lives of the goods or services in question, in exactly the same way as does the Zamboni. When a person buys a dishwasher, or a frozen dinner, or a TV, he has bought plans for future behaviour, communication of those plans, commands that they be performed in certain ways, and forms of enforcement if they are not. It is true that the commands and their enforcement are all conditioned on the person's deciding to go ahead and use whatever it is he has acquired. He can, after all, easily throw the thing away.²³ It is true that his continuing as a bureaucrat is voluntary,²⁴ but that does not mean that he is not a bureaucrat while he continues. He will discover this the hard way if the dishwasher is installed improperly, or if he leaves the TV dinner unfrozen too long before cooking and eating it, or if he sticks his finger into the back of the TV while the interlock is connected and the set is plugged into the electric socket.

Not only are these goods bureaucratic, but they are also, as are most consumer goods, goods of adhesion, to use the late Arthur Leff's phrase.²⁵ Like documentary contracts of adhesion, one's participation in making them ranges from quite to extremely limited. Outside those limits one takes them or leaves them. Inside those limits one's participation in making them is heavily bureaucratic.²⁶

Services, as much or more than goods, convert consumers into part of the bureaucratic apparatus of the supplier.²⁷ Even a simple thing like a haircut involves the consumer in a number of bureaucratic processes.

²³ Actually, even that is not always true — consider the disposal of such dangerous objects as pressurized cans or large objects like freezers.

²⁴ It is voluntary in terms of obligations, legal, or otherwise, to the purveyor. Typically, however, the pressures leading to acquiring the goods in the first place lead to their use after acquisition.

²⁵ Leff, *Contract as a Thing* (1970), 19 Am. U. L. Rev. 131 at 145.

²⁶ Of course, there are great variations: a bare canvas, miscellaneous oils, and brushes, are obviously less bureaucratic than a paint-by-number set.

²⁷ Services almost always involve goods, which add to the bureaucratic effect.

More complex services, such as medical services in a hospital, often integrate consumers into the medical bureaucracy in virtually every aspect of their lives, indeed far more extensively than medical personnel themselves.

The supplying of both bureaucratic goods and bureaucratic services is often accompanied by planning and control of the consumer by documents (or other communication media, such as electronic types) emanating from the bureaucratic centre(s) in question. These take countless forms, among them instructions for using goods, institutional regulations, notices in buildings and computer programming. Very often this documentary planning and command is just as important, in terms of benefits the consumer seeks to acquire, as the basic good or service in question.²⁸ For example, resort hotels typically hand to guests upon registration extensive descriptions of facilities, location, times of opening, who can use them, and on what terms. Without the information they contain, utilization of the facilities may be thwarted and a wide range of difficulties may be encountered. These documents, which we commonly associate with bureaucratic planning, command, and enforcement,²⁹ combine with the capital itself — restaurants, swimming pool, sauna, tennis courts, golf course, etc. to convert the vacationer into a bureaucrat throughout the stay — a happy one, we hope, but a bureaucrat nonetheless.

To summarize to this point, bureaucratic patterns of behaviour are engendered not only through words (oral or printed) and other means of communications, legal structures, and the like, but by the *use* of goods and services produced by bureaucracies. Consumers thus become functionaries of bureaucracies both by documentary contracts and by the processes of acquiring and using goods and services supplied by the bureaucracies. Both goods and documents are commonly adhesive in nature.³⁰

²⁸ In the case of some products, such as computer programming, it may be almost impossible to distinguish the basic good from the "mere" communication.

²⁹ The consumer may receive them earlier, when making the reservations, and in the eyes of traditional contract law that may affect his rights, but in terms of normal functioning of the relation it makes little difference when they are received; their final bureaucratic effect is identical.

³⁰ Recognition that acquisition and use of consumer goods and services are part and parcel of the whole bureaucratic enterprise puts Professor Rakoff's definition of contracts of adhesion, *supra*, note 4, in a very different perspective. His limitation of the definition to instances where "[t]he principle obligation of the adhering party in the transaction considered as a whole is the payment of money" takes on singular importance. He included the limitation to eliminate "certain interactive relationships that might also be evidenced by standard forms used on a nonnegotiable basis, but in which the drafting party may be constrained by *continual need to generate cooperation and effort on the part of the adherent*. Certain long-term business relationships and some employment

III. LEGITIMIZING CONTRACTS OF ADHESION³¹

But what does this have to do with MacBrayne's shipping documents and their twenty-seven paragraphs of small print? First, it may be noted that in our economy the idea of the consumer's being committed by consent to the unknown or to take-it-or-leave-it propositions is hardly peculiar to documents. Whenever a consumer buys any bureau-

contracts fall within this excluded category." Rakoff, *supra* note 1, at 1178. (Emphasis added.) (The modifier "some" in reference to employment contracts is strange, as is a footnote reference describing a franchise as a "borderline case of a contract of adhesion." Under both the limitation set out in the definition and the reason given for the limitation, all employment contracts and all franchises would be excluded. Some unexpressed agenda seems to underlie Professor Rakoff's thinking on this point.)

If use of goods and services is an essential part of the bureaucratic enterprise of supplying consumer goods and services, then bureaucratic purveyors in *all consumer transactions* have a "continual need to generate cooperation and effort on the part of the adherent." And use *is* an essential part, for without it the entire producer-consumer structure would fall apart, since no one would buy anything. (It may be noted that the "need to generate co-operation and effort on the part of the adherent" is the only specific element Professor Rakoff attributes to his "interactive relationships.")

It follows from the foregoing that limiting the term "contracts of adhesion" to those where "[t]he principal role of the adhering party in the transaction as a whole is the payment of money" would leave the term applicable only to a virtually empty set in real life. Or to forget the jargon, there are not many to be found. And, even though Professor Rakoff states his limitation not in terms of role, but in terms of legal obligation, it is clear from examining his underlying reasons for that limitation — quoted above — that it is role rather than presence or absence of legal obligation that really matters. The presence or absence of any *legal* obligation to use a consumer good or service once acquired is entirely irrelevant to existence or nonexistence of the purveyor's need for cooperation and effort on the part of the adherent.

If Professor Rakoff is to deal with the adhesion contracts of the real world, his definition must be expanded. But expanding the definition to encompass contracts where the consumer (or others fitting the rest of his definition) have roles beyond paying money would open up a Pandora's box of troubles for his analysis, namely the whole "interactive relationship" problem he now carefully avoids. But the troubles are there in the real world; the consumer in fact has the roles Professor Rakoff wants to avoid considering.

It seems to me that Professor Rakoff is very much subject to the same criticism (albeit for a different reason) he aims at Llewellyn, Leff, and Slawson: "They have not followed the practice [of using contracts of adhesion] back to its roots in the relationships of individuals to large institutions and forward into its implications for the relationship of those institutions to the social order as a whole." *Id.* at 1215-16.

The foregoing should not be taken to indicate complete disagreement with Professor Rakoff's conclusions. I think there may very well be some circumstances where one of two legislative or judicial approaches are appropriate: (1) Professor Rakoff's presumption of unenforceability, followed by an opportunity for the form-supplier to justify the terms affirmatively, or (2) reading the contract as if the terms had never been inserted in the first place, thereby simply leaving gaps to be filled in the usual way legislatures and courts fill gaps in contracts. (My own preference tends towards the second.) As will be seen, however, my conclusions are not based on the liberal principle as Professor Rakoff appears to accept it, but on the practical matters he explores. See, for example, his discussion of the difference between business expertise and drafting expertise, *id.* at 1204-1205.

³¹ The word legitimize — synonymous with legitimate — is not used here in the Weberian sense attacked in Hyde, *The Concept of Legitimation in the Sociology of Law*, [1983] *Wis. L. Rev.* 379, nor in the other three senses Hyde describes as "quite common," *id.* at 381, n. 1, nor in Habermas' sense, *id.* at 399, n. 45. Rather it is used in a fairly common lay sense of the word: make something conform to recognized principles. In this case, the "recognized principles" are those of the liberal state, as defined at the start of this Article.

cratic good he is being committed by consent both to the unknown and to take-it-or-leave-it goods. There are few, if any, bureaucratic goods about which even the most well-informed consumer knows everything at the time of acquisition, or indeed ever, and few, if any, offered except on some take-it-or-leave-it terms. This similarity between goods and services on the one hand and printed standard terms on the other suggests either that both ways of binding consumers are legitimate or that both are *illegitimate*. If bureaucratic goods are legitimate ways of binding consumers to the unknown, why not bureaucratic documents? If bureaucratic documents are *illegitimate* ways of binding consumers because their contents are unknown, why are bureaucratic goods not equally illegitimate on that score?³² But which is it, are both legitimate or are both illegitimate?

To answer this question it is, I believe, necessary to re-explore the fundamental liberal ideas of consent and their relation to contracts. The beginning of this Article describes the idea of specific individual consent — contractual consent — as separate from the idea of democratic collective consent. But these two forms of consent are intimately connected in the world of contract, the world of exchange.

In the liberal model, contractual consent — consent to exchange — occurs in the first place only because of the coercion made possible by rights of property and rights of liberty. Each party to any potential exchange starts with the right *not* to surrender his property and *not* to surrender his liberty. Each potential party to a contract thereby has power over the other. This makes it possible for each to coerce the other, however much that power in each may find its justification in concepts of individualism and rights to be let alone. Thus, the only way a potential exchanger can secure desired property or services is to con-

³² Analyzed in Professor Rakoff's terms of "take-it-or-leave-it," *supra* note 4, the questions remain fundamentally the same: if bureaucratic take-it-or-leave-it goods are legitimate ways of binding consumers, why are not bureaucratic take-it-or-leave-it documents equally legitimate ways of binding consumers? If take-it-or-leave-it documents are *illegitimate* ways of binding consumers, why are take-it-or-leave-it goods not equally illegitimate?

It may be noted that the essence of all the characteristics in Professor Rakoff's definition of contracts of adhesion may be restated in terms of bureaucratic goods and services:

- (1) Tender of the good or service purports to be contractual, and its various standardized parts become part of the resulting contract.
- (2) Good or service is made by or for one party.
- (3) Producing party routinely enters numerous transactions in this type of good or service.
- (4) Good or service is, except for some dickered parts, *e.g.*, various options, presented on a take-it-or-leave-it basis, explicitly or implicitly.
- (5) Adherent takes the good or service.
- (6) Adherent enters few acquisitions of the good or service, at least compared to the supplier.
- (7) Principle obligation of adherent "in the transaction considered as a whole is payment of money." Problems with this characteristic are discussed, *supra* note 30.

vince the other potential exchanger that it is in his interest to supply them, to give up his property or liberty. Only one proper way exists to do this: to offer something valued by the other party. These mutual powers to coerce — founded on property and liberty rights — do *not* themselves arise from the individual consent of these parties. Rather, they come from society.³³ In the theory of the liberal state these rights of property and liberty are legitimized by *collective* consent to the existence and support of such rights, such collective consent being exercised through democratic processes.

Thus we find that the idea of individual consent, upon which our traditional notions of contract are based, is in fact set upon a foundation of coercion made possible by property and liberty, which themselves are legitimized by collective consent. With that thought in mind we can now return to contracts of adhesion and to the consumer as bureaucrat.

What the consumer agrees to in purchasing a bureaucratic product is to *become a bureaucrat* as defined by both the known and the unknown natures of that product. Similarly when he accepts a product knowing that it is accompanied by documentary terms he agrees to *become a bureaucrat* as defined by both the known and unknown documentary terms. In principle he is no different on this score than if he had signed up formally as an employee of the organization in question, one whose job is to acquire and use the product in accordance with its bureaucratic nature and with bureaucratic directions of the employer.

In the traditional contract theory described earlier, however, there is no justification for restraining the consumer either by the unknown nature of the product or by unknown documentary terms. In that traditional theory the only legitimate coercion comes from rights of property or liberty coupled with specific individual consent to the making of *known* changes in those rights.

There is, however, another well-established strand of contract which has not been mentioned and which is quite, quite different. Liberal society has always recognized numerous legitimate *relations* into

³³ Even if one believes that rights of property and liberty are conferred on man as a matter of the natural law of a *deus ex machina*, as a practical matter rights of liberty and property come from society, including its formal manifestation in the State. Certainly any theory traceable to an idea of man-the-atom, whether liberal, utilitarian, or otherwise, must, to be consistent, recognize that such rights come from society as embodied by Leviathan. It may be noted that acceptance of this proposition reduces the public-private distinction to a level far less basic than that often accorded to it. (I mention this point because Professor Rakoff, *supra* note 1, at 1197-1220, stresses alleged failures of prior analyses to transcend the distinction. Private rights are, just as the Marxists have always asserted, an arm of society, although, for a non-Marxist and maybe for many Marxists these days, not necessarily an arm of a dominant class.)

which entry is by consent, but the content of which is largely unknown at the time the consent was given. This is the idea of joining a relation. We can join a law firm or a university faculty or any other employment relation; we can join the army; we can join a corporation by buying its shares; we can join in holy matrimony. In each instance we can do so in spite of large-scale ignorance about the restraints we are accepting. In spite of our ignorance liberal society will bind us to those unknown restraints. All that is required — besides our individual consent to join — is that the kind of relation in question be one upon which the collective stamp of approval has been impressed.³⁴

At this point the reader may be forgiven for thinking that I have been playing a shell game. Having said that liberal society has only *two* bases for restraining its members, now I have introduced a third: consent to join an approved relation. And so I have, but I shall not apologize. My excuse is that mainstream liberal thinking avoids the existence of relations like the plague, because the concept of relation, particularly when it is given the common label of status, is anathema to the individualism upon which liberalism is based. Thus, although liberal societies have *at operating levels* always — and necessarily so — used the consensual status route to *de facto* legitimation, liberal *theorists* largely ignore such legitimation. Instead they try to squeeze legitimation into one of the other two categories first mentioned.³⁵ Legitimation by consent to relations approved by society is, whenever possible, hidden in the liberal intellectual closet.

Now it is possible to see how contracts of adhesion are legitimized. Contracts of adhesion are the product of two legitimations by collective democratic processes of the modern liberal state. One of these is the legitimation of what I shall call the consumer-mission, the mission of seeing to it that consumers have, at relatively low prices, vast quantities of the goods and services so dear to most of the denizens of the modern liberal state.³⁶ The second is the legitimation of the bureaucratic rela-

³⁴ Property itself creates such relations, but without any consent (except the collective consent of society) of people subject to the property rights of others.

³⁵ Sweeping statements of this nature are probably best left undocumented and to the general sense of approval or disapproval of the reader. If the statement is reduced to include only liberal American analysts of adhesion contracts, reference may be made to Professor Rakoff, and those writers discussed in his article, *supra* note 1.

³⁶ The phrase "seeing to it" includes in this context seeing to it that consumers use the goods and services, as well as that they acquire a right to use them. While widespread acquisition of rights to use may be sufficient to achieve goals of the modern state, such as high levels of employment and apparently high levels of "standard of living," in the long run acquisition depends on consumer perception that the goods and services can be and will be used by them in achieving final consumption. Even conspicuousness of consumption (as a goal in itself) is largely dependent on some form of use.

tion *per se*, particularly in the service of the consumer-mission. This is, of course, the relation of most purveyors of goods and services of adhesion and suppliers of documentary contracts of adhesion. Both the consumer-mission and the bureaucratic relations that encompass consumers and that are required to carry out that mission are thoroughly legitimized by the democratic processes of the liberal state. The entire political structure, whether one views that phrase narrowly in terms of government or more broadly to encompass, for example, corporations and labour unions, is geared up from top to bottom to keep the cornucopia of bureaucratic goods and services ever-flowing. Let inflation, business cycles, or taxation slow the flow even moderately, and governments fall like matchsticks in a hurricane. In the modern liberal state the consumer-mission is the most legitimate of all modern activities and bureaucracy is the most legitimate of all modern relations. Thus, of all the statuses extolled in the modern liberal society, that of bureaucratic-consumer is held to be the highest of them all.³⁷ Each enterprise supplying consumer products thus has the *collective approval* for its proceeding bureaucratically — the only way it can — analogous to that given property and liberty in traditional contract. Add to that the consumer's consent to *join* any particular bureaucracy by buying its product, and the second leg of liberal legitimation of goods and documents of adhesion is satisfied.

IV. LIVING WITH CONTRACTS OF ADHESION

The particular principles by which a social institution is legitimized has many effects, of which three need mention here.³⁸ First, the legitimizing principle shapes our very perceptions of the institution. Second, the legitimizing principle sets *outside limits* on the feasibility and appropriateness of legal responses to the institution.³⁹ Third, the

³⁷ There is no room in liberal theory for the idea of status. The statuses existent in all known human social relations can be viewed through the lens of liberal theory only as social aberrations. For example, quota or quota-like programs for the benefit of racial or linguistic minorities or for the female majority, which create the status of Black, French, or Female, can be justified under liberal theory only as most undesirable expedients (means) to achieve social conditions in which those statuses can be abolished (ends). But the argument of expediency does not work respecting the status of consumer-bureaucrat, because its nurturing *is* the end of the present liberal state. Thus one may not expect to find in writings based on liberal theory overt recognition of a status as an acceptable permanent condition. Overt recognition requires either abandonment of liberal theory (as the term is used in this Article) or abandonment of the consumer-mission as it currently prevails in the liberal state. The former is unattractive theoretically, the latter is impossible politically.

³⁸ "Legitimized" continues to mean conforming to the principles of the liberal state discussed at the beginning of the Article.

³⁹ It has similar effects on other social responses as well; for simplicity the discussion is lim-

legitimizing principle serves as one of perhaps many *guides* to what the legal responses within those limits *should be*.

Consider, for example, traditional contract. Our idea of the nature of contract is so much shaped by the legitimizing principles of property, liberty, and individual consent, that we often find it very difficult even to think about contract in any terms other than those of a traditional contract law founded on those principles. In addition, traditional contract, because of that legitimation, leaves only limited range for interfering with so-called freedom of contract.⁴⁰ This is true not only in the ideological sense, but even more so in the practical sense. History is, for example, strewn with the wreckage of efforts, such as peacetime rent control, where this lesson has been ignored. Finally, within the outer limits imposed by this particular legitimation, principles of property, liberty, and consent provide guidance for the resolution of a wide variety of conflicts. For two reasons, however, within the outer limits those principles provide only guidance, not definite answers. First, conflicts always exist within any legitimizing principle itself; for example, between the principle of liberty and the coercion of consent.⁴¹ Second, there are conflicts with principles lying outside these legitimizing principles. For example, principles of equality, which may prompt wealth redistribution by governmental regulation, often conflict with the legitimizing principles of traditional contract.

Similarly, any method of legitimizing contracts of adhesion will shape our perceptions and will as well establish outer limits and guides (but not clear answers) for legal intervention within the outer limits. The traditional legitimations through consent have been found, upon careful examination, simply not to work within the limits of liberal theory.⁴² That leaves us with only the legitimacy suggested in this Article: legitimacy through the consumer-mission and bureaucratic ways of accomplishing it. By legitimizing consumer-bureaucracies such as the Ford Motor Company and allowing — indeed encouraging — consumers to become their functionaries by purchasing their products, society has shaped our perceptions of the relations created by goods of adhesion and documentary contracts of adhesion. Our perceptions are those of a consumer whose role in all respects, including the legal obligations

ited to legal effects.

⁴⁰ I label it "so-called" not because of a distaste for it, but because freedom of contract is a misleading term; for most purposes it is better called "power of contract."

⁴¹ This conflict, as well as the difference between choice and consent, is explored in Macneil, *supra* note 12, at 356-59.

⁴² This is the point, insofar as legitimation is concerned, made by Rakoff, *supra* note 1, as well as by Leff and Slawson, whose work he analyzes.

and rights attached to the role, is indistinguishable in any general sense from that of any other bureaucrat.⁴³ In addition, this legitimation has created outer limits and guides to what society can and should do in overseeing the status of consumer-bureaucrat, whether by law or otherwise. The *outer limits* are ignored at the peril of either destroying Ford or so transforming it that its consumer-mission can no longer be performed. The *guides* are ignored at the peril of *partially* frustrating the consumer-mission of producing large numbers of relatively low cost automobiles.

V. THEMES

No exploration of these matters in any detail is feasible here. It is feasible only to show some of the themes that must run through any approach to contracts of adhesion which recognizes their consumer-bureaucratic nature.

One theme concerns the nature of the technique available to society when it uses sovereign law to interfere with contracts of adhesion as developed by the consumer-bureaucracies. There is only one such technique: the sovereign has only public bureaucracies available to interfere with contracts of adhesion.⁴⁴ Only other bureaucracies are capable of dealing with private bureaucracies or anything beyond a mere joining or adhesion basis. This requires us to rephrase any noble principle of controlling business greed, harshness, and overbearing power exercised through contracts of adhesion. The only workable "principle" along

⁴³ By definition, all bureaucratic roles are specialized roles; hence, the role of a consumer is not identical to the role of an employee, but then the role of an employee is not identical to that of a shareholder, or, for that matter, any other type of employee. Interestingly enough, particular consumer specialities can be, and often are, far more ubiquitous than any employment speciality; e.g., almost every Canadian and American over three or four years old is a TV-user specialist part of the time.

⁴⁴ Recognition of this fact should give pause to anyone enamored with my colleague Michael Perry's call for the United States Supreme Court to act as a major moral voice in the society. Perry, *The Constitution, the Courts, and Human Rights* (1982). (Perhaps similar calls have gone forth respecting the Supreme Court of Canada; whether they have or not, the new Charter of Rights virtually begs for creation of such a role.) Morality voiced only through the bureaucratic legal process available to the United States Supreme Court has defects and costs that Professor Perry has not addressed. The recent action of the United States Supreme Court in requiring (as a matter of statutory, not constitutional, right) unisex life expectancy tables for calculating retirement benefits is illustrative. *Arizona Governing Committee, etc. v. Norris*, 103 S. Ct. 3492 (1983). Presumably the Court was voicing what it would consider to be a moral view against sexism. (Which is more sexist, unisex or sex-based tables is, however, debatable, and it is by no means clear who makes a net gain from universal use of unisex life expectancy tables.) But the Court's morality will most assuredly be expressed primarily through bureaucracy. As Sophie Korczyk of the Employee Benefit Research Institute noted: "The group that everyone agrees will thrive [on the decision] . . . is 'the benefits consultants. They will be raking in a lot of fees.'" *Time*, July 18, 1983, at 34.

these lines becomes:

Our public-bureaucracy will interact with their private-bureaucracy in constantly ongoing resolution of the conflict between their assessment of what will attract consumers to join their bureaucracy (or at least not deter their joining) and our public-bureaucratic assessment of what the terms of that consumer-bureaucratic status should be.

Nobility of thought tends to disappear under such circumstances. All too often it is replaced by the sweetheart relations typically arising between the regulated and the regulators, a major curse of the administered capitalist state.

A second theme concerns effectiveness in accomplishing the consumer-mission. By and large, the liberal states have shown very limited interest in taking over the design, production and distribution of consumer goods and services. There is a widespread view that public bureaucracies cannot accomplish the consumer-mission as effectively as can so-called private bureaucracies.⁴⁵ As long as this view prevails, what society can or should do to interfere with the consumer-bureaucratic status is severely limited.⁴⁶ This is true whether the bureaucratization is established by goods and services themselves or by documentary contracts of adhesion. The question is always: if the public bureaucrats get in there and mess with this good of adhesion or this contract of adhesion, can the business still deliver the goods?

A third theme concerns the vector consumer-bureaucracies take. While the consumer-mission is largely assigned by the modern state to private bureaucracies, there is a sharp difference between their mission and their motives. Their mission is to produce large quantities of goods and services at relatively low cost. Their motive is a desire to reap profit, power, growth and internal employment.⁴⁷ There is neither total

⁴⁵ The public nature of private property and liberty, discussed, *supra*, text at note 33, makes "private bureaucracies" in both fact and theory a special type of public bureaucracy. In addition, any bureaucracy is by definition a law-maker in every sense of the word except that "private bureaucracies" cannot through sovereign law directly invoke force and confiscation to enforce their laws. (They can, of course, do so indirectly, by invoking property, liberty and contract rights.) To the extent we associate law-making on a large scale with the word "public", large "private bureaucracies" are in fact public.

⁴⁶ Professor Rakoff accepts this as one of his premises as to goods and services, but not as to documentary contracts of adhesion: "With regard to mass-produced goods, government, at least in the absence of revolutionary economic change, must take private production for granted and adopt a reflexive, regulatory stance; production of standardized legal terms is, by contrast, governmental stock-in-trade." *Supra* note 1, at 1209-1210.

⁴⁷ The last may require explanation for some readers who have no trouble accepting the first three motives. To the extent that the "motives" of the consumer-bureaucracy are those of upper-level management, that management is, of course, concerned about its own continued employment. In addition, wherever there is unionization, job security will be a goal of the union, and, to the extent it has power, a goal imposed on upper-level management. And, if one is not completely cynical about these things (and I for one am not) one may believe that many of the more powerful

harmony nor total disharmony between mission and motive. The consumer vote in the marketplace is a powerful force towards harmony of motivation and mission, but far from all powerful. And to the extent there is disharmony, public intervention must be considered. Considered, mind you, not automatically chosen. Before public intervention respecting anything, including contracts of adhesion, is chosen, it is necessary to remember that society has but one means of intervening — public bureaucracy. Its potential effectiveness and costs in the circumstances must therefore be considered. Among the points to be recognized is that deviation between mission and motive is every bit as serious, if not more so, in public bureaucracies as in private bureaucracies. Unfortunately, the vote of the citizen in establishing the directions of the public bureaucracies often seems pitifully weak on this score. Thus, just as the vector of private consumer-bureaucracies may and does veer from the consumer-mission, so too may and does the vector of public bureaucracies veer from their legislatively assigned missions.

A fourth theme concerns competing legitimacies. The consumer-mission is far from the only mission legitimized by the modern liberal state. Nor, as was suggested earlier in connection with traditional contract, is that mission free of its own internal conflicts. Competing legitimacies, including paternalistic ones adopted by collective consent, such as wealth distribution, may give rise to legal interventions respecting both goods of adhesion and documentary contracts of adhesion. Of course, if pressed too far this intervention could prevent performance of the consumer-mission. Moreover, the effectiveness of such intervention may be limited, and no one can guarantee that the vector any public bureaucratic tool actually takes will be the one putatively assigned to it. But none of these potential problems will necessarily arise, and public intervention to promote competing legitimacies is always a live possibility.

Finally we come to a dark theme, the existence of which few like to admit, but which is more prevalent than we like to think. This theme is the deformed lovechild of the union of power-seeking and pure reason. It has no proper place in the theories of the liberal state, but its ubiquity in that state requires consideration in any realistic discussion. Human beings have an inordinate love of power, of being able to move their brethren and sistren in directions other than those in which the siblings would otherwise go. At no time is this love more dangerous than when it is meshed with pure reason. And of all the human social

members of consumer-bureaucracies, i.e., upper level management, mean what they say when they take on the role of creators of jobs.

institutions in existence, bureaucracy most exemplifies — even though it corrupts — pure reason. Thus in any debate about the roles of either private or public bureaucracies respecting goods of adhesion or documentary contracts of adhesion, the effects of this evil combination must, if we wish salvation, be kept in mind.⁴⁸

VI. CONCLUSION

I shall conclude by remarking on the sharp contrast between the complexity of analysis appropriate to deal with contracts of adhesion, and the relative simplicity of the questions raised by the traditional contract approach to them.⁴⁹ Traditional contract poses two questions: (1) Did the person adhering consent, either by knowing the contents of the form or because he ought to have known them? (2) Do the rights of property and liberty extend far enough to justify giving full effect to the consent they coerced in this situation?

In modern times, the first traditional question gives rise to an immensely simple answer: consumers remain unbound by the great mass of fine print purportedly governing their contractual relations, to say nothing of remaining unbound by the unknown contents of the goods they buy. MacBrayne, Air Canada, and Ford Motor beware if legislatures and courts ever start being true to traditional contract principles! The second traditional question gives rise to simple answers such as “Yes” or those apparently somewhat more complex answers based on principles like unconscionability and unequal bargaining power.⁵⁰

These traditional questions and answers are very simple indeed compared to the analysis required when we view contracts of adhesion as inevitable extensions of bureaucracy, and those adhering to them as becoming consumer-bureaucrats. Complexity is raised to a whole new

⁴⁸ The editors kindly allowed this statement to remain, in spite of their distaste for its — to their eyes — hyperbolic nature.

⁴⁹ “Traditional contract approach” refers to a “pure” one based on the theory of the liberal state described at the beginning of this article. As mentioned, *supra* note 6, the supposedly traditional contract approach actually applied by various courts often departs from that “pure” approach. The reader will have noted that this article is addressed to the legitimations actually or putatively underlying law, not to the actualities of current law-in-action in North America or elsewhere, except to suggest the bureaucratic character of that law-in-action.

⁵⁰ I use the word “apparently” in the text because these doctrines can, and often do, become not tools of analysis, but clichés to confirm gut feelings of judges and other writers. Unequal bargaining power is one of the great mindless clichés of the day. Most often the term seems to be a screen for avoiding facing the fact that undesired inequalities arise from the existence of property and bureaucracy. These inequalities have little or nothing to do with bargaining or deals *per se*, and trying to redress them by focusing on contract rather than on property and bureaucracy is fruitless, hypocritical, and incredibly costly. When such “doctrines” are used as clichés, they provide simple answers in sophisticated clothes.

order of magnitude as soon as everything to do with goods of adhesion and documentary contracts of adhesion is viewed in terms of effective and responsive bureaucracy. Principles become lost in the meandering corridors of bureaucratic structures. Individual consent loses its sharp, knowledgeable focus when the consent is to become a consumer-bureaucrat. Democratic consent loses its legitimacy as it forces its way through complex legislative, administrative, and judicial structures and emerges unrecognizable at the other side. And even that metaphor is too generous, because the consent never emerges anywhere, it just oozes into the private bureaucracies through their almost unrecognizable interfaces with the public bureaucracies. Like everything else created by the melding of utilitarianism, pure reason, modern technology, and modern bureaucratic governance, goods of adhesion and documentary contracts of adhesion are now complex beyond all human capacity to deal with them.

If this complexity, whether concerning contracts of adhesion or other aspects of modern life, raises serious problems, the solution is not to be found in the usual palliatives offered by concerned tinkerers with the liberal state. But they are also not to be found while accepting the legitimacy of the bureaucratic consumer-mission as the *summum bonum* of society. The solution can only be found in efforts to undo the unholy mixture just mentioned. Doing that involves sacrifices we are presently unwilling to make.⁵¹ Until we are prepared to make those sacrifices, we can understand contracts of adhesion, but our legal responses to them can be no more than limited, and in many respects unsatisfactory, compromises of both utility and principle.

⁵¹ The directions we shall have to go are discussed in Macneil, *Bureaucracy, America, and the Legal Profession*, *supra* note 7.