The Behavioral Theory of Contract

By

Zev J. Eigen

J.D. Cornell Law School, 1999
B.S. Industrial and Labor Relations, Cornell University, 1996

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Signature of Author: _____
Sloan School of Management
April 29, 2009

Certified by: _____
Thomas Kochan
George Maverick Bunker Professor of Management
Thesis Supervisor

Certified by: _____
Susan Silbey
Leon and Anne Goldberg Professor of Humanities
Thesis Supervisor

Accepted by: _____
Ezra Zuckerman
Nanyang Technology University Professor of Management & Economic Sociology
Chairman, Committee for Graduate Students

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ABSTRACT

This work develops a theory of contract grounded in empirical analysis of individuals' experience with and interpretations of form-adhesive contracts. Form-adhesive contracts are unilaterally drafted, typically by organizations, intended for multiple signers. They are offered on a take-it-or-leave-it basis, with no opportunity afforded to negotiate in the traditional sense during the pre-agreement phase. This type of contract dominates the way in which exchange relationships between organizations and individuals are governed in many areas of contemporary life—including, but not limited to, employment, medical treatment, intellectual property licensure, telecommunications, and social networking. The theory poses the question, "how do individuals experience and interpret these agreements?" and explores the relationship between the answer on one hand, and two other elements on the other: (1) socio-economic exchange between the drafting organizations and signers, and (2) trust in the rule of law.

The first part of the dissertation explains the theory. The second part explores the theory's empirical basis in an employment relationship. Employees' interpretations of a mandatory-arbitration agreement they signed as a condition of their employment are compared to MBA students' interpretations of the enforceability of a similar clause. MBA students with considerably greater educational attainment and employment opportunities are found to be significantly more likely to believe that they could escape the contract's terms to which they consented than employees of a large, national electronics retailer with consistently less education and fewer job opportunities. For both MBAs and employees, regarding the signed agreement as unenforceable is correlated with a greater likelihood of viewing the employment relationship as one devoid of trust or loyalty.

In the third part, a large-scale web experiment is used to measure the behavior of signers of a form-adhesive contract. Both pre-agreement conditions varying the adhesiveness of the contract and post-agreement prompts (legal, moral, social and instrumental) urging signers to continue to perform as the contract purportedly requires are tested as competing determinants of contract performance. Results suggest that when subjects see and choose the contract term during the pre-agreement consent phase, they are more likely to perform as that term purportedly requires in the post-agreement performance phase, and that prompting contractual performance based on

an appeal to morality generates the greatest rate of performance. Consistent with the behavioral theory advanced in this research, a legal threat is associated with a level of contractual performance no better than a control condition in which subjects were requested to perform the same task, except without signing any contract requiring performance of that task.

Thesis Supervisor: Thomas Kochan
Title: George Maverick Bunker Professor of Management

Thesis Supervisor: Susan Silbey
Title: Leon and Anne Goldberg Professor of Humanities

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Part 1: Introduction: Theory & Background

Introduction

In a way, this dissertation is about everything, and in another way, it is about nothing. It is about everything because it articulates a theory about contract, and contract is at the heart of all social and economic exchange. The theory is based on observation of how individuals experience and interpret the most common contract prevailing in relationships between organizations and individuals in contemporary life. That earns another point in the "about everything" column because relationships between organizations (employers, hospitals, service-providers, etc.) and individuals (employees, patients, consumers) are as important as they are quotidian. If contract is a "social artifact" as Suchman (2003) convincingly argues it is, we can learn a great deal about the socio-economic exchange relationships between the organizational and individual contractors by studying their agreements.

On the other hand, this dissertation is about nothing because it examines our collective experiences with and interpretations of *fine print*, "boilerplate" form-adhesive contracts—those pesky, unavoidable *legal* speed-bumps that slow our ability to start a job, receive medical care or otherwise engage as productive social members. Why bother studying such tiny, albeit ubiquitous creatures? What impact could they have? The rest of this part of the dissertation addresses these questions more fully, but the short answer, beyond the response alluded to above (that contract is worthy of study as artifact, among other things, and is therefore a useful means of understanding important relationships between the drafting parties and how individuals regard the rule of law generally), is "termites." If perceptions of law are like a house, there is a strong argument that it is worth studying the effect of hurricanes, fires or earthquakes on the house. In these instances, one big event could drastically alter or destroy the house. By analogy, something like the Rodney King trial or O.J. Simpson's criminal exoneration could be regarded as an earthquake—a single event that caused mass confidence-loss in the rule of law (Gibson

1991; Nadler 2005: 1400, 1426; Tyler and Rasinski 1991). Form-adhesive contracts are like termites. One of them is not going to harm the house. Nor would a few of them. But I argue that our collective *house*, our collective faith in the rule of law, is infested with millions of termites taking the form of form-adhesive contracts. They are in the kitchen, the bathroom, bedrooms, and eating away at the drywall and foundation. Everywhere you look in the house, there are form-adhesive termite-like contracts, quietly devouring the foundation of our faith in the rule of law, in tiny, singularly undetectable bites. It may not be as obvious as the damage caused by a fire, flood or earthquake, but I argue, quite worthy of study nonetheless.

The Over-Arching Goal

The over-arching goal of this dissertation is to articulate a novel theory of contract, which I call a "behavioral theory of contract." In the broadest sense, I do this to explain the interconnectivity among three things: (1) socio-economic exchange, particularly focused on the exchange relationships between organizations and individuals (primarily the employment relationship), (2) experiences and interpretations of contract, and (3) trust in the rule of law. This work asserts that how individuals experience and interpret contracts is an important yardstick by which to measure the viability of social and economic interaction, including, and most closely focusing on, the "social contract."

The next few paragraphs outline the progression of the argument underlying the theory. After that, in the rest of this first part of the work, I explain the rationale for the approach adopted. This is followed by a brief historical account of the evolution of contract, which is important for understanding how the behavioral theory of contract fits into the existing framework of contract, law and exchange between organizations and individuals.

The remainder of the dissertation is divided into two parts. The second part includes the first set of studies reporting on the empirical support of the theory in the employment context. The third part steps back to search for empirical support of the theory in the most marginal of cases—a form-adhesive contract in a single-transaction exchange on the internet where anonymity theoretically minimizes the social and moral normative effects on perceived enforceability, and the low dollar amount at stake and readily available alternatives to the exchange minimize the

effects of socio-economic power and dependence on resources. Overall implications for the work are discussed in the conclusion.

Progression of the Argument of the Theory

The progression of the overall argument of the behavioral theory of contract advanced in this work is as follows: First: Existing theory states that contract underlies economic exchange and functions as a bedrock on which our capitalist economy rests (McIntyre 1994; Schwartz and Cartwright 1973; Weber 1954). The law is an important part of the relationship between contract and capitalist exchange. Without it, enforcement of contracts would default to extra-legal means such as violence, power and dependence or other potentially undesirable, inconsistent and unpredictable means. The rule of law, and our collective trust in the enforceability of "binding" promises, therefore, is a critical component of sustaining a viable economy.

Second: Voluminous research on the "social contract" theorizes that individuals feel obligated to reciprocate the receipt of certain fair and equal treatment by the state with socially correct and desirable behavior (Thibaut 1968; Tyler 1997). This reciprocity of fair and just treatment occurs not just in the relationship between the state and individual citizens, but between organizations (employers, banks, etc.) and individuals (Kochan 1999; Kochan and Shulman 2007) as well. Theory posits that the opposite of this positive reciprocal exchange of fairness for obedience happens too: More perceived ***un***fairness and ***lack*** of justice in law (to the extent that law deviate from moral normative expectations) corresponds with a potentially reciprocal desire or tendency to flout the law or avoid it (Budd 2004; Engel 1995; Ewick and Silbey 1998; Spencer 1986; Tyler 2006).

Third: Contract enables the most powerful social actors, which in contemporary bureaucratic life are typically organizations like employers, banks, etc., to enact "private law" in which the state is always a third party even to the most private arrangement (Durkheim 1933; Ehrlich 1936; Weber 1954). These powerful social actors exploit contract law's legitimized law-making power to replicate pre-existing power imbalances (in the resource-dependence sense) vis-à-vis "binding," enforceable contracts forced upon individuals dependent on these actors for the resources they

control. Contract law conforms to these power-replicating ideals without announcing this fact, lest the less powerful individuals learn of this and diminish the degree of respect for the law and hence the power of the more powerful actors. This conforms with Nonet and Selznick's (1978) classic theory of how law progresses. The extent to which social actors respect the binding nature of contracts entered into "lawfully" is a measure of the degree to which they respect the state's legal authority and the rule of law more generally. Hence, it is critical to observe how contract has evolved, and how social actors' experience with and interpretations of common forms of contract affect their perceptions of the rule of law generally.

Fourth: Historically, contract evolved in parallel with social progress (Friedman 1959; McIntyre 1994). It reflects the changes social theorists ascribe to the development of contemporary social and economic life. In this historical evolution, contract has transmogrified into its current form away from "status" and other non-contractual bases for enforcing promises (Maine 1954 [1861]). The tangible result is the "form-adhesive agreement" that dominates the contemporary contractual landscape. Indeed, the form-adhesive agreement is the dominant means of memorializing exchange relationships between organizations and individuals (Ben-Shahar 2007). Almost all important spheres of life involve such exchange relationships. For instance, work almost invariably involves relationships between organizations and individuals and form-adhesive contracts drafted by employers, and signed by employees without any opportunity to negotiate over the terms. The same is true for medical care (hospitals draft contracts, and patients sign to receive treatment), monetary lending (banks draft and borrowers sign), intellectual property licensing, (producers and distributors draft, consumers sign), consumer sales (sellers draft and consumers sign), etc. It is difficult to identify a sphere of life *not* dominated by organizational-individual exchange relationships, and hence also not purportedly governed by terms contained in form-adhesive contracts drafted by the organizations and signed by all of us.

Fifth: Evaluating social actors' experiences with and interpretations of common form-adhesive agreements in various spheres of social and economic life is a useful means of understanding how individuals regard the rule of law, and how contract has evolved, perhaps, beyond the realm of social theorists' existing descriptions. Because these form-contracts are everywhere, they may have broad, albeit subtle effects on many important aspects of how we regard the law,

organizations and fellow citizens. This is the "termite" analogy described above. I argue that there is a connection between how individuals regard the enforceability of something as mundane as the "contract" on the back of a parking lot receipt purporting to waive the liability of the owners of the lot on one hand, and individual beliefs about employers' abilities to make employees waive their right to a jury trial as a condition of employment, as well as their tolerance and acceptance of violating intellectual property licensing rights (particularly in the form of downloading music, movies and other media without paying for it).

The theory goes further to explain how the ubiquity of form-adhesive contracts has diluted our collective respect for the rule of law, and has in turn, shifted our focus from status to contract, not back to status as some argue, but away from law in the positivistic or "natural" sense (Greenawalt 1985), towards extra-legal bases for contractual enforcement. This *could* be viewed as at odds with theorists like Nonet and Selznick (1978) in that the evidence of how individuals experience and interpret contracts presented below may show a move not towards "Responsive Law," from "Autonomous Law," but towards something else, in which law's role is diminished and not responsive at all. It also seeks to explain the role of contract and the rule of law in what could be characterized as *post-Durkheimian* and *post-Weberian* contemporary life, wherein the role of law is reduced, and perhaps more importantly, compartmentalized—ending up functioning more as a parallel or shadow of other extra-legal sources of power, authority, status and norms of social exchange, instead of a driving force influencing social and economic exchange on its own. In the place of law (as a means of determining outcomes) emerges another dividing point—a behavioral measure of the extent to which individuals recognize the extra-legal forces at work, and position themselves to exploit these forces accordingly.

To illustrate this point, imagine someone on one extreme who regards all exchange relationships and the resulting agreements (contractual or otherwise) as merely a series of tactics—as something surmountable via exploitation of resource dependencies, norms or status. A form-contract for this person is just a manifestation of a tactic. When faced with signing a form-adhesive contract, this person is likely to regard it as unenforceable, as a surmountable obstacle, given the application of the right counter-tactic. Lacking an available counter-tactic, this individual would seek out alternative means of "settling the score" with the organization that

exploited him via this contract in round one. In later "rounds," this person might be more likely to ignore the law or respect the law less when the person has the perceived upper hand. For instance, he might be more likely to illegally download or copy music, movies or other media without paying for these things in retribution for large production companies forcing him to agree to form-contracts when he purchased their products.

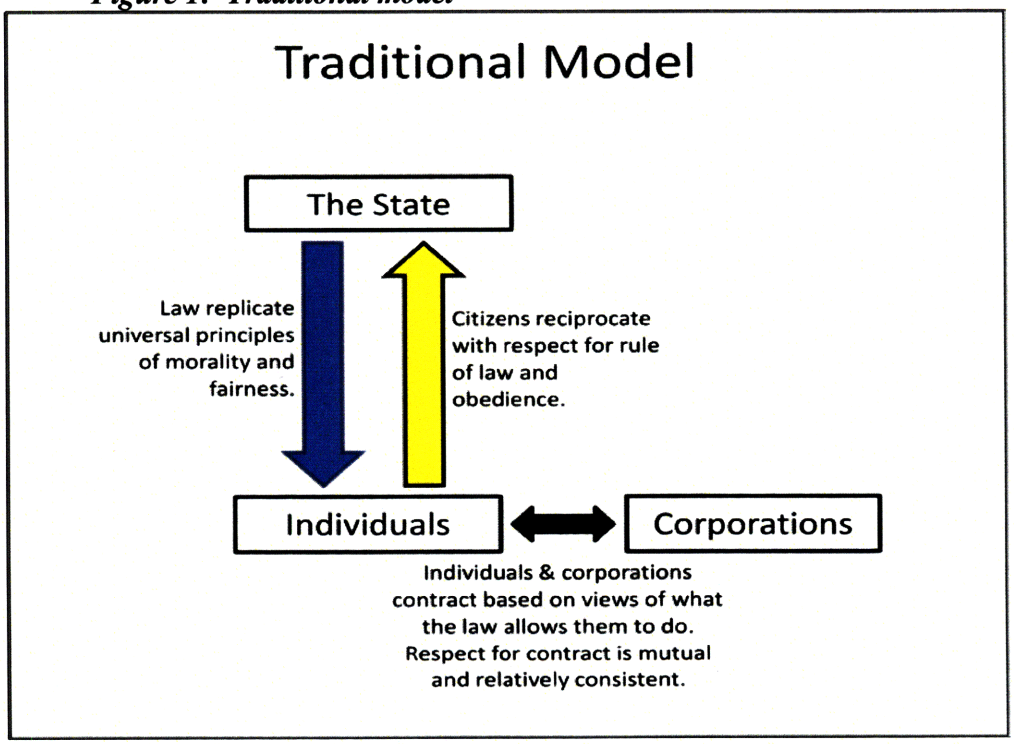
Imagine another individual on the other extreme who lacks this perspective, and is therefore *stuck* in the "Autonomous Law" phase to borrow Nonet and Selznick's (1978) term. This person is more likely to see a form-adhesive contract as a legally valenced and therefore as a significant document controlling behavior. Perhaps it is enforceable because signing a legal contract means that one has to perform according to the document's terms. This is what the law requires, regardless of the substantive fairness of the contract's terms.

Surely, this dividing line between these two perspectives existed long before the rise of form-adhesive contracts. I do not argue that form-adhesive contracts' ubiquity gave rise to this divide and the other behavioral characteristics around contract performance. Rather, I suggest that the historical evolution of contract has reduced the marginal influence of the rule of law—the ever-present third party to all private contracts—and thereby allowed to flourish the influence of extra-legal sources of authority discussed in greater detail throughout this work.

In this way, the model advanced by this theory is a response to the way that traditional theory has explained the relationship between the state and individual citizens vis-à-vis contracts. In this traditional model, there is a direct, reciprocal trade between the state and all social actors. This includes organizations and individuals alike. For purposes of this theory, there is no reason to distinguish between these two categories. In fact, there are good legal grounds not to distinguish between organizations and individuals, as a substantial body of law has developed that has equated organizations and individuals for purposes of entering into contracts. The state offers fair and just laws and court rulings, in exchange for which, citizens of the state reciprocate with obedience to and respect for the rule of law and state-derived authority generally (Garth and Sarat 1998; Gibson 1991; Tyler 1997; Tyler 2006). Figure 1 depicts this traditional theory visually. In the traditional model, contracts between or among citizens and other citizens,

organizations and other organizations or organizations and individuals all entail a silent third party, the state, which underwrites the contracts and ensures *consistent* perceived enforceability. In this way, contracts among citizens and organizations are no different from other contracts. All individual actors are thought to enter into free-choice relationships with others. As Atiyah put it, "the overall social structure was made up of huge numbers of such one-on-one relationships" (1979: 724). The law is the law in all cases, and perceived enforceability is considerably uniform across social actors because the state is considered a democratic ideal that does not discriminate against those with greater resources. In Figure 1, there is an arrow going down from the state towards all citizens, and one arrow from all citizens going up to the state, representing this uniform reciprocal relationship. Contracts are represented by a horizontal line among citizens (regardless of whether they are organizations or individuals). Note also that the contract arrow is double-headed, representing the embodiment of the objective theory of contract—all contracting is a function of free-will, with limited interference with the substantive terms of agreements.

Figure 1: Traditional model

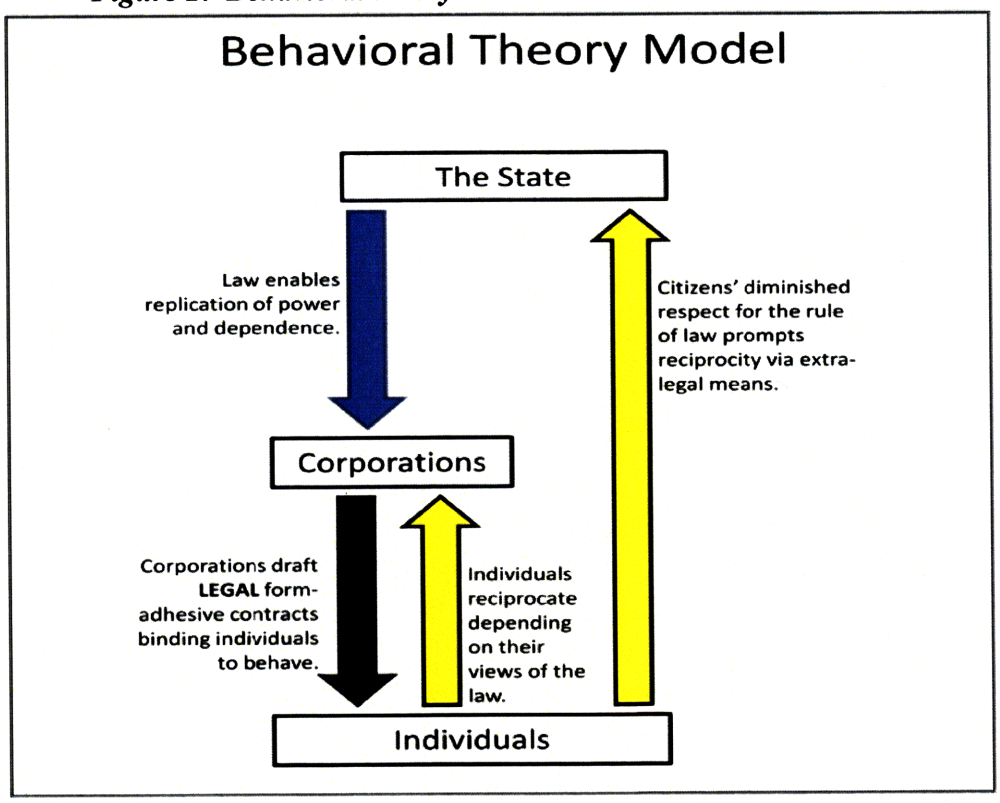


The traditional model differs substantially from the model advanced by this work. As demonstrated by Figure 2, in the behavioral theory's model the reciprocal relationship between the state and individuals is still present, but in terms of how contract fits into the picture, the reciprocal relationship is functionally mediated by organizations drafting and promulgating form-adhesive contracts. Consistent with decades of research on law as a differentiated resource, contract law ends up replicating existing power and resource-dependence relationship. As explained in greater detail below, as contract law evolved and continued to replicate existing power and resource-dependence relationships, the corporation grew in tandem as the dominant entity. The law of contracts expanded to permit corporations to contract just like individuals, and ascribed to corporations many other individual rights. Corporations became as dominant a force as the state. Some political economists argue that corporate power has even eclipsed the state in many ways. The behavioral theory model depicted in Figure 2 reflects this critical fact. Corporate actors are no longer on the same horizontal level as individuals. Instead, they are above individual citizens making law by dictating contract terms unilaterally and imposing them on individuals. Hence, the uni-directional arrow representing such contractual relationships. Individuals reciprocate their treatment at the hands of the contract-drafting organizations in part as a function of the extent to which they recognize how much law underwrites the unfair contractual treatment. Some notice it and think that that is what the law does, some do not notice it, and some notice it and think that the law prevents it and protects individuals from unfair contractual exploitation. With any of these three possible responses, individuals reciprocate the treatment (perceived or otherwise) by the contract-drafting organizations in two ways. First, they respond to the contract-drafting organizations. Consistent with the literature on "psychological contract" violation (Coyle-Shapiro 2002; Kotter 1973; Rousseau 1989), and the social contract, particularly in the employment arena (Kochan and Shulman 2007), individuals may respond in the classic *exit, voice, loyalty, neglect* framework (Hirschman 1970). Second, individuals reciprocate with the state (the silent third party to these form-adhesive contracts). Overall, the effect of the ubiquity of these agreements and the building awareness of their effects contributes to our collectively diminished respect for the rule of law. This notion of the connection between negative experiences with form-adhesive contracts and their apparent ubiquity on the one hand, and diminished trust in the rule of law and a corresponding increased resort to extra-legal and sometimes asocial means of adjudicating disputes among other extra-

legal responses on the other hand is consistent with the literature on obedience to the law and responses to apparently unjust procedures or outcomes in court cases (Cole 1999: 1090-1091; Lind and Tyler 1988; Nadler 2005; Thibaut and Walker 1975; Tyler and Rasinski 1991).

What takes the place of the law in terms of underwriting enforceability of promises made is an empirical question worthy of study, as is the inquiry of when this occurs. The law becomes like a prism without light emanating from within. Rather, the law reflects and refracts illumination from alternative sources such as socio-economic bases of authority like norms of social exchange, economic self-interest, power and dependence and moral standards of behavior. This effect is described in greater detail in the third part of this work.

Figure 2: Behavioral theory model



It is the objective of this work to begin exploring and empirically vetting this model and underlying theory by asking questions about how individuals experience and interpret form-

adhesive contracts they are made to sign. Specifically, the second part of this work explores how individuals regard a form-adhesive contract in the employment context (a mandatory arbitration agreement), and how these interpretations relate, if at all, with how individuals exchange with their employers. Is there a relationship between perceptions of enforceability of this form-contract and how employees relate to their employers—is work a mere economic exchange, devoid of trust or loyalty, or is it more of a relationship, where trust and loyalty are exchanged and expected? The third part of the work observes individual behavior with respect to enforceability of an extremely common form-adhesive agreement occurring on-line. This part of the work experimentally examines how individuals behave when the contractual prism is constant, and the moving parts are the circumstances under which individuals consent to the contract, and the way that enforceability is prompted—along the extra-legal dimensions alluded to above—(1) legal, (2) moral, (3) instrumental and (4) social.

The Approach

Even apart from the implicit rationale explicated above, given that the dominant form of exchange for resources involves organizations providing resources to individuals (employment, medical care, communication services, etc.), and that these exchanges almost invariably involve contracts, it makes sense to ground a novel theory of contract ultimately aimed at explaining social interaction and the viability of institutional social structures in empirically studying experiences with and interpretations of form-adhesive contracts between organizations and individuals. This argument builds on pre-existing social theories, by integrating several of their contributory notions, but also deviates from pre-existing approaches in several critical respects.

I develop and ground this theory in the following ways: First, I observe and describe individuals' experiences with and interpretations of form-adhesive contracts in the employment context. Specifically, I offer evidence of variation in perceptions of enforceability of a mandatory arbitration agreement. Second, I observe and describe individuals' behavior indicative of their perceived enforceability of another common form-adhesive agreement in an experimental setting online.

I argue that evaluating how social actors (employees, consumers, etc.) experience and interpret contract is a useful way to understand how they interact with the organizations that draft the form-adhesive agreements they sign in order to receive the benefit of the bargain (employment, medical treatment, phone service, the intellectual property purchased, etc.). In so doing, the hope is to advance theory about these important social-exchange relationships—most notably, the employment relationship. More broadly, this research bears on theories about interpretations of law and how such interpretations critically affect almost all facets of contemporary exchange between organizations and individuals.

The approach taken is distinct from other existing theories of contract in three respects: First, this approach starts from the realist question, "how do individuals experience and interpret contracts," rather than the more common starting point for existing theories of contract, "what should the law of contract be and do?" (see, e.g.: Fried 1981; Kronman 1980; Posner 1999). The goal is for the answers to the former question to inform the latter, among other related questions. That is, I rely on observations of individuals' behavior with respect to contract to understand what the law of contract should be and do (if anything). The idea of law as "expressive" (Sunstein 1996) underlies the rationale for the traditional starting point. This is the idea that law tells us how to behave. Individuals learn from the expression of law via numerous overt sources like laws and court rulings. This clearly happens, and is an important part of both the traditional model as well as the model articulated in this work. I argue that it is not only uni-directional as the traditional model and classic approaches to contract theory apparently assume. Law trickles up as much as it trickles down.

Second, the approach taken herein examines individuals' experiences with and interpretations of form-adhesive contracts as opposed to the standard arms-length, bilaterally negotiated fare. Form-adhesive contracts are drafted by one party, typically an organization, intended for multiple signers. They are offered on a take-it-or-leave-it basis, without opportunity afforded the signers to negotiate over their terms. Form-adhesive contracts likely outnumber bilaterally negotiated agreements by an order of magnitude in contemporary social life. As such, I argue that it makes more sense to ground theory in subjects' experiences with and interpretations of this ubiquitous form of contract.

Third, this approach relies on decades of research that suggests that the way that individuals experience and interpret the rule of law carries important consequences for understanding social interaction broadly (Bies and Tyler 1993; Bumiller 1988; Coleman 1990; Ewick and Silbey 1998; Galanter 1974; Kritzer and Silbey 2003; Macaulay 1963). In this sense, I argue for the connection between sociological studies of law and contract theory broadly.

Why do I ground a novel theory of contract in examination of social actors' behavior with respect to form-adhesive agreements? Why not base such a theory on the standard, arms'-length contracts used as the starting point for all pre-existing theories of which I am aware? There are three reasons: theoretical, phenomenological and methodological. The theoretical reason is that most theories of contract begin by analyzing arms'-length, negotiated instruments, typically dyadic exchanges between individuals, and offer evidence of contract's *life* with instances of efficiency (Bebchuk and Posner 2006; Posner 1999), morality (Fried 1981), community, cooperation, collaboration (Markovits 2003-04), social-structure and social ordering (Suchman 2003). These efforts typically carve out form-contracts from the intended scope of the theories, often citing form-contracts' illusory consent, divorce from *real* social interaction, or the fact that most form-contracts involve an organization, not an individual as at least one party to the exchange. My view is that form-adhesive contracts are such marginal instances of contract that they offer an optimal setting in which to explore when these elements of contract's life spring up. By *marginal*, I mean that form-contracts are barely contracts. How much like a contract any given document is could be placed on a continuum from "no one thinks this could be a contract" to "everyone agrees that this is a contract." If the elements of contract in the classic, legal sense are: consideration, meeting of the minds, and a set of mutual obligations consented to by all parties to the contract, most form-adhesive contracts are likely to fall lower on this scale than arms'-length agreements, but probably above documents like newspapers, magazines and advertising pamphlets. This is why I call them "marginal" instances of contract. This marginality is what makes form-adhesive agreements optimal instances for seeing when they can produce the evidence of contract's life cited above. This is analogous to the difference between observing plants growing in ideal climates versus observing how and when they grow in a desert. In the latter instance, we can more clearly see the minimum amounts of sun and water that enable

the plants to survive. As my theory of contract involves a similar minimalist environment, form-contracts are a better starting point than arms'-length deals.

The second reason is methodological. The structure of form-contracts is inherently more suited than arms'-length contracts for teasing out the extra-legal sources of contractual authority from the rule of law. This is because they exist in a relatively constant context of asymmetric power-imbalance and social ordering, with substantial variation in the socio-economic status of the individual signers of these contracts. For instance, in the employment context, it is the case that there is wide variation in the socio-economic status of signers of mandatory arbitration agreements. Highly educated and highly compensated employees of security-trading firms routinely sign such form-adhesive contracts, as do poorly educated and poorly compensated sales associates of retail electronics stores like those studied in the first part of this dissertation. The constant is the content of the contract they sign, even the very wording in many instances. Similarly, in the case of emergency medical care, everyone who comes through the emergency room signs the same piece of paper waiving their rights in order to be treated.

The third reason is phenomenological. These contracts are the norm, not the exception to the rule. They abound in contemporary social life. Social actors enter into form-adhesive contracts exponentially more frequently than they negotiate agreements. Plus, they exist in almost every facet of contemporary life—employment, consumer relations, purchasing almost anything online, intellectual property licensing, and medical treatment.

It is insufficient to say that form-adhesive contracts exist and they are the dominant form of contractual exchange between organizations and individuals without at least an attempt at understanding how this became the case. Understanding how contract evolved along side other key elements of economic, social and legal elements is critical to understanding the place of the behavioral theory in the existing literature, and how it could be viewed not only as a way of understanding contract, but could be regarded as a social theory as well. What follows, therefore is a brief history of contract in the United States, in order to historically and theoretically ground the theory advanced in this work.

A Brief History of Contract

A. Pre-Law Extra-Legal Sources of Contractual Authority

Contract existed before law. This is not a novel idea (Seagle 1947). Contract, in this pre-law sense, and, I would argue even in the contemporary legal sense as well, is a bilateral exchange of promises associated with expectations of some future performance (Friedman 1965). Even if one disagrees with the suggestion that contract preceded law temporally, at the very least, it is worth acknowledging and identifying sources of contractual authority that exist independent of law. It would be difficult to deny that, even with law, contracts are often enforced without regard or reference to law (Macaulay 1963). Research in enforceability of collective bargaining agreements has shown this to be the case in the employment arena for at least three decades (Walton and McKersie 1965).

This begs an obvious question: In the absence of law, what formed (and continues to form) the basis for authority to enforce contractual agreements? The extra-legal bases for authority to enforce contracts in absence of law in the formal sense (codified by a state actor) may be subdivided into three categories: (1) power and resource dependence, (2) social structure and social ordering, and (3) moral norms. The principle disparity between these extra-legal bases of contractual authority and legal authority for contractual enforcement is in the latter instance, the state (or some version of a third party state actor) is a necessary component without which, contract could not be enforced. In the cases of power and resource dependence, social structure and social ordering and moral norms, even absent a state actor dictating the scope of contractual enforcement, contracts may be binding. It should be said that even when these extra-legal bases of authority exist along-side formal, legally-valenced written contracts, they are not vacuum sealed. That is, they interact with perceptions of law and, like the law, affect behavior on the margins. This is akin to explaining variation with statistical modeling. I am not arguing that all the variation in post-agreement behavior is determined by any one of these extra-legal sources, or that they consistently and uniformly trump "the law" as a way to explicate when social actors live up to terms in contracts they signed. Rather, I suggest that they interact, and sometimes

shine more brightly than other elements depending on various constraints, some of which are explored in greater detail in the second and third parts of this paper.

What follows is a brief explanation of these three extra-legal bases of contractual authority. Following this, I explain how the legal birth of contract coincided with a critical economic and social transition period, giving rise to the modern objective legal theory of contract. The extra-legal sources of contractual authority do not simply dissipate with the birth of legal authority for contracts. What happens to the extra-legal sources and how they interact with the legal basis of contractual authority is a difficult question with important consequences. This research contemplates this interaction and begins to explain circumstances under which the extra-legal bases are actually more salient than the legal basis in contract enforceability. As discussed above, I argue that form-adhesive contracts are the natural extension of this historical evolution. Along with this, comes a collective augmented reliance on extra-legal bases of authority for contractual enforceability and a corresponding diminished trust in the rule of law. I posit that, consistent with existing social theory, this shift carries negative social and economic consequences (Cole 1999: 1090-1091; Lind and Tyler 1988; Nadler 2005; Thibaut and Walker 1975; Tyler and Rasinski 1991). I conclude this part of the dissertation by introducing the subsequent empirical components.

1. Power and resource dependence

In classical social-exchange theory (Blau 1964; Emerson 1962; Homans 1974), two things predict greater likelihood of enforceability of contracts: (1) the extent of asymmetry in mutual dependence in the relationship of the contracting parties, or put another way, the ratio of the resources controlled and needed by the party seeking enforcement of the contract to the resources controlled and needed by the other party, and; (2) the extent to which there exist relatively available and low-cost alternatives to the contractual exchange being enforced (Blau and Richardson 1973; Blau 1964; Coleman 1990; Granovetter and Swedberg 1992; Molm 1997). A simple example illustrates these points. A signs a contract with B in which A agrees to give B fifteen percent of the profit earned from land leased to A by B. A is a farmer and lives on the land owned by B and leased to him according to this contract. Farmland is mostly unavailable,

and land that is available is difficult to farm in this region. Plus, A has sufficient sunk costs associated with the land—A improved the land substantially with his labor by building a barn and an irrigation system. If A refuses to pay the fifteen percent owed according to the contract, B has sufficient power over A to evict A from the land. A would be homeless and without any revenue coming in if A were evicted. Even if a dispute arose about the way that the contract was to be interpreted (for instance, is it fifteen percent of the gross or net profit?), A would be significantly disadvantaged to the extent that he is dependent on B for the land and his livelihood and to the extent that it is difficult and costly for A to move to new farmland. There is great asymmetry in the mutual dependence in this relationship because A is extremely dependent on B for resources that B controls and A needs, but, due to the readily available supply of farmers seeking to rent this land, B is not nearly as dependent on A for A's fifteen percent of profit made from farming the land. As a result, even absent the law, A is significantly disadvantaged and B is significantly advantaged in enforcement of this contract.

Additionally, the extent to which the parties have relatively available alternatives to the exchange directly affects the ability to enforce the agreement. Farmable land is not readily available. Therefore, A has few available alternatives to exchange. Because A has sunk investment of time and money into developing the land by building a barn and establishing an irrigation system, A is further disadvantaged because these investments raise the costs associated with moving to new farm land (or they lower the relative cost of staying at the current location). A's lack of available low cost alternatives to exchange make it marginally easier for B to enforce the contract's terms. This is how classical social-exchange principles of power, resource dependence and available alternatives to exchange affect contract enforceability even in the absence of law.

2. *Social structure and social ordering*

Anthropologists like Malinowski (1920) and Levi-Strauss (1969) have demonstrated that even absent law, power and dependence or external sources of morality, contract is a function of reciprocity and exchange. In fact, some like Hobbes (1969) and Williamson (1985) argue that the notion of "contractual" reciprocal exchange is *the* building block of social ordering (Suchman 2003). In Malinowski's classic study, an elaborate system of social ordering was

established across eighteen island communities and thousands of individuals by way of a system of reciprocal exchange of necklaces and armbands. The "kula" items exchanged were not used for any purpose other than for enhancing one's social status. Exchanges were clearly "contractual" in nature, with systematic expectations built in and treated as socially binding. Failure to conform could result in social ostracization or other sanctions such as boycotting of trade of goods or food (Malinowski 1920). Without the exchanges, the social order would not form as it did. The reciprocal exchange of the kula formed the basis of the social ordering in the absence of formal laws or external moral ordering (Ekeh 1974).

Modern theorists like Coleman (1990) have similarly advanced the notion of the social basis of authority of enforcement of contracts. The common thread in all of this work is the recognition that social interaction and contract are intertwined. The shared expectations of which "contracts" are enforceable make up what some call the "civil contract" (McIntyre 1994: 20). Individuals tend to internalize the social constraints and act accordingly, even independent of laws, moral constraints and economic interests. Research on conformance with socially expected behavior has repeatedly demonstrated this (Cialdini 2001; Hermann, Thoni and Gachter 2008; Marshall 2002; Posner 2000; 2007). While a thorough review of the extent to which social constraints strongly influence behavior generally is beyond the scope of this work, numerous studies across varied contexts have demonstrated that social forces affect judgment and perception (Asch's famous line experiment (Allen and Porter 1983: 295-303)), obedience to authority (Milgram's (1965; 1974)), and even social roles (Zimbardo's Stanford prison experiment (1969)). It is not a far stretch from this extensive line of research to argue that *post-agreement behavior* is similarly socially constrained to the extent that form-adhesive agreements are often experienced *socially*. For instance, at an emergency room, when bringing my one-year old daughter in for treatment for a high fever, the person behind plate glass at the counter handed me a clipboard full of legal forms to sign. She told me to sign them and return them so that they could admit my daughter. I could not have signed those forms faster. Later, I learned that one of them was a mandatory arbitration agreement waiving my right to sue for the hospital's improper treatment of my daughter.[1] As described in the second part of this dissertation, the social context in which social

[1] The hospital treated my daughter well, and she was fine. I only noticed the mandatory arbitration agreement later because I was curious to read what I signed.

actors sign a form-adhesive agreement in the employment context is also important for understanding how these agreements are experienced and hence interpreted.

3. *Moral norms*

As Daniel Markovits observes, "promises lie at the center of persons' moral experience of one another, and contracts lie at the center of their legal experience of one another" (Markovits 2003-04: 1419). It is a widely held and often articulated belief among philosophers like Kant (Wood 1999) and Rawls (1971), historians (Atiyah 1979; Farnsworth 1982), contract scholars (Fried 1981) and even biologists (Hinde 2004), that people tend to adhere to a universal moral principle of promise-keeping and that this moral grounding forms an extra-legal basis for contractual authority (Soper 1984). As Fried aptly puts it,

> ...[t]he obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust. ... An individual is morally bound to keep his promise because he has intentionally invoked a convention whose function it is to give up grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust (1981: 16).

Fried grounds his moral basis for contractual performance by invoking both social norms ("abuse of a shared social institution") and in the tandem concepts of free choice and trust ("intentionally invoked a convention..." and "invoke the bonds of trust..."). As discussed in greater detail in the third part of this work, it is interesting to observe just how powerful the moral basis for contract has become, even when trust is diminished, as is the free-will aspect of consenting to a contract. As other have noted, the decline of free choice in contract law has important consequences (Atiyah 1979: 717-721) worth exploring.

Many (Atiyah 1979; Fried 1981; Schwartz and Scott 2003; Schwartz and Cartwright 1973) note the interconnectedness of this shared norm and the Durkheimian ideal of communal togetherness. As Markovits describes, many theories emphasize that "promissory and contractual obligations promote the well-being of both promises and promisors, by increasing the

reliability of social coordination and promoting the efficient allocation of resources" (Markovits 2003-04: 1419). We make promises and rely on them because of the universal ideal of keeping our word. Keeping one's word is a universally normative constraint—the promisor is empowered with the ability to generate the norm when she makes the promise (Craswell 1989: 497; Raz 1981). The common denominator for all of these works is that they find morality as the underlying root enabling force for legitimacy of enforceability, either independent of law or as a precursor of law, enabling the enactment of specific doctrinal manifestations of the moral ideals.

As already suggested, these three broadly defined extra-legal bases of contractual authority are not necessarily mutually independent of one another. Nor are they independent of the rule of law as individuals perceive it. As an example, Durkheim (Schwartz and Cartwright 1973) advanced the argument that society is "fundamentally a moral system." By this, he meant that "human groups are held together by their members' commitment to a common set of values" (Sutton 2001: 32). In simpler terms, this means that we join together in our collective adherence to the ideal principle of living up to promises made, upon which others have come to reasonably rely. A more practical, empirical example of this is the social structure described by Engel (1995) in a small town where people kept their word to each other. "Keeping our word" is this commonly accepted notion that binds us together socially. As such, disconnection from this social bond (like in Malinowski's kula ring example) is one critical repercussion associated with promise-breaking. The "social contract" is a mere extension of this promise-based ideal to expect that the state too keep its promises. Figure 1 above demonstrates this visually.

If one imagines these three extra-legal bases of contractual authority temporally, what happens as the legal basis for contract emerges and takes hold? This historical shift deserves some attention, as it is critically important if one is to understand the modern iteration of contract (the form-adhesive variety specifically) and its socio-economic heritage.

B. Historical Evolution of Doctrinal Contract

Contract in the symbolic sense of the term (as distinguished from the notion of barter), was born out of the transition from a feudal system to a capitalist one (Beirne and Quinney 1982; Sutton 2001), from "use value" to "exchange value" in a Marxist sense (Marx 1964; 1978), from Mechanical to Organic Solidarity in Durkheimian (1933) terms, from Gemeinschaft (community) to Gesellschaft (society) in Ferdinand Tönnies's (1957) terms, from Irrational-Substantive to Rational-Formal law in Weberian (1954) parlance, or from Repressive Law to Autonomous Law in Nonet and Selznick's (1978) terminology. For all of the above-cited theorists, doctrinal contract began its life as these transitions occurred. Where there is less consensus is in discussion of the specific role contract played and the scope of that role. For instance, was it an enabling device relied upon by the powerful to exploit the less powerful vis-à-vis the appearance of institutional authority, or was it merely an innocuous means of ensuring the order, viability and organization of newly emergent systems of social or economic organization, or was it simply a means of memorializing and formalizing the moral normative basis of promise-enforcement, such that the job of enforcement of such promises was passed on officially to the state? These are difficult questions, not readily discernable, although they are addressed by many engaged in the debate about the role of contract and how contract has evolved with social, political and historical forces. These issues are discussed in greater detail below. This is particularly important to the behavioral theory of contract advanced in this work because of the extent to which contract evolved in tandem with the growth, prominence and power of the organization, or the dominant economic-legal form of the organization, the "corporation."

Starting at the beginning, all theorists seem to agree on some fundamental pre-shift facts. As the feudal system that existed on the basis of *status* made way for the market based economic system, this shift in social organization was paralleled by a corresponding transition "from status to contract" as the central metaphor for legal reasoning in modern societies (Ellickson 1991: 246; Maine 1954 [1861]; Selznick 1969: 62; Sutton 2001: 29). By "status," Maine primarily meant the "law of persons," which proscribed actors' legal identities, and hence their ability to exchange economically and interact socially. People's status and their legal identities were hierarchically arranged and readily discernable. For instance, identities such as slave, serf, servant, ward, wife, cleric, lord, duke, king, were mostly mutually exclusive and relatively

immutable. As Weber and Selznick each note, other forms of "status," clearly emerge from so-called "purposive contracts." (This will be discussed in greater detail below.) However, the argument here is that in order for a market system to function, there needs to be some mechanism upon which private actors may rely to ensure adherence to terms of agreements. This sentiment echoes the declaration of Adam Smith that "freedom of contract"—to enter into enforceable bargains—would encourage individual entrepreneurial activity (Hurst 1964 [1956]). This is because the economy relies on direct bilateral exchanges between individuals and business entities (Farnsworth 1982). Before, status as Maine meant it, ensured adherence because those beholden to higher status actors were obliged to exchange and share goods accordingly. Factors such as kinship and age, over which actors had no control, determined, in large part, actors' obligations to share (Farnsworth 1982). This was reinforced by pressure from peers and from religion. As Thompson (1975) and others note, with the shift of social organization to a market based economy came the need to secure current investment returns in the future, in other words, in the most general sense, to confine arbitrary decisions of the royal prerogative and ensure compliance without regard to status. In short, the change created a strong need for formal, legitimate, state-sponsored law that ensured the reliability of inter-citizen promises and exchange.

For Marx (1978), capitalism is associated closely with the notion of "exchange value" (valuing commodities according to their capital worth independent of their actual utility) as distinct from "use value" (valuing commodities by their actual utility). To function effectively, capitalism requires protection of private property. Contract was the optimal way of ensuring a state-backed institutional means of supporting this system. In a mechanical society, in the Durkheimian sense, it makes sense that contracts are imbued with morality. Here, law and the communal values are perfectly intertwined, and the autonomy and differentiation of the law discussed by Nonet and Selznick are non-existent. Capitalism breaks up this mechanical interdependence, and social actors become alienated strangers. Then, in Stuart Macaulay's words, "the legal system supplies a kind of synthetic community based on rights and duties enforced by courts" (1985: 467). The free market capitalist system necessarily depends on freedom of contract to sustain itself and to ensure protection of wealth accumulated vis-à-vis economic transactions between and among citizens of the state. This is why commentators generally agree that the state in

capitalist societies such as the United States gives freedom of contract (on which contract law depends) more legal scope than do pre-industrial and socialistic economic systems (Farnsworth 1982; Friedman 1965: 10; Gilmore 1974). Indeed, a modern legal historian concluded that in America, the years from 1800-1875 were, "above all else, the years of the contract," because they embodied the very essence of "energetic self interest" required of a free-market system. (Hurst 1964 [1956]). This becomes increasingly important as capitalism paved the way for the rise to power of the modern organization and by extension, the dominant form of contract—the form-adhesive agreement. But, as the moral center originally underscoring law, particularly contract law disintegrated, the state loses its credibility as an actor looking out for everyone's best interests and the trust and obedience reciprocated in the traditional model makes way for the reciprocity relationship depicted in the behavioral theory model. As George Orwell, famously wrote in *Animal Farm*, "all animals are created equal, but some animals are more equal than others" (1945).

A variant on the story is that capitalism imbued the pre-existing Durkheimian mechanical solidarity and interdependence with a spirit of autonomous, economic self-interest. Contract law supplied the *glue* needed to hold individualists to their bargains instead of the communal, social or dependence on resources. As discussed earlier, in this view, contract emerged as a formal embodiment of pre-existing morally derived authority. Enforcement of pre-existing norms of morality shifted away from inconsistent, power-hungry elite to the democratic, egalitarian state. This, in turn, promotes efficiency (Budd 2004; Posner 1986). Even if this is true, it is difficult to deny that economic freedom paved the way for the rise of the corporation as the most powerful form. When organizations are granted the power to contract, to have their own interests, the same legal standing as an individual even though lacking a physical body had enormous consequences for the development of society (Coleman 1990; Swedberg 2003: 209-210). As Coleman notes, contemporary life is "asymmetric" in that an individual has next to no power as compared to that of the modern corporation (Coleman 1990: 145-170). So, even if it is the case that the promise-enforcing moral normative constraints are alive and well in contract, and have been entrusted at least in part to the state to enforce, this fact is not a static one. I argue that the dominance of corporate form and the point made by Coleman and others needs to be accounted

for when evaluating how the moral normative authority of contract has dynamically shifted in contemporary social life.

Evaluating Weber's views on this subject shed more light on how this dynamic shift may have occurred. Weber (1954) agrees with this idea that contract, the ultimate representation of what he refers to as "private law," emerged as a significant means of ensuring the viability of a market economy. He writes that "the present day significance of contract is primarily the result of the high degree to which our economic system is market-oriented and of the role played by money" (1954:105). Again, it is not that contract did not exist in some form prior to the rise of the market-based system, but the way that agreements were operationalized, and the way that they related to the law as a form of institutionalized and legitimate power changed. Voluntary agreements for barter, or as Weber calls them, "primitive type 'status contracts,'" echoing Maine's (1954 [1861]) terminology, made way for the "exchange or market economy 'purposive contracts,'" echoing Marx's terminology (Weber 1954). Hence, the movement towards purposive private contracts represents for Weber, the quintessential move towards rational-formal law and the resulting "legal domination" through the elite's manipulation of the bureaucratic administrative staff (Weber 1968).

This Weberian notion of contract's critical role in the usurpation and exploitation of the law as a particularly subversive form of social control by the powerful, socially elite has been documented repeatedly in the Law & Society literature (Black 1983; Chambliss 1964; Hall 1952; Thompson 1975). Particularly, with Thompson's account of the Black Acts and Jerome Hall's description of the evolution of the laws of property and theft, we witness the way in which the social tendency towards Positivistic adherence to the rule of law is exploited by those with power. Contract is a particularly easy way to exploit this tendency because it acts as a tabla rosa on which the powerful may write their own laws, and have the courts enforce them in the interest of promoting free-market economic liberty.

The framework set out by Nonet and Selznick (1978) is a useful way of further understanding the life and death of contract in contemporary society. They model three types of law, making up stages of evolution in the relation of law to the political and social order. The three stages are (1)

Repressive Law, (2) Autonomous Law, and (3) Responsive Law. The authors describe the social response to Repressive Law as "acquiescence founded in awe and sustained by apathy leaves a wide path for legitimate but unrestrained authority" (1978:32). This is essentially an explanation of the birth and rise of contract law out of the transition from Repressive Law to Autonomous Law. The point is not that there were no agreements before the shift from Repressive to Autonomous Law. Rather it is that there was a significant shift in the force of law bolstering the contracts, which resulted in the increased specter of "legitimation" that rendered contracts so powerful a tool in the hands of the elite. As the authors explain so eloquently, "repression is perfected when it can forego coercion." This is exactly what contract accomplished—perfected repression by the avoidance of coercive exercise of power, replaced instead with institutionally legitimate means. Hence, as described in greater detail in the second part of this work, contract law is one of the primary means through which powerful owners of the means of production rely on institutionally endorsed means of control to secure their accumulated wealth, and to ensure compliance and acquiescence of the ones being controlled and subordinated.

This is exactly what is meant by the term, "dual law" used by Nonet and Selznick. The dynamics by which the legal order upholds social subordination are paradoxically a chief source of evolution away from coercive Repressive Law and towards institutions that can divorce themselves from consolidated state power. The result is "differentiation," or the separation of powers required of Autonomous Law. In other words, "dual law" builds into the very structure of Repressive Law a mechanism of transition to Autonomous Law, and contract law offers the institutionalized, acceptable, legitimate mechanism for retaining control in the transition (Nonet and Selznick 1978).

Through this differentiation and *dual law*, we see the evolution of contract, its maturation along the same progression of other laws that are used a means of social control. This is the ongoing paradox of liberal legalism that emerges from the transition from Repressive to Autonomous systems: The more the system appears rule based, legitimate, applicable to all in an equal, non-discriminatory way, the greater the power of those who can defy the differentiation. Contract offers a primary vehicle for this defiance at the hands of the winners under the capitalist system. Individual freedom of contract diminishes and makes way for routine form-contracting between

the now-dominant organizational actors and their employees, customers and other individuals dependent on the resources they have come to monopolize. As Atiyah explains,

> [w]hat we now have is a relatively small number of large organizations, who exercise more or less control over their own members, and who enter into relationships, whether commercial or otherwise, with other similar organizations. The role of the individual as the centre of a network of relationships has largely disappeared. And this is the sense in which it is correct to speak of an enormous decline in the role played by contract in modern society (1979: 724).

As the "winners" under this system are organizations, it makes sense that they would create the form-adhesive agreement in order to maximize their leverage of imbalanced mutual dependence over the millions of individuals with whom they contract as a group.

Given this paradox and Nonet and Selznick's framing described above, it should be no surprise that the ramifications of contract on employment and collective action are greatly important. In the employment world, the paradox noted above is particularly problematic given the inherent inequality of bargaining power between labor and capital. Hence, freedom of contract affirms equality, but lays the foundations of the unregulated subordination frequently exhibited in non-union employment situations (Selznick 1969: 122-137). Unfortunately, in keeping with the legal liberal tradition, courts routinely struck down labor legislation on the grounds that it interfered with freedom of contract (Kaufman 2003; Stone 1981). This is why Richard Ely remarked at his presidential address to the American Association for Labor Legislation that "when economic forces make possible oppression and deprivation of liberty, oppression and deprivation of liberty express themselves in contract" (Kaufman 2003: 8). He too regarded freedom of contract as a façade used to restrict true human freedom.

Selznick (1969) too believed contract to impede the evolution of a "law of associations," (labor laws) as he called it, for two reasons. First, he claimed that the contract model was "nominalist in spirit." By this, he meant that it reduced group reality to the acts and relations of individuals. Second, he claimed that contract weakened the very meaning of social participation. As he eloquently put it, "[t]he idea of a person in his wholeness, and in his potential as a group member, lost its hold on the legal imagination. The new jurisprudence could more comfortably

apprehend a fragmented act of will." (1969:53). Selznick thought that the conflict between the voluntaristic, individualized, obligation-driven world of contract was at odds with the commitment-based, open-ended, relationship world of association. The only way such a system could survive, and in truth, continue to replicate the pre-existing status-type hierarchical oligopoly, is through the appearance of strict adherence to elaborate rules by legitimate legal authority.

Similarly, the rise and fall of the arm's-length contract and the associated "freedom of contract" paralleled the rise and fall of liberal economics as a working philosophy (Friedman 1959; Macaulay 1985; Selznick 1969). For instance, the classical contract law doctrine of "consideration" rejected the notion that any price fixed freely by two parties might be condemned in law as unfair or inadequate. Only the market, as evidenced by what a willing seller would pay a willing buyer, measures value. This notion is even crystallized into formal doctrine, and is often referred to as "the peppercorn theory of consideration," after the idea that consideration may take the form of as little a thing of value as a peppercorn, and courts are not to interfere with the substance of parties' contracts (Friedman 1959: 91; Patterson 1958). That is, if I want to sell my Rolls-Royce Phantom for a dollar, that is my business, and courts are not to interfere. It is not difficult to see how this objective theory of contract primarily benefits the modern corporation contracting with numerous individuals simultaneously, applying uniform terms to all. It would seem horribly unfair and illegal, but for the peppercorn theory, on the margins if contracting for the same amounts from individuals of varying means—$1,000 for a sandwich is not objectively unfair if the individual purchasing the food is Bill Gates, but it is probably unfair if the person is homeless, jobless and penniless. Contract law was losing its credibility as the guardian and keeper of the pre-law moral normative power of promise-keeping as a direct result. Law needed to at least maintain the appearance of fairness, and so, it did adopt numerous substantive contractual limitation in numerous consumer, labor, and communication contexts.

Another illustration of the parallel between the rise and fall of contract law based on freedom of contract and the premise of individual freedom to contract on the one hand and rise and fall of liberal economics as a working philosophy on the other is how the law of contract damages

accounted only for generalized types of economic damages, ignoring personal damages like embarrassment or humiliation from the alleged breach. Damages recoverable for breach of contract to deliver goods were computed based on the difference between contract price and market price at the moment of breach. This formula assumes a frictionless and perfectly competitive market, operating instantaneously and universally. Contract law would not abide contracts for which no market price was conceivable—like contracts so vague or one-sided that they lacked ascertainable value. This is perhaps best illustrated in the phrase, "no one rationally buys or sells a mere guess" (Friedman 1965: 88). This too, was severely eroded, as contract began withering and dying.

The law of "mistake" in contracts is another example of this parallel. Contracts are generally only set aside or reformed by courts if the mistake is judged to be "material." Materiality, however, was almost ubiquitously measured by whether the mistake affected only the price, that is, whether the mistake was related to measurement of value or risk. The juxtaposition of liberal economics and contract law is perhaps most stark when contract law is confronted with the concept of fairness of the bargain. The general rule of law, alluded to above, is that unless illegal, or contrary to public policy, the agreements of parties is to be the law by which their rights are to be measured. As Lawrence M. Friedman noted in his seminal work, Contract Law in America (1965), "...the law of contract was the legal reflection of [the free] market and naturally took on its characteristics." That is, the law of mistake was to be as narrowly construed as possible. Not surprisingly, it took a long time for the law of mistake to be gain a broader interpretive berth by courts, but close inspection of contemporary case law reveals a fair degree of evidence of erosion (Gilmore 1974).

C. The Death of Contract in Contemporary Society?

With the anthropomorphic dramatization of "death" ascribed to an otherwise seemingly lifeless legal doctrine such as "contract," writers like Friedman and Macaulay intend to demonstrate not that contracts are written less, but rather, that the social distance between the courts and the business world (the actors to whom Friedman and Macaulay primarily refer) has increased such that the institution of law in contemporary society is removed from the contracts into which it

once breathed life. As Friedman describes this process, the bench became removed from the business community over time, such that by the 1950s, judges did not comprehend the underlying intentions and meanings of contract required to ensure continuation of market conditions. Friedman cites the expanding landscape of the business world such that it was impossible for a judge to understand the ins and outs of so many burgeoning and disparate areas. For instance, it was impossible for a judge to understand the intricacies of the logging industry, labor-management relations and real estate all at once. Judges could no longer be subject matter experts, as they were prior. As a result, contract acquiesced to statutory regulation specific to these (and many other) industries. Formal, statutory legislature supplanted the common, judge-made case law. Friedman also cites the rising costs of going to court, and the institutionalization of private dispute-settling methods along with increased fluidity and ambiguity of business relations as additional causes of contract's decline. Contract law simply could not keep pace with businesses' need for dynamic change and hence, increased abstraction and fast, cheap, subject-specific-knowledgeable dispute-resolution mechanisms (Friedman 1965: 200-205). The result of these changes was increased centralization of power in the hands of the contract writers, (the powerful, business-owning social and economic elite) and less reliance on the state to bolster the agreements that facilitate economic transactions.

Interestingly, Friedman writes that the diminished capacity of courts and common law contract law left room for courts to adopt a new role—that of protector of individual "civil liberties" (1965:209). In the example cited of *Pattenge v. Wagner Iron Works*, Friedman explains how a court relied on contract law to protect employees who were fired for striking in support of the CIO, a rival to the AFL union in place at the plant. Here, contract law was not a symbol of the market, or as Friedman writes, "a set of interstitial principles to be applied residually, where legislation was silent." Instead, it was a weapon of due process. (1965:210). It is not surprising that a court sought to *bend the rules* in order to achieve a more just outcome. However, I question the degree to which this example proves the rule, as Friedman alleges it does, that the law's new role is to protect the defenseless. Surely, this happens from time to time, but perhaps it does only marginally to the extent that it is required to do so to avoid Rodney King incidents (Nadler 2005: 1400).

Macaulay's work is the logical, realist continuation of Friedman's. He set out to demonstrate empirically that the assumptions about the reliance on contract law for planning business relationships and ensuring compliance with agreements were wrong, seriously misleading, or at least, frightfully overstated. The prior common knowledge was that without contract law and the state's monopoly of the legitimate use of force, performance of contracts would be uncertain (Macaulay 1977). Indeed, this assumption was built up around the theories of contract's birth developed above. In fact, there are many contract scholars who continue to adhere to these beliefs, and argue against Macaulay and other realist scholars who align with him (see, e.g.: Hillman 1988).

Macaulay (1963) did what he set out to do in his seminal article, "*Non-Contractual Relations in Business.*" There, he showed that businessmen (they were mostly, if not all men) relied on norms of business relationships instead of their elaborate contracts that purported to govern their exchanges. That is, there were two, independent sets of rules governing their exchanges—(1) the legally defined, contractually prescribed ones, and (2) the business norms. Overwhelmingly, he showed that the latter controlled. Specifically, Macaulay identified two business norms that most saliently governed his subjects' interactions: (1) "Commitments are to be honored in almost all situations." (Ellickson (1991: 190) calls this norm "welfare enhancing" because it reduces the cost of enforcing any one given contract, and hence, even the cost of writing elaborate contracts tailored to a specific exchange.) The second norm of exchange that Macaulay identified is: (2) "One ought to produce a good product and stand behind it." This transfers the risk of product defect to the seller, the party typically better informed about that risk. It is a sensible norm, and one that was entirely inconsistent with the contracts Macaulay's subjects crafted that frequently purported to do just the opposite! Put together, these norms usurped or circumnavigated contractual limitations and remedies such that available damages were almost wholly ignored. Here is a stark example of contract, and hence, the state and the rule of law, being usurped by norms of exchange in the business community, not the other way around, as had previously been considered the correct way to perceive of contractual norms as emerging. That is, norms of exchange are supposed to be seen as emerging from and varying with the law, not orthogonally to it.

A similar, and widely cited example of what Macaulay observed is found in David Engel's (1995) account of "Sander County," a small, rural town in the U.S. in the late 1970s in which everyone knows everyone else and there is a strong sense of community and shared norms and values. There, Engel showed that contracts exist, but there is very little resort to formal legal systems to enforce them. Contractual disputes usually involve a failure of a party to conform to the commonly shared values and beliefs in the community. People kept their promises to one another because there is a shared norm of trust in each other's "word." This was very important to Engel's subjects. The core value of the traditional culture of Sander County was that "promises should be kept and that people should be held responsible when they broke their word" (1995:31).

Whereas Friedman and Macaulay argue that contract has shifted power away from the state into the hands of the owners of the means of production, Gilmore (1995: 95) suggests that expanding tort doctrine is gradually absorbing the "bargain theory" of contract, and in so doing, reducing its viability and utility as a body of law upon which people may reasonably rely in planning their affairs. In the legal realist tradition, Gilmore asserts that the bargain theory is an artificially narrow construct generated by Langdell, Holmes and Williston at the turn of the century to jive the law of business dealings with liberal economics and individualism. As such, according to Gilmore, the "death of contract" was inevitable because the bargain theory began to disintegrate when judges refused to follow it in the cases where doing so appeared unfair, when inconsistencies and alternative hypotheses were available for cases, and when the "tide of codification" focused analysis on legislative policy instead of the common law. (The latter echoes the observations of Friedman about the transfer away from common law towards subject-area-specific legislation.) Gilmore (1961) blamed this on the precedent-based legal system being unfit for the scope of the modern economic world.

To put Gilmore's ideas in the context of capitalism and neo-classical economics, he believed that our present welfare state inevitably caused the demise of the construct of consideration and contract that was part and parcel of the individualistic economic system. As he put it, the capitalist system was predicated upon the idea that "no man is his brother's keeper; the race is to the swift; let the devil take the hindmost. The decline and fall of the general theory of contract

and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond" (1995 [1974]:104).

D. Contract's Prismatic Resurrection

Contract may have died in the traditional, doctrinal sense, but it is far from dead in contemporary life. One cannot start a job, join a gym, purchase *anything*, park a car, receive medical care, use a cell phone, PDA or computer, log onto the internet, communicate with others (via phone, online or in any other way), watch a movie, television show or video content on the internet, or listen to audio recordings of any kind without encountering the most common form of contract—the form-adhesive variety. Perhaps it is more appropriate to say that the way that contracts are most commonly experienced has changed, but the law has not. In that sense, then, contract *is* dead. Our current situation with respect to contract as experienced versus contract law on the books is analogous to how it would be if we developed the capacity to travel via instantaneous teleportation, but continued to apply the laws of highway travel to the new form of transportation.

The traditional contract model, based in large part on freedom of individual choice, contemplates the parties negotiating their agreement. Drafts are exchanged or verbal terms traded. Reviewing any classic contracts case book will reveal this dominant traditional conception of contract formation, where there is "offer", followed by "acceptance," and there is some "meeting of the minds," and "consideration." There is a consent phase where all of these elements take shape, an agreement phase, and then a post-agreement "performance" phase, which may or may not involve one or both parties breaching the terms of the agreement, necessitating the non-breaching party or parties to seek to compel compliance with the contract's terms. In the modern, most common way that individuals experience contract, the consent phase is compacted—there is often no time or perceived need to review the terms embedded in the "contract". Parties shift the negotiation that occurs pre-agreement to the post-agreement, enforcement phase. As discussed in greater detail in the second part of this work, whether signers initiate negotiations in the post-agreement phase or not is partly a function of the way they regard the *legal* enforceability of the contract. When the terms are activated (when the signers realize that they have been billed or

when the contract-drafters inform them that as per the terms of the contracts they have signed, something is about to happen or has already happened) some signers initiate negotiations regarding the enforceability of the terms, and some comply with the terms without initiating negotiations—they just perform as the contract requires. The new form of contract contains terms, but it is useful to distinguish between *primary* and *secondary* terms. In the traditional contractual model all terms that are negotiated are incorporated into the written document, in many cases barring resort to extra-contractual oral terms in interpreting the written document (the so-called, *parole-evidence* rule). Terms excluded from memorialization are considered intentionally omitted by the parties and hence, unworthy of legal consideration. However, with form-adhesive contracts drafted by an organization intended to be signed by multiple signers, this *one-size-fits-all* approach to contract makes the parole evidence rule seem grossly unfair, inefficient and ultimately inapplicable.

I submit that a better approach would be to distinguish between primary and secondary terms. Primary terms are the ones that are up-front, and clearly articulated to signers before they sign. Primary terms are typically the only ones that signers see before signing. They usually include price terms (in employment, the wage rate for the type of work performed), and an expected duration of the relationship. In the medical care example mentioned earlier, I knew that the hospital was going to provide medical care to my daughter in exchange for payment, partly from my insurance company, and partly from me in the form of a co-payment. The primary exchange was medical care for money.

Secondary terms are those drafted by the organization and included only in the form-contract, or the *fine print*. These often include legally valenced clauses like choice of forum, jurisdictional submissions, dispute resolution, or other contingency clauses. The secondary term that ultimately became part of the contractual transaction in the medical treatment example was the agreement to resolve any disputes that may arise by final, binding arbitration instead of in court. I, as the signer, did not know that this term was part of the deal until after I signed (more factually, after the primary terms had been fully executed).

The most troubling secondary terms modify the primary ones. For instance, the primary exchange for the business known as "Girls Gone Wild" is one or two DVDs (depicting college-aged women of various levels of inebriation in various states of undress) for a set price (it varies, but is usually between $9.99 and $29.99). The company advertises on television and the internet. When individuals agree to this simple primary exchange (a flat price for a set number of DVDs), they agree to the company's tiny-fonted "terms & conditions"—a form adhesive contract. This contract contains a secondary clause that changes the price term of the primary exchange such that purchasers become contractually obligated to continue paying for more DVDs over a period of months and pay an automatically renewing *subscription fee* of considerably more money than the original amount. A cursory review of consumer complaints about *Girls Gone Wild* on the internet reveals at least one consistent trend among those who purchased the DVDs: many were surprised by the secondary term's amendment of the primary term. For instance, the following are excerpts from the website http://www.consumeraffairs.com/misc/wild.html:

> **Joseph of New Brighton MN (04/08/09)**□Took trail offer and have been unable to cancel□about 200 dollars in lost revenue to me and I'm poor.

> **Thomas of Fall River MA (03/13/09)**□A few years ago I purchased a few DVDS from Girls Gone Wild, and then for the next 5-6 months I was getting billed for Dvds I never bought. Even after I canceled with them they kept sending videos and charging my account. A lawyer sent me a form a few weeks ago telling me I wasn't the only one who has been scammed, but it was thrown out on accident, I want justice!!!

> **Scott of Lake Wales FL (02/28/09)**□I also order a video and a month later 2 more came in so I tried to quit the sending them and they kept coming till the whole set was sent and the whole time they was taking money from my account putting me in a hole every time—every time they charged me it would put my account in the negative then I would have to pay the extra money to get it out so I would have to pay for the dvds and the hole it would put me in making me pay 60 to 70 dollars a month every time they billed me.

> **Jacob of Middleburg FL (01/16/09)**□I ordered 1 video to see what they were like in Sept 08. I then was sent 2 videos in one package and they charged my account in Oct 08. I called them to cancel and to NOT send any more. Now I have been charged another $29 the first of January and I did not order anything nor have I

> received any videos. I called and they said they would credit the account. They still have not. I still have the 2 from Oct that are unopened. I am returning them in hopes of getting my money for those. If I do not get my credit within a week, I will report my card lost so that they can not charge anything else on the account.□□I am unemployed at this time and can not afford for them to take money from my account.

Conclusion

The *Girls Gone Wild* secondary term that amended the primary price term vis-à-vis the tiny-fonted terms and conditions, (truly, a form-adhesive contract at its most nefarious), is a good example of the way that doctrinal contract law and the objective theory of contract has *died* by not catching up to contract as most commonly experienced. Traditional contract is an older breed, dying out and making way for its progeny—the form-adhesive contract. Doctrinal contract and the objective theory associated with it evolved out of the transition to modern capitalist economic system. It was born out of strict and near-unanimous belief in economic freedom. Contractual liberty was the quintessential embodiment of a liberal democracy. The extra-contractual or pre-contractual bases for contractual authority (morality, social and cultural norms of reciprocity, and mutual power and resource dependence) did not disappear when the new legal, doctrinal contract law emerged married to economic freedom. Some argue that they became incorporated into contract law. For instance, some contend that the state became the neutral enforcer of moral norms of promise-keeping. What has actually happened to these extra-contractual sources of authority is largely unclear. What is clear is that powerful actors thrived in this system and exploited the contractual and economic liberty to exploit less powerful actors. With the rise of the legal freedoms granted to the modern corporation such as the freedom to contract as an individual (the notion of "*persona ficta*" or a fictitious person with the same legal standing as an individual even though lacking a physical body (Swedberg 2003: 210)), and ascription to corporations of many individual rights came the increased ability of corporations to exploit vis-à-vis contract (Swedberg 2003: 209-210). What started out as a liberal ideal of democratic freedom ended up giving rise to the dominant form of contractual relations between organizations and individuals in contemporary life.

In its new form, contract acts like a prism through which the light of other extra-legal forms of contractual authority shines. In the *Girls Gone Wild* example offered above, many of the signers' complaints indicate how imbalanced mutual power and dependence seem to shine the brightest—many reference how the company has their credit card number and uses this information to leverage payment through costly and time consuming cost of reversing the continued charges. But twisting the form-contractual prism could just as easily permit other extra-contractual light to refract more clearly. The second part of this dissertation demonstrates an important twist of the prism in the employment context—clearly one major area in which form-contracts prevail. The third part of this work twists the prism several times in an experiment designed to strip down the form-contract to its bare form, revealing more about how and when these other lights compete and ultimately which one or ones shine the brightest.

Part 2: The Devil in the Details: Malleable Consent in the Employment Context

Introduction

Trust in agreements underlies not only economic transactions, but lies at the heart of the civil justice system, the rule of law, and to a larger extent, our ability to interact socially. The notion that parties to an exchange may bind themselves presently, and often rely on their agreements in the future, is simultaneously at the root of all commerce as well all social interaction. Norms about such exchange, including the reliability and enforceability of agreements, are essential to our collective propensity to sustain a civil justice system and to ensure continuation of healthy and peaceful social exchange. What happens to these perceptions of enforceability when actors bind themselves to contracts that they have had no opportunity to participate in drafting or negotiating? Does variation exist in perceptions of enforceability of such agreements? What effect(s), if any, does such variation have on the way individuals conceive of how they exchange with the entities (mostly institutions) that draft such agreements?

The starting point for answering these questions should be an evaluation of individuals' experiences with and interpretation of the most commonly experienced form of contract. Most contracts between organizations and individuals are form-adhesive. Indeed, form-adhesive contracts are ubiquitous. Anyone who has received a loan, entered into a mortgage agreement, rented a car, purchased software, music, or other media, received medical care, entered into a cell phone service contract, gone on a cruise, signed up for a credit card, joined a club, or engaged in just about any other economic exchange with an organization in the last three decades has likely encountered many such agreements. In fact, relationships between organizations and individuals are rooted in these take-it-or-leave-it contracts drafted by organizations (or more often, lawyers representing the organizations' interests), intended to be signed by numerous individuals such as customers, employees, medical-care recipients and others. And yet, in spite of their ubiquity, form-adhesive contracts are relatively understudied. When they are studied, it is rarely from a

socio-legal perspective, although the need to adopt such an approach has been acknowledged (Rakoff 1983; 2006 p. 1244-46). Most of the attention paid to form contracts has been from an economic or legal-economic perspective, focused on theory and model building as opposed to empirical inquiry. Most existing scholarship has adopted the perspective of "society," the legal system, the economy, or the drafters of form agreements. A focus on individuals' experiences with and interpretations of these contracts is much less common.[2] Individual behavior with respect to such terms is usually assumed, theorized, or modeled. It is rarely empirically observed and reported.

Assumptions made about how individuals experience and interpret form agreements may not be accurate, and may lead to incomplete or inaccurate conclusions about the effects of such agreements. As form agreements often dominate and define the contractual landscape in such important areas as mortgage lending, consumer relations, intellectual property licensing, and dispute resolution (in employment and consumer domains), it would seem like a worthwhile endeavor to empirically explore the effects of such contracts both within and across socio-economic strata, if for no other reason than to contribute to policy discussions in these areas. Further, as explained in more detail below, prior socio-legal research suggests that form-adhesive contracts may be a fruitful, but relatively untapped area in which to explore views about citizenship in the state.

This portion of the dissertation seeks to fill these voids in the literature by employing several empirical methodologies (structured face-to-face interviews and surveys) to study individual social actors' experiences with and interpretations of form-adhesive agreements. In so doing, I seek to contribute to the discussion of the role of the rule of law in daily life.

Existing research about form contracts has been framed by the observation that these agreements are axiomatically different from contracts as classically defined. Specifically, drafting organizations promulgating these contracts are invariably more powerful than, and less

[2] One exception is Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 83 (1997) (presenting initial evidence that "exculpatory clauses [in form contracts], *if read*, have a deterrent effect on propensity to seek compensation") (emphasis added).

dependent on, the individuals who sign them.[3] There is often no "meeting of the minds" in the classical sense of the term, as many signers do not read or understand what is in the agreements they sign. In fact, some organizations take great pains to craft and deliver their forms specifically to minimize the likelihood of such a "meeting of the minds" (Sullivan 2007: 8-10).

Scholarship has explored the nature of these differences and the important question of how such differences affect judicial enforcement of these contracts. For instance, economists have questioned the lack of competition over terms contained in such contracts (Gabaix and Laibson 2006; Korobkin 2003). Others have pondered whether these agreements are one-sided, the extent of the one-sidedness, and the conditions under which they are more or less one-sided (Hillman 2007; Kessler 1943; Rakoff 1983; Slawson 1971). Still others have contemplated when such terms are enforced by courts and when they ought not to be (Baird 2006; Hillman and Rachlinski 2002; Marotta-Wurgler 2007b; Slawson 1971). Some note that boilerplate is not as bad as it may seem, in part because firms selectively enforce them against signers (Bebchuk and Posner 2006; Johnston 2006; Marotta-Wurgler 2007a). As discussed below, this last observation is perhaps the most interesting example of the underlying conundrum presented by form-adhesive agreements. For the most part, however, those who have approached the subject try to ascertain what the text of these agreements purports to do, when they are good or bad (where "bad" means the language is one-sided in favor of the drafting organization), just how bad they are, how courts have treated such terms, and how courts should treat such terms.

These approaches are useful and serve an important role in addressing policy discussions about form-adhesive agreements. However, they collectively fall short of the mark when trying to understand the role of such contracts in exchange relationships, or more significantly in sustaining or undermining the rule of law. Also, it would seem that more than three decades of

[3] The term "powerful" is used here in the classical, social exchange theoretical sense, essentially as a function of imbalanced mutual dependence. *See, e.g.*, JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 134–35 (1994) (diagramming the value of an individual's power and situations where that power will be greatest); LINDA D. MOLM, COERCIVE POWER IN SOCIAL EXCHANGE 11–39 (1997) (describing basic concepts, assumptions, and principles of social exchange theory and its conception of power); Richard M. Emerson, *Power-Dependence Relations*, 27 AM. SOC. REV. 31, 31–36 (1962) ("In short, *power resides implicitly in the other's dependency.*"); George C. Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597, 605–06 (1958) (discussing small-group research on social structure and exchanges of influence).

socio-legal studies have repeatedly demonstrated the need to understand not only the formal "law on the books" aspect of a legal phenomenon such as form contracts, but the "law in action" aspect as well. The "law in action" approach is particularly salient in this area because, as noted in the literature and confirmed by the research reported herein, form agreements are often not even read or understood by the signers. It would therefore make sense to explore interpretations of and experiences with form agreements (the "law in action" component) to determine how the law should regard these contracts, and at the very least to supplement the existing research, which has addressed the "law on the books" component almost exclusively.

It may occur to those steeped in the law and society tradition—particularly those of the legal realist persuasion and even more particularly those familiar with the seminal work of Stewart Macaulay (1963; 1985), Grant Gilmore (1974), and Lawrence M. Friedman (1965)—that such a focus on the citizen is essential to fully understand these unusual forms of contract as experienced. Contract as experienced, as Macaulay and others would likely agree, is often more important than contract as written. In fact, the necessity of including empirical analysis of individuals' experiences and interpretations of contracts is evidenced by the central finding of Macaulay's important work on contracts among businessmen: individual opinions about contracts more saliently predict how breaches are perceived and resolved than the contract terms themselves. As Macaulay directly and succinctly introduced his classic work, the relevant empirical inquiry remains the same: "what good is contract law? Who uses it? When and how?" (1963: 55). This research seeks to extend the work of Macaulay and others by examining how individuals actually experience form agreements, and how individual interpretations of form agreements affect the way in which social actors exchange (contractually or otherwise) with the organizations that require their consent on such forms.

The objectives for this analysis are therefore threefold. First, this part of the dissertation argues that through an exploration of individual interpretations of and experiences with form-adhesive agreements, it is possible to gain a fuller understanding of trust in the rule of law and by extension, citizenship in the state. Second, this part of the dissertation seeks to contribute to the important discussion among contract scholars about how form agreements ought to be regarded in doctrine and legislation by demonstrating empirically the connection between interpretations

of form-adhesive agreements and how individuals regard their ongoing relationships with form-drafting organizations. Third, in challenging the assumption of uniformity in individual interpretation of form agreements, this part argues that observed differences of interpretations of and experiences with boilerplate vary with socio-economic status (SES), such that higher SES actors view the enforceability of contracts they have signed as more malleable than lower SES actors. The implications of such SES-based differences of interpretation of form agreements for theories of democracy and the liberal state may be far-reaching considering the degree to which citizens' consumer and employment relations are governed by these contracts.

In sum, this part of the work attempts to elaborate on our understanding of the rule of law through perceptions of contract. This is not at odds with prior research on boilerplate. In fact, it is an extension of existing research in mostly uncharted directions. However, in so doing, I challenge several critical assumptions made by existing scholarship about the uniformity of perceived enforceability of form agreements.

To illustrate the importance of actor-centered empirical inquiry, consider the arguments advanced by Lucian Bebchuk and Richard Posner in one article (2006: 827-28) and Jason Scott Johnston in another (2006: 858). These authors claim that firms do not intend to strictly enforce the terms contained in form agreements. That is, firms keep self-serving terms in form contracts to selectively "fend off consumer opportunism," as Omri Ben-Shahar describes it, but otherwise allow honest clients off the hook (2007: xi). These authors assume a uniformity of individual interpretation of the form agreements they have signed. All actors, they argue, are assumed to behave consistently with their interests—when the terms are activated and not in their interests, individuals will speak up and demand circumnavigation from the organizations, otherwise honest clients remain silent. Firms then sort the honest from the dishonest and enforce only against the latter, resulting in a presumptively fair outcome. Johnston goes so far as to argue that boilerplate encourages negotiation, suggesting that the terms contained in such agreements to which both sides have ostensibly bound themselves are merely invitations to negotiate (Johnston: 864-77; Wolfson 1999). This may be the organizations' view, and I later addresse how this approach parallels the way in which powerful, ruling-class elite social actors historically transformed statutory law to conform to their interests. But this assumption conflates the notion of self-

interest, on the one hand, with perceptions of one's ability to rely on the law to enforce a contract or to wield the law as a sword to escape from a contractual provision that appears unlawful on the other. I posit that these things are quite separate, and need to be measured separately, especially when the exchange relationship of interest is axiomatically power-imbalanced as is the case with form-adhesive contracts.

What if all individual signers do not view these contracts they have signed in this unusual way—as invitations to negotiate? [4] Form agreements are, after all, binding legal contracts (at least they may appear as such to some). What if some regard form contracts "myopically," thinking that there is no post-agreement negotiation available, and others regard them, perhaps more sophisticatedly, as open and quite negotiable, like the "myopes" and "sophisticated consumers" in Gabaix and Laibson's terms? (2006: 507-09). This is exactly the type of division that prior research on law as a differentiated resource suggests. Along these lines, what if the variation in individual interpretations is such that the organizations' opportunities for sorting are not aligned to distinguish opportunism from altruism? What if SES differences among individuals explain part of the variation, such that lower SES actors are more likely to feel bound by one-sided terms than higher SES actors? Again, this is consistent with prior scholarship on citizenship.

The purpose of this part of the dissertation is to raise questions, provoke discussion and begin to empirically vet the theories developed about perceived enforceability of contract. It is also the aim of this part to expand the scope of inquiry on the phenomenon of form contracts beyond the present range of disciplines. Hopefully, this part illustrates the need for further empirical study of citizens' engagement with these ubiquitous contracts, some of which is followed up on in the second part.

To begin, this part examines these questions: What happens to interpretations of enforceability when actors bind themselves to contracts that they have had no opportunity to participate in negotiating or drafting? Does variation exist in interpretations of enforceability of such

[4] Interestingly, there is research demonstrating significant gender differences in the way in which individuals perceive opportunities to initiate negotiations. *See generally* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003) (exploring gender gap in propensity to initiate negotiations).

agreements? What effect(s), if any, does such variation have on the way individuals interpret their exchanges with the entities (mostly institutions) that draft such agreements? Do groups of socio-economic actors interpret enforceability of agreements differently and with what effect, if any?

To address these questions, a construct called "malleable consent" is introduced, which is the view that an agreement to which one has consented without duress or fraud is nonetheless not enforceable against the signer in whole or in relevant part. Part II traces the theory underlying the interrelationship among interpretations of contract, trust in the rule of law and citizenship in the state. This Part also outlines malleable consent's theoretical utility as an indicator of trust in the rule of law. Malleable consent is presented as a means of studying how individuals construe and respond to form agreements, and as a way of examining popular faith in the rule of law.

Part III explains the two questions motivating the research methodology and findings. First, how does malleable consent vary across SES? Second, what is the relationship, if any, between malleable consent and how individuals exchange with their employers: as a transaction devoid of trust and loyalty, or as an ongoing relationship? Part IV details the two studies in which malleable consent was observed.

The main analysis is in Part V, which sets out the preliminary findings supporting the hypothesis that higher SES actors are more likely to regard form-adhesive agreements as unenforceable when compared to lower SES actors. Part VI then discusses the findings in support of the hypothesis that actors are more likely to regard form agreements as unenforceable (high malleable consent) when they view their jobs as instrumental transactions—as simply a financial exchange. Where employment is regarded as an exchange of obligations as well as rewards, as imbued with a substantive, moral relationship—what industrial relations scholars often refer to as a "social contract" or a "relational exchange" (Kochan January 7-9, 2000; Kochan and Shulman 2007; Osterman et al. 2001)—actors are more likely to regard the form-adhesive agreements as enforceable (low malleable consent). Essentially, when actors view form-adhesive agreements as unenforceable, there is less expressed trust in the employment relationship. These results seem to hold across diverse populations, from low level employees of

a national company to MBA students at an elite business school. MBA students, who enjoy less dependent employment constraints (for example, more job opportunities and less dependencies), voice less respect for the enforceability of the contracts they sign. They display malleable consent more frequently than sales associates with greater employment dependency and constraints. Exploring these differences across the two divergent groups, the construct is presented as a means of revealing otherwise unobserved differences among citizens' interpretations of law in the employment context. Part VI discusses the implications of this research and Part VII the limitations. The conclusion follows.

The Relationship Between Contract and Trust in the Rule of Law

There is a connection between interpretations of law and virtually all social and economic exchange. By understanding such interpretations, we may gain a fuller understanding of the circumstances under which individuals rely on the law, avoid the law, break the law and believe in the consequences of actions that deviate from the law (Ewick and Silbey 1998; Ewick and Silbey 2003; Greenawalt 1985). This connection is important because, in part, it defines citizenship in the state. Work by sociologists and other scholars has repeatedly and consistently demonstrated this connection (see, e.g.: Bies and Tyler 1993; Bumiller 1988; Coleman 1990; Edelman and Suchman 1999; Ewick and Silbey 1998; Galanter 1974; Garth and Sarat 1998; Gibson 1991; Kritzer and Silbey 2003; Merry 1990; Tyler 2006). As mentioned at the outset, *trust* that agreements will be enforced underlies not only economic transactions, but also underwrites the civil justice system, and more generally, the rule of law, and, to a larger extent, our ability to interact with one another without resort to violence and other asocial means of assuring compliance. The notion that parties to an exchange may bind themselves presently, and often rely on their agreements in the future, is simultaneously at the root of all commerce and all social interaction. Understanding this relationship is important because deterioration of the critical mass of contract-enforceability believers yields a corresponding problematic deterioration of law, associated with loss of social control and increased resort to non-legal means of redress, including violence, asocial behavior and other potentially undesirable outcomes (Black 1976; Black 1983; Ehrlich 1936).

This connection between perceptions of the rule of law on one hand and beliefs about enforceability of contract on the other is discussed specifically by several notable scholars. For instance, Eugen Ehrlich wrote that the contract is the "juristic form for the distribution . . . of the goods and personal abilities (services) that are in existence in society" (1936: 48). The law embodies the norms of exchange in this "contract." Actors interpret and often reinterpret contracts they have created (or at least to which they have consented). Actors' interpretations of their contracts are colored by their views of the law specifically, in context with respect to the relative power of the parties, and generally, often drawing on notions of justice, equity and fairness (Gibson 1989; McEwen and Maiman 1986; Tyler 1997). Thus, a self-perpetuating loop that enables both economic and social exchange to function is born.

Max Weber and others after him agree that contract creates law as much as law creates contract (Weber 1954). This is why, for example, the Uniform Commercial Code (UCC) attempts to embody *and* defer to industry custom (the norms of exchange), and why those creating contracts governed by the UCC look to case law interpreting it and related statutes in negotiating their instruments of exchange.

The proposition that our collective belief in the enforceability of contracts is necessary for the law to remain self-sustaining is not novel. On the contrary, the idea of the embeddedness of the state, and hence, the law, in all seemingly private contracts is, in fact, rather old. Emile Durkheim explained that there are no private contracts—even in agreements between private parties where no explicit reference to the state or the law is made:

> It is true that obligations that are properly contractual can be entered into or abrogated by the mere will to agreement of the parties. Yet we must bear in mind that, if a contract has binding force, it is society which confers that force. Let us assume that it does not give its blessing to the obligations that have been contracted; these then become pure promises possessing only moral authority. Every contract therefore assumes behind the parties who bind each other, society is there, quite prepared to intervene and to enforce respect for any undertakings entered into. Thus it only bestows this obligatory force upon contracts that have a social value in themselves, that is, those that are in conformity with the rules of law. We shall even occasionally see that its intervention is still more positive. It is therefore present in

> every relationship determined by restitutory law, even in ones that appear the most completely private, and its presence, although not felt, at least under normal conditions, is no less essential (1933: 71).

It follows from the above proposition that belief in the enforceability of contracts is at least, in part, a reflection of belief in the state's ability to enforce law generally. Ehrlich agreed with Durkheim on this point and took the concept one step further. Ehrlich believed not only that the law and the state lurk in the shadows of all private contracts, but that informal, everyday norms of social exchange do as well (1936: 45-48). He noted that even in commercial dealings, contracts are not entered into as with definite persons, "but as with the whole group of persons who are in a mutual relation of exchange of goods with each other." (p. 46). This idea that contractual relations norms extend beyond the four corners of private parties' agreements to affect the scope of others' legal power is echoed in Weber's writings as well:

> In certain situations the normative control through enabling rules necessarily extends beyond the task of the mere delimitation of the range of the parties' individual spheres of freedom. As a general rule, the permitted legal transactions include a power of the parties to the transaction to affect even third parties. In some sense and to some degree almost every legal transaction between two persons, inasmuch as it modifies the mode of the distribution of disposition over legally guaranteed powers of control, affects relations with an indeterminately large body of outsiders. (1954: 26)

Taken together, the ideas of Ehrlich, Durkheim and Weber yield the feedback loop described above wherein law relies on norms of social exchange, which in turn rely on law to sustain social order generally. Thus, the normative context of exchange, the social valences associated with the provisions of agreements, and interpretations of *law* are all part of this critical interplay in which emergent contracts are the legal representation of the interaction. This notion is encapsulated in Abram Chayes's influential work, *The Modern Corporation and the Rule of Law*, (1959) in social theoretical insights of how each person makes the law when he or she writes a contract, and in the idea that the law is not about *proscriptions*, but about individually

crafted *prescriptions* (See also Friedman and Macaulay 1977).[5] Because the way that parties to a contract interpret their agreements has the capacity to affect the law, the "disposition over legally guaranteed powers of control," and a host of other socially relevant measures, trust or faith in the enforceability of contract is required for the feedback loop to be perpetuated.

This feedback loop—involving norms of exchange, interpretation of law, law "on the books" and contract—begs the question of which element is in control of the loop. Macaulay (1963) demonstrated that terms contained in negotiated, arms-length business contracts among sophisticated and knowledgeable actors are often eclipsed by the norms of interaction. These actors' interpretations of how business is to be conducted dictated how they behaved more so than the written terms in contracts they had entered (see also, Gilmore 1974). Available contractual remedies were foregone, and extra-contractual responses, including penalties for breach, were negotiated and accepted in spite of pre-existing written agreements purporting to dictate otherwise. These observations lead to the provocative Realist assertion that "contract is dead" (Gilmore 1974; Hillman 1988). However, this assertion and its associated scholarship, do not begin to fully explain the effects of this alleged death on contracting parties, and the conditions under which these important norms and interpretations vary systematically. This research seeks to pick up this very set of questions.

A. Variation in Malleable Consent

Depending on one's theoretical assumptions, it could be either expected or quite counter-intuitive that actors vary in the way they construe the enforceability of agreements into which they have entered. It may be expected for those who posit that law is a differentiated resource (Ewick and Silbey 1998; Kritzer and Silbey 2003; Nonet and Selznick 1978). If form-adhesive agreements are interpreted and experienced in the same way that other legal things are, it follows that variation exists here as it does in contexts like the civil and criminal justice systems (Cover 1986; Kritzer and Silbey 2003; Moore 1973; Younts and Mueller 2001). Some could view contract, regardless of adhesiveness or *form-ness*, as a set of moral obligations. In this instance,

[5] Noting that "the source of law is said to lie in the will of the people. . . . [T]he structure of the legal system itself—the way in which 'custom' or 'public opinion' is translated into 'law'—is itself an important factor . . . ." p. 577–78.

the morality of agreement drives perceived enforceability and trumps other concerns like fairness, instrumental cost-benefit calculations, or even *legality*. However, it is just as easy to imagine how a different configuration of priorities could lead to regarding the same form contract as unenforceable. Variation may therefore also be expected for those who subscribe to the view of contract as an embodiment of moral obligations, where one person's morality may differ greatly from her contractual counterpart's (Barnett 1986; Fried 1981). For some, a "deal's a deal" trumps "it's not fair that I was forced to sign the waiver in order to receive emergency medical treatment for my daughter." Lastly, it may be the case that variation in perceived enforceability is expected for those who believe that resource-dependency dominates the decision-making process. For instance, if one has to sign a contract in order to receive the benefit of the bargain, one may very well be acutely aware of one's true resource-dependence on the party requiring his signature. It would be rational and expected to assume that a party who is able to force one to sign a contract is also quite capable of enforcing its terms.

Variation in perceived enforceability may be counter-intuitive for those who assert that action is consistently, and almost uniformly, rationally self-interested, as is often the case in economic models of behavior. In such models, people sign because it is in their interests. They prefer to receive the benefit of the bargain and incur the costs of signing the agreement, because the benefits less the costs are assumedly preferred to incurring the opportunity cost of foregoing the benefit of the bargain. In the employment context, new hires are in a honeymoon period and could not imagine having to sue their employers for being illegally fired or harassed. They therefore view the costs of signing away their right to sue their new employers in court as either extremely low or nonexistent. Why not give away a right if the likelihood of needing it is so low? Down the road, when signers want to do something the terms of the agreement prohibit, actors are assumed to regard the contract as unenforceable, proportional with their expected utility of seeking escape from the contract less the perceived costs of seeking escape. This is most often the case in economic analyses of behavior around contract (Hylton 2000; Plaut 1986).

Similarly, those who study law with regard to norms of exchange often laud the law as supporting shared, uniform and socially accepted institutional rules as a reflection of public opinion (Friedman 1959; Habermas 1987). For instance, Jürgen Habermas notes that the law

allows actors to relate to each other as agents *predictably* because of a shared understanding of legal obligation and responsibility, thereby removing a heavy organizational burden from communicative skills.[6] Variability of subjective contractual enforceability yields less predictability and increased social discord. This part of the dissertation offers preliminary evidence of this lack of uniformity, contending that actors vary in the degree to which they regard the enforceability of terms, even when the terms are constant *and* against their interests.

B. The Relationship Between Form-Adhesive Agreements and Malleable Consent

Form-adhesive agreements are not new. In fact, writing in 1936, Ehrlich observed that "[m]ost written contracts are drawn up according to printed forms, the content of which often is not made known to the parties, for it is determined by society quite independently of their individual wills" (p. 49). Form agreements were and continue to be justified byproducts of a bureaucratic, industrialized society. Many judges and scholars initially viewed such forms as innocuous conveniences—as the way to lubricate economic exchange given the unavoidable impersonal nature of daily interactions. As Weber noted, "forms are necessary only to the extent that they are prescribed for reasons of expediency, especially for the sake of the unambiguous demonstrability of rights, and thus of legal security" (1954 p. 125). He believed, however, that the expanse of their use would be determined by property rights and power. In fact, he theorized that the very tenet of "contractual freedom," and courts' desire to avoid substantive analysis of "fair deals," would result in institutionally legitimated and routinized power by the few over others.[7]

The nascent evolution of the notion of malleable consent is traceable even in court opinions in which boilerplate was sought to be enforced. In 1960, the Supreme Court of New Jersey heard the case of *Henningsen v. Bloomfield Motors, Inc.* in which a car buyer sued the automobile manufacturer for consequential damages allegedly resulting from a defective steering mechanism

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[6] "This is true of cases where the *law* serves *as a means for organizing media-controlled subsystems* that have, in any case, become autonomous in relation to the normative contexts of action oriented by mutual understanding." p. 365.

[7] "The result of contractual freedom, then, is in the first place the opening of the opportunity to use, by the clever utilization of property ownership in the market, these resources without legal restraints as a means for the achievement of power over others." p. 189.

(1960 : 73, 75). The car maker argued that the buyer waived his right to sue for such damages when he signed the contract containing a waiver of damages clause in the fine print. The court ruled that the waiver did not apply:

> The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. (p. 86).

The court's implied and uncanny prediction that the rise of the form-adhesive agreement would upset the "social order as a whole" is particularly emblematic of the suggested scope and effect of this research. Specifically, this work speculates that the more we enter into form-adhesive agreements, the more our collective notion of contract becomes watered-down. With the degradation of this bedrock on which our economic system is based, I forecasted major instability in industries predicated on boilerplate contracts, like the mortgage lending industry. Form mortgages are the norm, and because people have numbed to contracts that *appear* similar and innocuous, this part of the dissertation speculates that many sign these agreements with greater malleable consent than they should have for such contracts. A mortgage form may look like the same form legalese as the "Terms & Conditions" that a cell-phone service provider sends to its customers in the mail, but they are not. Greater perceived unenforceability on a mass scale can have dire economic consequences if and when the drafting organizations seek enforcement of terms that individual signers regarded incorrectly as mere *invitations to negotiate* just as individuals might with more innocuous form agreements like the cell-phone service Terms & Conditions or other commonly encountered forms. The greater the societal level of malleable consent, the less trust there is in the rule of law. Less trust in the rule of law yields increased resort to non-institutional, extra-legal forms of coercive power and other negative outcomes.[8]

[8] This logical progression is somewhat analogous to arguments about other pervasive social phenomena in that it is easy to believe but hard to prove. For instance, it may be easy to believe that pervasive depictions of violence in music, television, video games and on the Internet has *some* deleterious impact on social action. This notion, however, is difficult to prove, in part because of the extent to which the phenomenon exists.

Lastly, it is worth noting two additional notions that may be applicable when addressing individual behavior around form adhesive agreements. The first comes from the literature on the phenomenon known as "escalation of commitment" (Brockner 1992; Staw 1976; 1981; Staw and Ross 1987). Part of this research has demonstrated that the less often or less actively actors participate in a negotiation process, the less *buy-in* the actors are likely to feel to the terms of the agreement (Bobocel and Meyer 1994: 360-61; Fisher, Ury and Patton 1991: 27-28; Walton and McKersie 1965: 149-150). It follows that actors who do not participate *at all* in the process of creating an agreement have no control over the terms or the process by which the parties bind themselves (this is the definition of form-adhesive agreements). In most cases, these actors have no personal connection with the party that created the agreement, and are more likely not to accept the agreement as compared to actors for whom such conditions do not exist. It is possible then, that such micro-level experiences also yield greater collective belief that such agreements are unenforceable against them.

A second notion comes from an observation frequently noted in the legal scholarship on boilerplate. People tend not to read the form-adhesive agreements they sign. As many argue, this is rational behavior for a number of reasons (Eisenberg 1995: 241-42; Hillman and Rachlinski 2002: 446-47). If signers do not read the terms at the time of consent, they would have no opportunity to know (or care) whether the provisions are enforceable against them. Later, when they learn that the terms exist, they can either accept that the entity that coerced them to sign is legally entitled to use the form-adhesive agreement to the coercing entity's advantage (it is enforceable), or they can believe that the law protects them, the individual, from such unfair behavior (it is unenforceable). Thus, the fact that actors tend not to read or care what it is that they sign is likely to produce ex-post differentiation in the perception of the agreements' enforceability.

C. Malleable Consent and Law as Coercive Power

If law is a means of social control, as many argue it is, (see, e.g.: Black 1983; Fuller 1975; Pound 1942: 18-20), then form-adhesive agreements offer an appealing and convenient way for

institutions that draw from the well of institutionalized (legal) power to exert greater control. In this sense, malleable consent can be a useful measure of the popular response to this institutionalized form of control.

Institutions rely on form-adhesive agreements to protect their rights and interests often to the detriment, exclusion or waiver of individuals' rights and interests (examples are waivers, penalty clauses, etc.). Such contracts are a powerful and subtle form of social control through the appearance of the law. Signing a form-adhesive agreement could mean either that pre-existing individual rights and interests are canceled out or waived (the right to a jury trial, for instance), or that future benefits are promised to be given by the individual to the institution usually upon the occurrence of a described event (i.e. in credit card user agreements, agreeing to pay a penalty for late payments). Institutions too could be said to vary in their malleable consent; they selectively enforce form-adhesive agreements against individuals in much the same way that laws are made and enforced against individuals. Numerous historical accounts exist of powerful actors creating rules to selectively enforce them against the less powerful (Chambliss 1964; Hall 1952; Thompson 1975). It should not be surprising then that this process is replicated through form-adhesive agreements. That is, institutions create forms in the first place to demonstrate uniform treatment, and then permit individuals to escape from the oppressive waivers in a demonstration of institutional leniency and good will (Hay 1980: 48-54; Thompson 1975: 265; Vogel 1999: 162-66, 168-69).

The footnoted references cited above in support of the proposition that institutions create forms to demonstrate uniform treatment and subsequently permit variable leniency are Thompson's (1975) account of the Black Acts and Jerome Hall's (1952) account of the laws of property and theft. These may be read as accounts of institutional renditions of malleable consent. Put another way, individuals replicate what institutions do when contracts (which are embodiments of state-institutional coercive authority and power) purport to bind them to action or inaction, in ways inconsistent with their interests. The essential difference is not in the process, but in the outcomes.

The frequently cited *Carrier's Case*, discussed in Jerome Hall's important work on the history of theft, offers a perfect example of the sequence by which powerful social actors (wealthy, property-rich elite) exhibit the institutional equivalent of malleable consent. In 1473, before specific laws of theft were established to protect property, influential property-owners first tried to adjust existing laws to comport with their interests as their needs and interests were not within the intention or existing interpretations of established laws. In the *Carrier's Case*, existing law suggested that goods not delivered as contracted were not "*stolen*" because through the act of bailment, the carrier had established temporary property rights over the goods. When these conventional understandings of bailment, property and theft proved problematic in a world of increasing commercial exchange, the merchants and their lawyers strained to substantively interpret the law to comport, in this case, via the idea of "breaking bulk," or opening the bails. When that proved too difficult because the rules were insufficiently flexible to suit their needs, new laws— whose letter comported directly with the merchants' and the King's commercial interests, resulting in more harmonious accord for those compelled to be in compliance with the law—were concocted. The transformed laws were then more easily relied upon to induce social actors to comply therewith, resulting in more security for the already more powerful actors' interests and wealth.

Following the same pattern, when individuals are faced with contracts that bind them in ways they do not wish to be bound, first, they may alter their expectations of what the contracts contain, either electing to ignore the agreements entirely, or to develop beliefs about their contents not based on careful readings but on normative expectations. This is supported by the data presented in this portion of the dissertation—only three out of thirty-seven subjects knew that they signed an agreement binding them to resolve all employment disputes by arbitration in lieu of adjudication. It is also supported by existing scholarship on reactions to boilerplate (Eisenberg 1995: 240-44; Hillman and Rachlinski 2002: 446-54). Following this, actors may strain to interpret existing agreements in substantive ways that differ from their apparent intention, arguing that the way others must regard these things differs from what the contract terms (institutional actor claims) purport to do. It is in this step that we may see actors' expectations about the norms of exchange more saliently predicting variation in action—some expect that their credit card late fees will be waived if they call and ask their lender to do so,

while others do not expect that this would happen, and pay the fine. The variation in malleable consent documented in this Article supports the occurrence of this reaction.

The last step is perhaps the most interesting, for those on the receiving end of form-adhesive agreements are axiomatically not the authoritative, powerful authors of the contracts empowered to alter the terms of the agreements. So, how do less powerful social actors react to form-adhesive agreements? What effect does exposure (for some, *prolonged* exposure) to these agreements have on these individuals?

Individuals may respond in four non-mutually exclusive ways. First, exposure to form-adhesive agreements may have no effect. That is, some individuals may sign these agreements and not care whether their rights are affected or how. They could tolerate or accept the invasiveness of the agreements and remain otherwise loyal to the organization(s) making them sign. Indeed, a portion of the participants observed appear to fall into this category, at least in the short-run. Second, actors could express "voice" about the agreements—complaining either to the organizations themselves, or more likely, in public venues. No substantial evidence of "voice" emerged in this study, but this does not mean that it is not a plausible or viable response. In fact, evidence of voice in response to form-adhesive agreements exists in other settings (Sullivan 2007: 8-10).[9] Third, they could "exit"—that is, refuse to sign the relevant forms, or find creative ways of opting out, by actually refusing to sign, editing the document before signing, or otherwise avoiding such exchanges. One could regard the existence of malleable consent itself as evidence in support of this response. The act of *mentally* excusing oneself from an otherwise binding contract (that one has indisputably signed without duress or fraud) is a creative way to "exit" from the reality of an unpleasant situation.

Lastly, actors could seek retribution specifically against the organization that made them sign, or more generally, against the institution requiring signatures on form-adhesive agreements,

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[9] *See, also* Posting of Angela Canterbury to Watchdog Blog, http://citizen.typepad.com/watchdog_blog/2007/07/protect-your-ri.html (Jul. 13, 2007, 11:38 EST) (explaining rights of Comcast customers to opt out of an "unfair and stealthy" arbitration agreement); The Small Print Project, http://smallprint.netzoo.net/reag/ (last visited Sept. 11, 2008) (encouraging awareness of form-adhesive agreements and compelling individuals to create their own boilerplate and to sneak it into correspondence with institutions that force such agreements upon individuals).

embodied, perhaps, by large, well-known firms such as internet service providers and media conglomerates. Examples of such exercises of coercive, punitive power might include neglect of duties or other counterproductive work behavior if directed at a specific organization, or more generally, increased disrespect for institutions' intellectual or material property rights. In the literature on sociology of law and sociology of work, such a response is referred to as "resistance" (Ewick and Silbey 2003; Garth and Sarat 1998; Hodgson 2005; Merry 1990).

This work does not offer evidence of the hypothesized *general* retributional response. That is, no evidence is presented in support of the theory that those who feel bound by terms of form-adhesive agreements (or those who do not feel that circumnavigation of such terms is an option) are more likely to take negative, reciprocal action against other organizations by doing things like stealing from them or disrespecting their intellectual property rights. However, in a second study conducted of malleable consent in MBAs, preliminary evidence was uncovered in support of the connection between views about enforceability of form-adhesive agreements and respect for organizations' intellectual property rights. Specifically, MBA students (n=132) who said they are "not bound by [terms in form agreements they have signed] because [they] don't have a choice in signing" or who said they are "not bound by such terms because practically speaking, it's usually the case that one can negotiate his/her way out of them" were significantly (p=.002) more likely to agree or strongly agree that "acquiring music, movies or software (sold for a fee) without paying for them is acceptable because [they] don't feel obligated to the organizations that sell these things." Conversely, MBAs who said that they are *always* bound by form-adhesive agreements or that they are bound by such terms because "practically speaking, an individual is not as powerful as an institution," were significantly (p=.04) more likely to disagree or strongly disagree with that statement.

Similarly, this work presents no direct evidence of specific retributional action taken against the entity promulgating the form-adhesive agreements. It is unclear whether the subjects who expressed the view that the form agreements they signed were not enforceable against them (*high* malleable consent) actually exercised coercive power against their employer at a greater rate than those who expressed the view that the form agreements were enforceable against them (*low* malleable consent). However, the current study does present preliminary evidence of the

connection between malleable consent and what subjects reported they *would* do. Specifically, actors who expressed the view that form-adhesive agreements they signed were not enforceable against them (*high* malleable consent) were more likely to express views consistent with the notion of the employment relationship as "transactional"—that is, as merely a market exchange, devoid of loyalty or commitment.

Therefore this part of the dissertation first argues that studying interpretations of enforceability of agreements as a construct in itself is worthwhile because such perceptions are useful to understanding a contextualized form of legal consciousness, as well as trust in the state and other regulatory institutions. The next part systematically examines the construct in an applied context, first using malleable consent as an intervening variable to reveal otherwise obfuscated interpretations of law across different socio-economic groups, and second as an independent variable predicting employees' conception of their employment relationship as transactional or relational.

Hypotheses

A. Malleable Consent and Differences Across Socio-Economic Status

As Richard Ely remarked, "[w]hen economic forces make possible oppression and deprivation of liberty, oppression and deprivation of liberty express themselves in contract." (Kaufman 2003: 8). The literature on law as a differentiated resource posits that perceptions of law will be different across socio-economic status groups such that higher SES actors will feel less "oppressed" and "deprived of liberty" than lower SES actors. If this is the case, interpretations of enforceability of form-adhesive agreements should reflect this distinction, revealing how unlevel the playing field is, regardless of its appearance to the contrary. Put differently, everyone has to sign these forms, but higher SES actors likely feel less bound by them than lower SES actors. This leads to the first hypothesis:

(H1) Higher SES actors (those with greater educational attainment and more job alternatives with lower dependence on their employers) are more likely to regard form-adhesive agreements they have signed as unenforceable than lower SES actors (those with lower educational attainment, fewer job alternatives and hence greater dependence on their employers).

In other words, higher SES actors should exhibit *more* malleable consent and lower SES subjects should exhibit *less* malleable consent. If supported, this hypothesis would strengthen the notion that different social groups hold different views about law relative to their ability to circumnavigate a contract purporting to bind them to terms contra their interests. Previous research on legal consciousness has demonstrated that those who regard law as more accessible—as a sword wieldable on their behalf—are often better-educated, with higher paying jobs, and greater socio-economic status generally (Black 1983: 1-10, 34, 41-42; Ehrlich 1936). Such individuals are represented by the MBA subjects in the second study reported in this work. Those who regard law as a shield, protecting organizations from the ineffective slings and arrows wielded by individuals, are often less educated, with lower paying jobs, and lower socio-economic status generally. This group is represented by the employees in the first study reported below. If malleable consent is a useful concept for understanding legal consciousness (derivative of institutional-legal faith or fear), it should reflect this dichotomy.

B. Transactional–Relational Scaled Responses to Conflict

> The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence on this process (Weber 1954: 188).

The next step is to explore the relationship between interpretations of enforceability (malleable consent) and the way in which individuals exchange with the organizations requiring them to sign these agreements. This was accomplished by developing a transactional-relational scale based on Ian Macneil's (1985) influential work. Existing research shows important differences between employees who view exchanges as *relational* and those who view exchanges as

transactional. Employees who view their relationship as "transactional" tend to regard the employment exchange as primarily one of specific monetizable exchanges (pay for attendance) over a specific time period (See, e.g.: Cavanaugh and Noe 1999; Rousseau 1990). Such a transactional perspective focuses on the essential exchange of pay (high pay, merit pay and advancement, for instance) for work, to the exclusion of other typically longer-term elements (Robinson, Kraatz and Rousseau 1994). In contrast, those who view their employment as a "relational" exchange have open-ended agreements to establish and maintain a relationship involving non-monetizable elements like trust, loyalty, job security, career development, and support with personal problems (Morrison and Robinson 1997; Rousseau and Parks 1993). In "relationally-governed exchanges . . . enforcement of obligations, promises and expectations occur[s] through . . . norms of flexibility, solidarity, and information exchange" (Poppo and Zenger 2002: 710). This is not the case for transactionally-governed exchanges (Rousseau 1989; Rousseau and Parks 1993).

One way to observe whether employees view their employment exchanges as transactional or relational is to observe their responses to workplace conflicts of varying severity. Relational-view employees tend to respond to conflicts at work with more loyalty, and less exit and neglect (Coyle-Shapiro 2002; Coyle-Shapiro and Kessler 2000; Turnley and Feldman 1999). They are more likely to resort to "voice" (Farrell 1983: 597-98; Hirschman 1970) and to afford their employers the opportunity to restore order when problems arise, resorting to internal organizational outlets such as human resources departments, instead of external ones like lawyers or governmental agencies. On the other hand, transactional-view employees are more likely to go outside of the organization, either exiting more quickly in response to conflicts, or resorting to external means of redress. Similarly, research has found that psychological contract breach has a greater negative impact in terms of decreased job satisfaction, role performance and organizational citizenship behavior on relational-minded employees (Robinson 1996; Robinson and Rousseau 1994; Turnley and Feldman 2000).

Table 1 depicts four types of common employment disputes and their associated predicted transactional and relational views. The disputes range from mild to severe forms of breach of psychological expectations—the first one involves the breach of the obligation to provide a

workplace free of co-worker to co-worker disputes; the second, the breach of the obligation to comply with internal company rules about fairness of treatment; the third, a breach of the obligation of the organization to comply with external legal constraints; and the fourth, a breach of the obligation to provide fair treatment and to comply with external legal constraints with the ultimate negative consequence of unilateral termination of the employment relationship.

Table 1: Transactional-relational comparative responses to employment conflicts

	Type of Dispute	**Responses**	
		Transactional	**Relational**
1	*Non-Legal* Interpersonal Dispute	Confront co-worker (As subject perceives this issue to be beyond the scope of the employment transaction, he will not trust Management to remedy it)	Report incident to manager (exchange of workplace free of harassment for policing the workplace)
2	*Non-Legal* Dispute between Individual & Organization	Do not show up for work (An internal rule was broken, so subject owes the organization nothing)	Show up to work (exchange loyalty for future fair treatment, or security)
3	*Legal* Dispute between Individual & Organization (ongoing relationship)	Pursue outside legal assistance—to ensure that the organization does not violate subject's rights	Report the matter internally—trust the organization to correct the wrong and restore the status quo; do not resort to outside legal assistance
4	*Legal* Dispute between Individual & Organization (Unilateral termination of relationship)	Pursue legal remedies against organization	Give Company a chance to correct the wrong and restore the relationship

Previous scholarship has mostly, if not all, but ignored interpretations of the law and, specifically, the written contracts employees have signed in assessing how employees view this exchange relationship and in predicting how transactionally or relationally they view their employment relationships. In fact, at least one paper claimed that "*formal stipulations* employers . . . contribute only *slightly* to general perceptions of contractual obligations" (Rousseau 1990: 397). This portion of the dissertation tests the relationship between interpretations of enforceability of contract and the transactional-relational scaled view of work. The concept of malleable consent in the employment context is a function of how much perceived (*not* actual) flexibility there is in a binding agreement one has signed that purportedly limits legal remedial power against an employer. Subjects who view work transactionally are more likely to care whether there is such flexibility, and are therefore more likely to report the belief that such elasticity exists, because they are the ones most likely to resort to non-relational responses described in Table 1. Conversely, subjects who regard the employment relationship as more relationally oriented, are less likely to express concern about their ability to escape a clause limiting their rights to sue their employers because (1) relationally-minded employees prefer to exchange relationally instead of litigiously, (2) they do not believe that the formal, written contract dominates their employment exchange anyway, and (3) to the extent that such subjects believe that the formal written contract controls their employment relationship, they are more likely to trust their employers to treat them fairly in the long run.

Thus, the second hypothesis emerges:

> *(H2) An inverse relationship exists between a relational view of exchange and malleable consent.*

This means that the more one regards his employment relationship as "relational," (and is thus willing to trade loyalty and commitment for a promise of some future benefit such as fair treatment, job security, etc.), the more likely one is to express the belief that the form-adhesive agreement he signed as a condition of employment is enforceable against him. Conversely, the more one regards his employment relationship as "transactional," the more likely one is to express the belief that the form-adhesive agreement he signed is *unenforceable* against him. Put differently, the current study presents preliminary evidence of the connection between malleable

consent and what subjects reported they would do in these conflict scenarios. Specifically, actors who expressed the view that the form-adhesive agreement they signed were not enforceable against them (*high* malleable consent) were more likely to express views consistent with the notion of the employment relationship as "transactional"—that is, as merely a market exchange, devoid of loyalty or commitment.

For instance, Subject 14, a forty-five-year-old African-American woman who had been working for her current employer for over three years, reported that the form-adhesive agreement she signed was "*just a bunch of you-know . . . .* " She reported further that, "*I think they'd try to enforce it, but basically, the way things are now, you can get a good lawyer, and they can get around anything.*" This is an expression of high malleable consent because it is her opinion that a contract into which she entered admittedly free of duress or fraud is nonetheless unenforceable against her. She expressed a correspondingly high *transactional* view of work, demonstrated by the consistent theme in her predictions of how she would respond to hypothetical workplace conflicts. For instance, she would not trust management to resolve a hypothetical interpersonal dispute between her and a co-worker, opting instead to handle the situation on her own. She would not come in on her day off if requested to do so, saying, "*I would just be like, 'I'm sorry, I already made plans.*'" If she were sexually harassed, she reported that she would tell management, "*I guess you're going to fire me, and I guess I'm going to consult my lawyer*," without affording the organization an opportunity to address the situation. If she were wrongfully terminated, she would "*find an attorney*" without hesitation. In sum, her responses to hypothetical conflicts at work evidence a tendency to view her exchange with her employer as transactional, not relational, and with a corresponding high degree of malleable consent.

Methods

A. Study 1: "InnoTech" (Low Socio-Economic Status Sample)

The construct of malleable consent emerged from an inductive field study of a sample of thirty-seven current employees ("sales associates") of a national electronics retailer (herein referred to

as "InnoTech," a pseudonym) in twelve locations in Southern California. InnoTech was selected for study because of its policy requiring its sales associates to sign a mandatory arbitration agreement upon hire. The locations were randomly chosen from a pool of thirty stores within a forty-mile geographic proximity to one another. Informants were approached outside the retail shops on their breaks, or before or after their shifts. Informants were offered five-dollar gift cards for their participation in the study and were informed that all information provided would be anonymous and confidential. To protect participants' anonymity, no personally identifying information was gathered other than subjects' voices that were recorded upon receipt of consent. Data gathered also consisted of the author's field notes of observations and unrecorded conversations.

Informants were 84% men, with a mean age of 27 years[10] and an average organizational tenure of 21 months.[11] The median duration of employment was 14 months. Subjects were 51% white, 19% black, 19% Hispanic and 11% other. Based on observation of sales personnel in each location, this sample closely approximated the population of sales associates employed in the geographical region sampled.

Subjects were asked about their alternative job opportunities, work experience, education, training on and off the job, what they signed when they started their jobs, how fairly they thought their employer treated them overall, and whether they considered their current employment situation a "job" or a "career." Only 19% (seven respondents) reported that this work was a career.[12] Fifty-four percent of the participants reported having access to lawyers. The mean rating of InnoTech's "overall fairness" of treatment on a 5-point Likert scale was 3.7.[13] Based on the researcher's observation of sales personnel in each location, this sample closely

[10] Standard deviation = 5.12 years.

[11] Standard deviation = 21 months.

[12] Not surprisingly, this view correlates positively and significantly with job tenure (.338; p = .04).

[13] Standard deviation = .91. The correlation between reported fair treatment by the organization and subjects being black is, somewhat shockingly, highly negative and highly significant (-.596; p = .0001), as was the correlation between subjects' age and fairness ratings (-.408; p = .001), indicating that older and/or black workers reported significantly worse overall fair treatment.

approximated the population of sales associates employed in the geographical region sampled. Table 2 is a correlation matrix of the salient descriptive demographic attributes of the sample.

Table 2: Correlation table of InnoTech respondents' demographic attributes

	1.♦	2.	3.	4.	5.	6.	7.	8.
1. Female								
2. Black	.162							
3. Hispanic	.162	-.065						
4. Other	-.153	-.048	-.048					
5. Age	.397***	.165	.070	-.019				
6. Tenure	.010	-.057	.193	-.040	.393***			
7. Career[1]	-.025	-.233	.120	.276*	.056	.338**		
8. Lawyer[2]	.047	-.115	.113	-.211	-.267	-.148	.029	
9. Fair[3]	-.168	-.596***	-.018	.029	-.408***	-.205	.137	0

Note: ***Significant at 1% level; **Significant at 5% level; *Significant at 10% level.
♦ Numbers across the row correspond with variables down the first column: 1.=Female, 2=Black, etc.
[1] This variable is an indicator variable coded "1" if subjects said that their current employment was "career" as opposed to a "job."
[2] This variable is coded "1" if subjects reported knowing a lawyer, and "0" otherwise.
[3] This variable is a 5-point Likert-style rating of the overall fairness of treatment.

According to the subjects, they are highly substitutable; their jobs require little if any training. Several subjects complained about the high rate of turn-over among associates. Additionally, InnoTech subjects generally expressed the notion that their jobs are the "best they can get" and that alternative work is not readily available. Almost all subjects completed one or two years of college, having mostly attended local community college and dropped out either to join the workforce or to have children. Other subjects were still attending college at the time of the interviews. For these reasons, this sample was considered to have uniformly lower SES actors than the MBA sample discussed in greater detail below.

Subjects were also asked about how they would respond to the four vignettes described in Table 3, designed to correspond with the types of disputes set forth in Table 1, in order to examine the relationship between malleable consent and the transactional-relational view of the employment exchange.

Table 3: Descriptions of vignettes

	Type of Dispute	Vignette Description
1	*Non-Legal* Interpersonal Dispute	"A co-worker is bothering you to the point that it interferes with your ability to do your job."
2	*Non-Legal* Dispute between Individual & Organization	"You are told to come in to work on a day that you already scheduled off and you have plans to be with family or friends."
3	*Legal* Dispute between Individual & Organization (ongoing relationship)	"Your direct supervisor tells you that if you do not sleep with him or her that your employment will be terminated."
4	*Legal* Dispute between Individual & Organization (terminated relationship)	"Your employment is terminated because of your gender, race, national origin or religion."

Subjects' coded responses to the four vignettes formed the bases for a scaled transactional-relational measure. The more subjects responded in ways consistent with a relational view, the higher they scored on the scale. The fewer relational points, the less relationally they were estimated to view their work relationship. Subjects with zero points (who had exhibited no relationally coded responses) were considered purely transactional. The six coded variables used for the scale and their distribution across the two studies are listed in Table 4.

Table 4: Comparison of relational scale components across studies

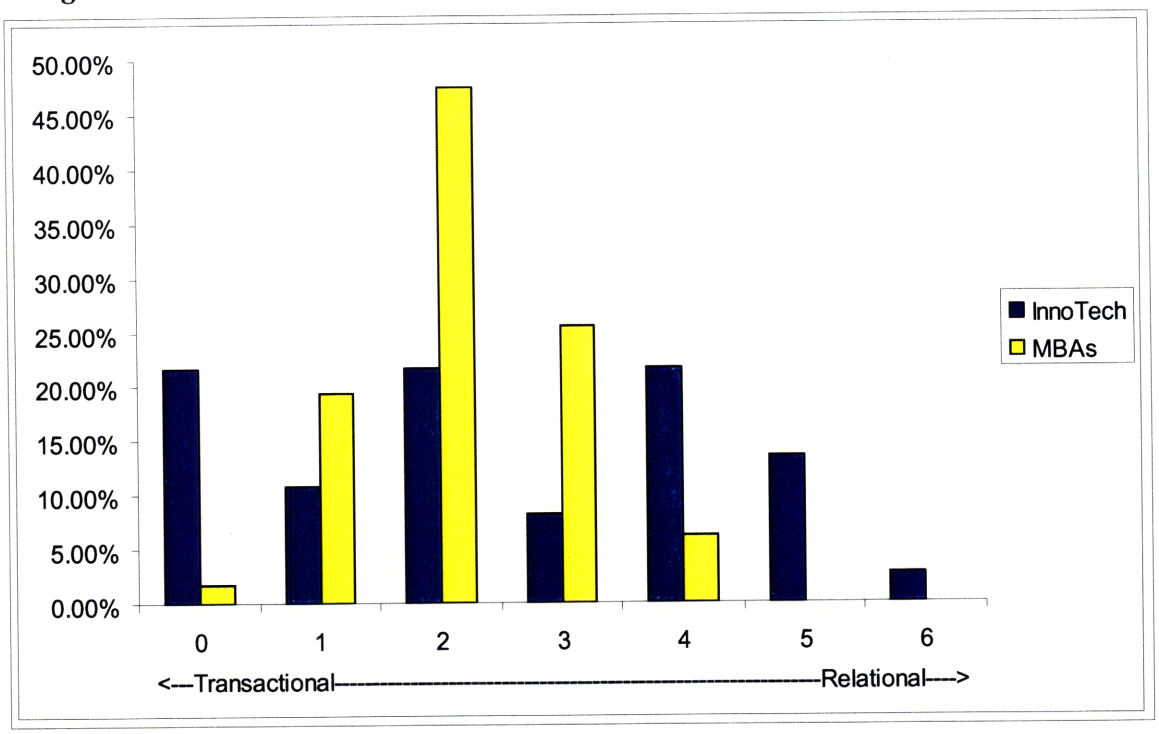
Variable Name	InnoTech	MBAs	Welch Diff of Means Test
Hyp1_manager_only	60%	3.51%	$p < .001$
Hyp1_self_help (rev. coded)	17.14%	4.39%	$p < .06$
Hyp2_show_up	30.56%	60.23%	$p < .05$
Hyp2_sub/alt	8.33%	25.69%	$p < .05$
Hyp3_citizen	48.65%	33.04%	$p < .10$
Hyp4_HR	39.39%	11.93%	$p < .05$

Figure 1 below depicts the distribution of transactional-relational scores across the two studies. Polychoric principle component analysis (PCA) and factor analysis each sufficiently confirms the internal validity of the scale when the variables "Hyp1_self_help" and "Hyp2_sub/alt" are excluded.[14] Including these two variables renders the internal validation methodologically problematic.[15] However, the two variables are included in the model because of their strong facial validity and the fact that the results reported herein remain robust whether the two variables are included or not.

[14] Polychoric PCA of the 4-elements scale demonstrates ample support for scalar convergence on a single element. The eigenvalue of the primary element is 1.85. The difference between this eigenvalue and the next closest is 1.05. This result was replicated with factor analysis (principle eigenvalue = .56, with difference between that and next closest as .62) for those uncomfortable with PCA, although it is the author's opinion that PCA is the more appropriate tool for this analysis.

[15] This is because the two variables excluded from the full model ("Hyp1_self_help" and "Hyp2_sub/alt") are each mostly or entirely orthogonal to the included measures of responses to the respective vignettes ("Hyp1_manager_only" from first vignette and "Hyp2_showup" from second). For instance, 98% of subjects who said they would show up in response to the second vignette ("Hyp2_showup" = 1) did not suggest that they would also try to find a substitute or alternative ("Hyp2_sub/alt" = 0). This makes logical sense in the same way that it makes sense that those who said that they would take matters into their own hands in response to the first vignette ("Hyp1_self_help" = 1) did not say that they would exclusively report the matter to their manager ("Hyp1_manager_only" = 0).

Figure 1: Transactional-relational scale scores (InnoTech: n=37; MBAs: n=114)



The first variable, "Hyp1_manager_only," is coded 1 (and otherwise 0) for subjects who responded to the first vignette (an interpersonal dispute between co-workers) by saying that they would bring the matter to the attention of their manager before or without addressing the offending co-worker themselves. This action is consistent with the relational view because it demonstrates a willingness to trust management with the resolution of non-legal disputes without first attempting to resolve the matter on one's own. While the difference between subjects who exclusively reported the issue to management and those who confronted the offending subject first and then reported to management may not appear significant, using this measure offers a more conservative and clearer divide between subjects. In other words, those who *exclusively* trusted management with this situation are incrementally more relational than those who attempted to resolve the situation on their own first.

The second variable, "Hyp1_self_help," is coded 1 (and otherwise 0) if subjects responded to the first vignette by taking matters into their own hands, often literally threatening to resolve the

situation with violence or other means of self-help. It could also be considered "revenge" as it is in other research (Aquino, Bies and Tripp 2001). This response is inconsistent with the relational view because it demonstrates subjects' belief that they cannot rely on the organization to resolve an interpersonal dispute. This variable is reverse-coded for the relational scale.

Similarly, subjects were considered more relational if they said that they would show up to work in response to the second vignette (for example, they are scheduled for a day off, they have plans with family or friends, but they are asked to come in anyway). The third variable, "Hyp2_showup," is coded 1 (and otherwise 0) for subjects who said that they would show up to work on a day they had scheduled off but were required to come in anyway. This is perhaps the clearest and most traditional measure of a relational exchange view of work while the employment relationship is intact. Specifically, these subjects are more likely to view the exchange as ongoing and one in which loyalty is traded for security (or other measures).

The fourth variable, "Hyp2_sub/alt," is coded 1 (and otherwise 0) if subjects responded to the second vignette by proposing that they secure a substitute for the work or suggesting that they find an alternative way of accomplishing the work. Again, this measure is a fairly clear demonstration of a relational view as opposed to a transactional view of work because it indicates subjects' desire to exchange the above-and-beyond task of finding a way to accomplish the organization's goals in exchange for some future hard-to-quantify measure like security.

The fifth variable composing the transactional-relational scale is "Hyp3_citizen." This variable is coded 1 (and otherwise 0) for subjects who responded to the third vignette (they are sexually harassed by a supervisor) by bringing the matter to the attention of Human Resources without threatening to bring a lawsuit or contact an attorney. Again, this is classic organizational citizenship behavior, and indicative of a relational view of work.

The sixth and final variable included in the full scale is "Hyp4_HR," which is coded 1 (and otherwise 0) when subjects reported giving the organization a second chance *even after their employment was terminated for unlawful reasons* described in the fourth vignette ("your employment is terminated because of your gender, race, national origin or religion"). Subjects

who sought to appeal their termination within the firm were coded as incrementally more relational than those who did not.

1. What Subjects Thought They Signed

Toward the conclusion of each interview, subjects were shown a copy of the actual mandatory arbitration agreement that InnoTech requires all sales associates to sign and were asked to identify the document. Most subjects positively identified the document as one that they had to sign on their day of hire. The researcher then explained the clause in the arbitration agreement to the subjects. Specifically, subjects were told that, if signers of the agreement wished to go to court to sue the employer, this agreement purportedly prevented them from doing so (either during the employment relationship or after it ended), requiring them instead to resort to arbitration to resolve any and *all* disputes, even ones like those discussed earlier in the interview, including the third and fourth vignettes. Subjects were asked if they were to try to bring a lawsuit against InnoTech, whether InnoTech could in fact compel them to divert their claims to arbitration instead of court as the document purports. Responses to this question formed the basis for the measure of subjects' malleable consent.

Thirty-six of the thirty-seven subjects remembered signing *something* when they started their jobs at InnoTech. Thirty-one of the thirty-six (86%) articulated what they remembered signing.[16] Sixty-nine percent mentioned signing something innocuous like tax forms or generic paperwork. For instance, Subject 2 reported, *". . . just a lot of documents, you know, making sure that I'm telling the truth about who I am and my person and everything. W-2 forms, that's about all I can remember."* Subject 7 reported, *"All the tax forms, I think it was just the tax forms, yeah, they made you fill out a whole bunch of stuff, like name and address, we watched a bunch of videos, like learning on the computers, we call it 'e-learning,' that's pretty much it."* Another typical

[16] Tenure on the job had no statistically significant relation to the ability to recall or the willingness to report what the subjects signed ($p = .7142$), although everyone who had been on the job for less than seven months ($n = 6$) was able to describe something about what they signed. The least time on the job of someone unable to recall what they signed was seven months. Six individuals with the most tenure in the study, (35, 36(x3), 48 and 120 months) were able to recall and describe what they remembered signing when they were hired.

response was Subject 28's: "*Just the general initial employment forms, like uh . . . oh boy, I don't even remember what they were specifically anymore.*"

Forty-two percent mentioned having to sign to consent to invasive terms like a drug test, a non-competition agreement or an "at-will" employment policy. Examples of the second category are as follows:

> "I skimmed through them . . . so . . . [Do you have any recollection of what they said?] I know there's a sexual harassment one . . . ." (Subj. 2).
>
> ". . . drug test, and no competition clause, you know, you can't work for any other [descriptive term deleted] company . . . ." (Subj. 3).
>
> "There was a non-competition agreement stating that I would not work at the same time on any project that [InnoTech] currently offers, there were a couple of other agreements, mainly, the contract saying that I would work for [InnoTech] and get paid, but the non-competition agreement is the most important of the multiple restrictions. [Anything else that you recall?] Basically, like what my duties would be and stuff like that." (Subj. 10).
>
> "It's like a contract between store and employee. We have to do certain things, and we have our certain rights, but they can fire us whenever." (Subj. 16).
>
> "Employment, . . . what do you call it, you know, the whole, they can fire you for whatever reason . . . the employment sheet. [What's your understanding of that?] They can fire you for almost whatever reason, pretty much, as long as they have a valid reason. [They get to fire you? That's what it says?] That's pretty much what it is." (Subj. 17).
>
> ". . . a paper that said that they're an open employer, which means that they can fire you at any time for any reason, that it was ok to drug test me." (Subj. 21).
>
> "A whole bunch of release papers basically saying that [InnoTech] is not held liable for a whole bunch of stuff. [Anything else?] Not to my knowledge." (Subj. 33).

Only 17% reported signing either a mandatory arbitration agreement or the waiver of the right to sue the employer. The following are examples of responses in this last group:

"Tax papers, and arbitration in case of dispute with the company, and later on they put in some security thing we had to sign for, regarding the work environment and stuff like that, and insurance papers, that came out later. [The second thing you mentioned was an arbitration form, do you know what that was?] Yeah, basically, it's to protect [InnoTech] in case we want to sue them in case anything happens. Basically, what the arbitration form said was that in case we had any dispute regarding labor issues or in case there was a wrongful termination lawsuit or anything like that, we wouldn't go to court, we will have to resort to arbitration, and arbitration only. [How do you feel about that?] I don't think it's fair. [Why not?] I don't think it's fair because it's dragging. It's not something you can go in and get out. It doesn't give you the options of—They're protected regardless, no matter what. Because if the two parties don't agree, you're stuck in arbitration forever, so at some point you have to settle—I think they get you over time, because you're going to get tired of going to arbitration. Because you sign an agreement that says that you can't go to court, that you have to stay in arbitration. [So, why did you sign it if you think it's unfair?] Well, I needed a job. Most people do need a job, half the people don't know what it is, and when you need a job, you say, 'what's the worst that could happen here?' You know? Worst scenario, I quit. So, you're like, 'ok.'" (Subj. 13).

"[A] don't sue us kind of thing, where, you know, where if, something happens here, and it's not, it wasn't through workman's comp or anything like that, that I can't sue them or anything like that. . . . If something happened to the point where I either got hurt and I wanted to pursue it further than workman's comp, that wouldn't be possible after I signed the proper paperwork to not allow me to . . . and then also, if something else happened, and [InnoTech] took care of it, but I wanted to take it further, one, they would try to talk me out of it, and two, they'd probably have me sign something that says I couldn't do it anyways. [And that's OK with you?] Well, nothing really happens, as long as you keep your nose clean and don't screw with the girls, you'll be cool." (Subj. 3).

"Basically things that I won't sue them, that I'll go within the company, legal issues, nothing life threatening, nothing that you wouldn't sign at any other job, nothing that doesn't protect the company. [What do you mean by, 'protect the company?'] Basically saying, that like, for example, if you have issues with a manager or something, you're not going to a lawyer and sue the company, you're going to go within it; there's a word, I can't remember the word now, that you basically do all legal issues within the company, that, and of course, the 'U word' is more or less illegal. [What's the U word?] The union. [Did you sign something that said that you couldn't join a union?] No, but, . . . no . . . but . . . there's nothing there that says that you can join a union, you know. . . ." (Subj. 18).

It may be worth noting the forms that InnoTech actually gives to new hires. It is my understanding based on information available to the public that in addition to the mandatory arbitration agreement, InnoTech gives all new hires an I-9 list of acceptable documents (to confirm an employee's identity), a W-4 form, a Fair Credit Reporting Act (FCRA) form notifying employees that the company may run a background check on them, and a form notifying employees of InnoTech's drug testing policy (employees are required to consent on demand). Employees are also required to acknowledge with their signature receipt of InnoTech's policy forbidding illegal forms of harassment, including but not limited to sexual harassment. These policies have been in place long enough to cover all respondents in this study with the possible exception of Subject 23, who has been with the company for ten years.

2. *Subjects' Malleability of Consent*

Participants were asked to identify the arbitration agreement that, according to the organization, all employees are required to sign.[17] Sixty-seven percent of subjects positively identified the document. This percentage is interesting considering the low number of participants who knew they had signed an agreement waiving their right to a jury trial, requiring them instead to resolve all disputes by final and binding arbitration. Thus, most subjects recognized the form they signed when shown the actual piece of paper, but did not know to what it was they had agreed. Consistent with the legal realist scholarship exploring the relationship between law as experienced and law as written, this makes the participants' interpretations of this document an even more salient predictor of future behavior than the document's terms themselves.

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[17] After being asked if they recognized InnoTech's arbitration agreement, three provisions of the agreement were pointed out to them in the text of the document. First, the provision that specifies that InnoTech and the signer agree to "settle any and all" disputes or controversies arising out of the employment relationship by "final and binding arbitration before a neutral arbitrator;" with the examples as specified in the form of claims covered, including ones like sexual harassment (vignette three) and terminations because of race, religion or national origin (vignette four). Second, the provision that states that the signer understands that if he does file a lawsuit, InnoTech "may use this Agreement in support of its request to the court to dismiss the lawsuit and require me instead to use arbitration." Third, the provision that states that signers have three days from the date of signature to notify InnoTech's Human Resources Department that they have withdrawn their consent to the agreement, but doing so will render them ineligible for employment with InnoTech.

Participants were then asked to reflect on whether InnoTech could stop them from bringing a lawsuit and require them instead to bring such claims to arbitration as the document purports. Their responses were varied, but for the most part, subjects either expressed the belief that they would be "stuck" with the agreement if they signed it, or that the agreement was unenforceable even though they signed it. Their responses formed the basis of the subjects' malleable consent. Thirty-one percent of the subjects expressed the view that the agreement was *un*enforceable against them, even if they signed away the right to bring a lawsuit against the company in court. Their explanations were predominated by the notion that the law protects individuals against institutions such as InnoTech. They recognized that InnoTech could require them to sign whatever it desired at the outset of their employment, but that the law, embodied by the employment-plaintiff's bar, in their view championed for individuals' rights, and would therefore permit circumnavigation of bothersome contract provisions. The views of those who formed this group in the InnoTech sample echoed sentiments expressed in Ewick and Silbey's classic study, *The Common Place of Law*, in which they characterized responses as perceiving law as a commodity in which being able to "get" a lawyer or "afford" a good lawyer "exerted a profound effect on their decisions in regard to disputes and grievances" (Ewick and Silbey 1998: 152-55; Ewick and Silbey 1999). Two exemplary high malleable consent views are as follows:

> "I think it's [the agreement] stupid. [Subject laughs.] [Why?] Because nowadays, you can go around that and still get a lawyer, and still go to trial. [So you think that the arbitration agreement isn't enforceable?] Yeah, I think it's just a bunch of you-know. [What makes you think that it's not enforceable?] Well, I think they'd try to enforce it, but basically, the way things are now, you can get a good lawyer, and they can get around anything." (Subj. 14).

> "Ultimately, you can sign anything you want, but you pay enough for the right lawyer, and it doesn't matter what you've signed. [Meaning, you don't think it's an enforceable agreement?] No. [Why not?] It's . . . there's always a loophole, there's always a way, and if you have the money and the time, and you have a lawyer that's greedy enough and says, 'I'll get a cut of this,' I guarantee you, there's somebody who is going to find a way to get you out of this agreement." (Subj. 19).

B. Study 2: MBA Students (High Socio-Economic Status Sample)

The second study consisted of 115 students from a prestigious East Coast business school. Primarily second-year MBA students were asked to complete a larger online survey as part of a class.[18] Completing the survey was a requirement in the class, so the response rate was approximately 100%. Subjects were 62% male; approximately 65% of the subjects were native English-speakers, and 65% were also partially or fully U.S. nationals. Sixty-one percent reported having direct access to a lawyer. The mean self-reported score of knowledge and experience with American law was 2.8[19] on a 7-point Likert scale where "0" is no knowledge or experience and "7" is extensive knowledge or experience. The inter-correlations of the demographic variables are reported in Table 5.

[18] It is unfortunate that the MBAs were not surveyed on their first jobs—they were all *current* students, on the job market and mostly negotiating with employers for their first post-MBA jobs, but not currently employed. It is uncertain what would change in these data if the MBAs were on their first jobs, but this limitation is recognized nonetheless.

[19] Standard deviation = 1.2.

Table 5: Correlation table of MBAs' descriptive variables

	1.♦	2.	3.	4.
1. Female				
2. Native[1]	.180**			
3. Nationality[2]	.124	.516***		
4. Lawyer[3]	.081	.061	.088	
5.Know law[4]	-.031	.187**	.111	.389***

Note: ***Significant at the 1% level, **Significant at the 5% level, *Significant at the 10% level.

♦ Numbers across the row correspond with variables down the first column: 1.=Female, 2=Native, etc.

[1]The variable "native" is coded "1" if English was the reported native language and "0" otherwise.

[2]This variable is coded "1" for those who listed the United States as their partial or full nationality, and "0" otherwise.

[3]This variable is coded "1" for those who did report knowing a lawyer, and "0" otherwise.

[4]This represents subjects' self-reported assessment of their knowledge and experience with American law based on a 7-point scale.

Most of these subjects were highly sought after by prestigious firms, and were considering multiple competing job offers. Without exception, the MBA subjects have greater educational attainment than the InnoTech subjects, making them less replaceable in their future jobs. The mean starting salary of the class in which the majority of MBA subjects surveyed was approximately $84,000 per year.[20] Sixty-seven percent of the MBA class of 2007 went into service industries, of which consulting (25.3%) and investment banking (17.5%) composed the greatest shares. Not surprisingly, the most prestigious, high-status employers recruit these students every year and the students who composed this sample were no exception. For these reasons, this sample was considered uniformly higher SES actors than the InnoTech sample.

[20] This figure is based on the MBA graduates from the class of 2007. Eighty-three percent of this class obtained jobs in the United States. The mean starting salary of students who worked outside of the United States was $81,800. These figures are based on information obtained by the author from the school's career services office.

As part of the online survey, the MBA students were asked to respond to the same four vignettes as the InnoTech employees by writing their responses in open-ended text boxes. They were also asked to rate their agreement or disagreement with the following statement, on a 5-point Likert-style scale:

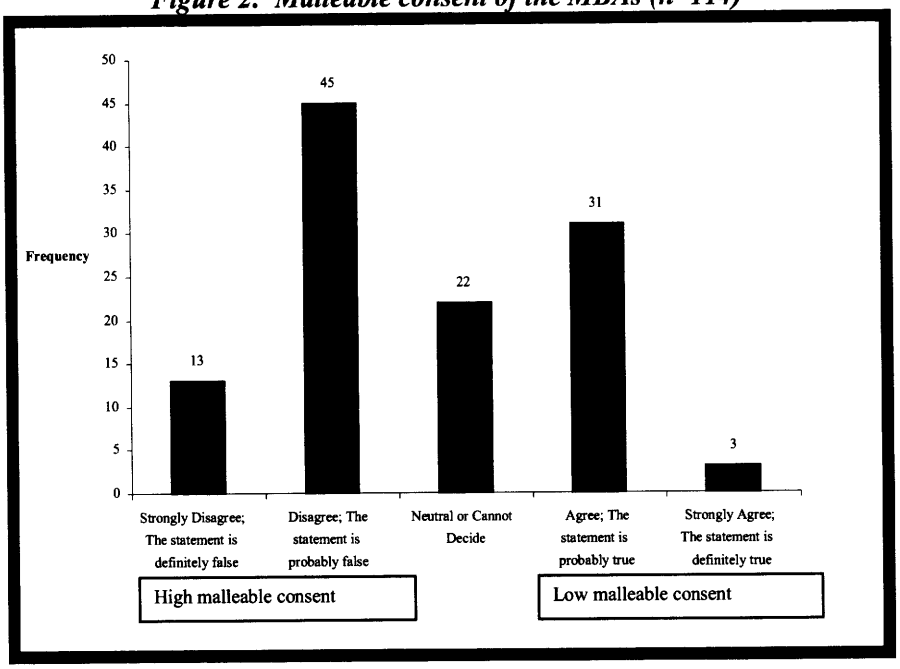
> If I sign a contract with my employer that indicates that in return for being hired, I agree to waive my right to sue my employer in court, and instead have to resort to a process called "arbitration" to resolve any and all disputes that arise, that contract is enforceable, and I would not be allowed to go to court.

The results are displayed in Figure 2. Thirty percent of the MBA subjects exhibited low malleable consent because they either agreed or strongly agreed with the statement. Fifty-one percent exhibited high malleable consent—that is, they either disagreed or strongly disagreed with the statement.[21] This distribution was replicated in a second study involving 138 MBA students in which 35% exhibited low malleable consent and 50% exhibited high malleable consent.[22]

[21] Roughly nineteen percent selected option three, "Neutral or Unable to Decide." These participants were considered as exhibiting neither high nor low malleable consent.

[22] It is also worth noting that the MBA data is used to evaluate the convergent, discriminant and predictive validity of the construct of malleable consent. As part of the much larger survey that subjects completed, many psychometric tests were administered measuring such things as emotional intelligence ("EQ"), Machiavellianism, positive/negative affect, self-esteem, distributive self-interest and the NEO-5 factor inventory.

Figure 2: Malleable consent of the MBAs (n=114)



Research Findings

A. Malleable Consent and Socio-Economic Status

Hypothesis 1 states that actors with greater educational attainment and more job alternatives that posses relatively lower dependence on their employers are more likely to regard the form-adhesive agreements they sign as unenforceable when compared to actors with lower educational attainment, fewer job alternatives, and greater dependence on their employers. In other words, InnoTech subjects are more likely to exhibit *lower* malleable consent than the MBAs. To test this hypothesis, the mean malleability of consent of the InnoTech subjects is compared with that of the MBAs. Table 6, depicting the statistically different mean malleable consent scores of the two samples, demonstrates support for this hypothesis. It appears that the MBA subjects are more likely than the InnoTech subjects to report that an agreement they signed purporting to prevent them from suing their employers (resorting instead to arbitration) is unenforceable. The mean MBA malleable consent score (MC) was .63 (SD = .485) as compared with .31 (SD =

.467) for the InnoTech sample (where MC of one is equal to the view that the agreement is unenforceable and MC of zero is equal to the view that it is enforceable).

Table 6: Comparison of malleable consent levels across samples

		InnoTech	MBAs	Welch Test of Difference of Means
Malleable Consent	High	31%	51%	
	Low	69%	30%	
	n	36	92	
	Mean/std. dev.	.305 (.467)	.630 (.485)	p=.000

B. Malleable Consent and the Transactional Versus Relational View of Work

The second hypothesis is that viewing the form agreement as enforceable (low malleable consent) is associated with an increased likelihood of viewing the employment relationship as relational. Conversely, expressing the view that the agreement is unenforceable (high malleable consent) is associated with an increased likelihood of viewing the employment relationship as transactional. To test this hypothesis, a proportional odds model for ordinal logistic regression was applied. This appeared to be the most appropriately fitting model. The *p* value for the Brant test of the proportionality assumption was .53 for the MBA sample and .01 for the InnoTech sample. This means that the proportionality assumption is valid for the MBAs but not necessarily so for the InnoTech subjects. The most likely reason for this is the relatively small InnoTech sample size (Brant 1990). It is unlikely to be cause for concern given the construction of the transactional-relational scale. Additionally, the results are robust when ordinary least squares regression is applied.

Tables 7 and 8 present the ordinal logistic regression results of the role of malleable consent in explaining subjects' transactional-relational scale scores for InnoTech and MBA subjects respectively.[23] The results demonstrate consistent support for the second hypothesis across both samples. In both cases, high malleable consent corresponds negatively and significantly with subjects' relational view of employment. As an example, holding other variables constant at their means, there is a 26.5% probability that a white, male InnoTech participant of average sample age (twenty-three) who expressed the belief that the agreement was unenforceable would score a zero on the relational scale (scored as "transactional"). This probability drops to 0.06% that the same individual would score a six on the relational scale.[24]

[23] The full 6-element scale is used in these analyses. The salient results remain significant when the 4-element relational scale is used as well—dropping the two coded variables that were excluded from the principle component analysis and factor analysis as discussed above.

[24] Interestingly, being a minority employee at InnoTech corresponds negatively with viewing the employment exchange relationally. It appears that minorities are more likely to view their employment relationships as transactional. This was borne out in analyzing the qualitative responses of subjects. Indeed, several of the minority subjects spoke "off the record," insisting on shutting off the recorder, about their belief that InnoTech discriminated against them based on their race. It is not surprising that such conditions, or at least the perception of such conditions, stymies relational exchange. Also unsurprisingly, employees who viewed their work as a career as opposed to a job were significantly more likely to view the exchange relationally. The gender of subjects did not seem to have any significant role in explaining transactional-relational scores of InnoTech subjects, but it was significantly positively correlated with expression of a relational view for MBAs. Women in the InnoTech sample were no more or less likely to view their employment as more relational, but women in the MBA sample were significantly more likely than men to view the employment relationship as more relational.

Table 7: Ordinal Logistic Regression Results: The Role of Malleable Consent in Explaining Transactional-Relational View of Work (InnoTech Subjects)

		Change in Predicted Probabilities[a]						
Indep. Variables	**Ordered Logit Est.[b]**	**Transactional 0**	**1**	**2**	**3**	**4**	**5**	**Relational 6**
Malleable Consent	-1.730** (.03)	.26	.11	.14	-.33	-.20	-.13	-.02
Female	-8.13 (.423)	.12	.06	.02	-.02	-.10	-.06	-.01
Black	-1.140 (.175)	.17	.08	.01	-.25	-.14	-.08	-.12
Hispanic	-1.910* (.056)	.33	.09	-.05	-.44	-.21	-.11	-.16
Other	-1.780* (.079)	.32	.09	-.06	-.04	-.19	-.10	-.01
Age	.028 (.716)	-.08	-.05	-.05	.01	.09	.08	.01
Career	2.560** (.008)	-.19	-.13	-.22	-.02	.13	.34	.09

Note: sample size=36; chi squared (df=7)=17.28; pseudo r squared=.39

[a]Change in the predicted probabilities of holding each scaled valence for an increase from the minimum to the maximum value of each independent variable, while holding all other independent variables constant at their means.

[b]The top entries are ordered logit coefficients.

P values are in parenthesis.

***Significant at the 1%level; **Significant at the 5% level; *Significant at the 10% level

Table 8: Ordinal Logistic Regression Results: The Role of Malleable Consent in Explaining Transactional-Relational View of Work (MBA Subjects)

		Change in Predicted Probabilities[a]				
Indep. Variables	Ordered Logit Est.[b]	Transactional 0	1	2	3	Relational 4
Malleable Consent	-1.023** (.02)	.01	.12	.09	-.16	-.52
Female	1.490*** (.001)	-.01	-.17	-.12	.22	.08
Nationality	.340 (.435)	.00	-.04	-.02	.05	.01

Note: sample size=91; chi squared (df=3)=19.00; pseudo r squared=.21

[a]Change in the predicted probabilities of holding each scaled valence for an increase from the minimum to the maximum value of each independent variable, while holding all other independent variables constant at their means.

[b]The top entries are ordered logit coefficients.

P values are in parenthesis.

***Significant at the 1%level; **Significant at the 5% level; *Significant at the 10% level

Figure 3: Comparative Lowess Graphs of Mean Malleable Consent by Relational Scores Across Samples

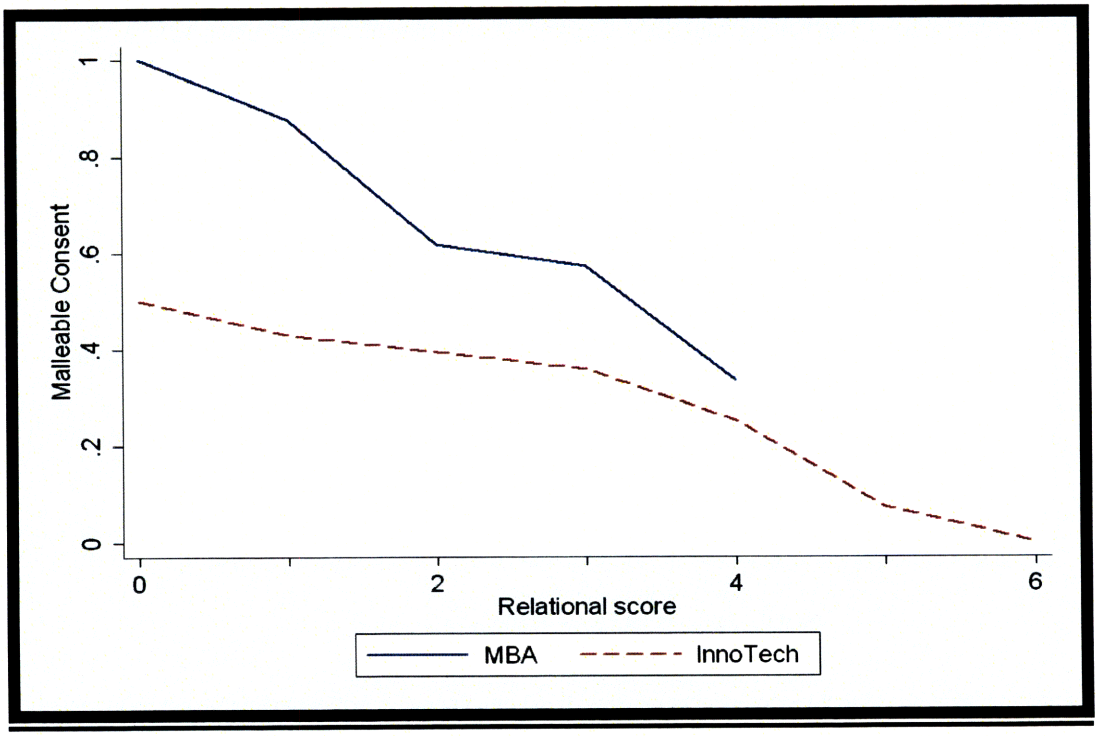


Figure 3 is a graphical representation of the two salient quantitative results of this Article—it shows a comparison of the Lowess-smoothed mean malleable consent scores for the MBAs and InnoTech subjects by subjects' transactional-relational scale scores. The hypothesized inverse relationship is present in both samples (supporting the second hypothesis), and the malleable consent of the MBAs remains consistently higher than the InnoTech subjects (supporting the first hypothesis).

Implications

Through their interpretations of contracts, actors instantiate their relationships with the state; they do so, it appears, on the basis of their socio-economic status, opportunities and constraints of employment, and power and potential to redress wrongs. From the vantage of individual signers, increased exposure to form-adhesive agreements is tantamount to increased loss of control over contracting capacity, a classical institutional symbol of capitalism and economic freedom (Beirne and Quinney 1982). As Weber noted, "the present day significance of contract is primarily the result of the high degree to which our economic system is market-oriented" (1954: 105). This loss of control over such an obvious icon of economic freedom begs the question of whether greater exposure to form-adhesive agreements has lead to increased social levels of malleable consent, and consequently, perhaps, less resort to institutional (legal) means of redress when persons' experiences suggest breach of contract (which are not read or understood).

Malleable consent may be one critical indicator of how individuals respond to this loss of control. Form-adhesive agreements may be a necessary means of expedient dealing for modern times. But like other modern "necessary" conveniences, they may nonetheless produce significant negative externalities. Such phenomena need to be studied, not only normatively or in terms of their legality, but from a sociological vantage—seeking to understand their causes and effects and how these vary by social class.

This research presents very preliminary evidence to support the theory that occupationally advantaged actors respond to these contracts differently than the less advantaged, which, in turn, results in different conceptions of self relative to employers and the state. By exploring these differences across two distinguishable groups, malleable consent is shown to be a useful construct for revealing otherwise unobserved differences between the groups' subjective construction of law and social status, and hence citizenship. It therefore seems that understanding malleable consent and related behaviors surrounding form-adhesive contracts may lead to further clarification of otherwise obscured social stratification on important features of citizenship—specifically, the ability to make claims against others or the state and the ability to mediate one's relationships through the law.

These findings might have been otherwise obfuscated, or at least more difficult to discern, without measuring malleable consent. Indeed, no statistically significant differences were observed between InnoTech employees and the MBAs in terms of the rates at which subjects reported wanting to resort to law to redress the hypothetical wrongs—even in the vignettes in which they imagined being sexually harassed and losing their jobs because of illegal discrimination.[25] Without a measure of malleable consent, the two groups would have appeared to have equally considered the law to be a viable option in their arsenal. Research has previously demonstrated that power-disadvantaged actors are constrained from taking action to redress injustices (Ewick and Silbey 1999; Zelditch and Ford 1994). In the employment context, malleable consent could be thought of as a cost that the advantaged perceive as avoidable more often than the disadvantaged.

This research also offers initial support for the theory that there is a connection between interpretations of enforceability of form-adhesive agreements and exchange relationships between the drafters and signers of such contracts. Individuals who regard the form-adhesive

[25] The numbers illustrated sixty-six percent for InnoTech and seventy-five percent for MBAs. This finding is consistent with prior research. *See, e.g.*, EWICK & SILBEY, *supra* note 21 (finding many people claim that they will resort to law if they experience denial of rights, but simultaneously describe how they cannot afford a lawyer to help secure their rights).

agreements they must sign as a condition of employment (in this case, a mandatory arbitration agreement) as unenforceable (high malleable consent) are more likely to view their jobs as an instrumental transaction—as simply a market financial exchange, and hence less likely to give their employers the opportunity to resolve disputes internally. When actors are more likely to regard form-adhesive agreements as enforceable (low malleable consent) they are more likely to interpret their employment as an exchange of obligations as well as rewards, imbued with a substantive, moral relationship, what industrial relations scholars often refer to as a "social contract,"[26] or a "relational exchange." In other words, when actors view form-adhesive agreements as unenforceable, there is less perceived trust in the employment relationship, and hence in the employer's ability to resolve disputes as well. This is an important finding as it is an indication of the class divide so often overlooked or ignored in recent descriptions of American social life. The measure of trust in the employer's capacity to handle disputes and the link between this measure and citizenship therefore seems worthy of future discussion and research.

Methodological limitations notwithstanding,[27] these results *appear* to hold across diverse populations. One potential implication of this specific preliminary finding is the connection between the overwhelming loss of control over contract, a symbol of a democratic, capitalistic free-market economic ideal, and increased resort to non-legal forms of redress when contracts are perceived to be breached.

At the beginning of this part of the dissertation, a feedback loop was described in which social constructions of law create contract, and contract in turn creates socially construed forms of private law, backed by the state. There is a fundamental discrepancy between this subjectively driven form of contract and the traditional objective theory of contract. This fundamental discrepancy becomes most apparent when examining form-adhesive agreements in which

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[26] *See* sources cited *supra* note 20.

[27] There are clear limitations, particularly when comparing across the two studies. For instance, the MBAs were asked to imagine that they had agreed to terms that the InnoTech employees had actually signed. As mentioned earlier, and described in more detail in the section below, this Article presents preliminary support for the hypotheses generated. In spite of its limitations, this Article hopes to establish some preliminary comparisons in order to provoke discussion in these theoretically important areas.

"freedom of contract" is a function of great imbalance of mutual dependency and "meeting of the minds" is fictional at best. Courts have clearly struggled with this discrepancy in deciding when to enforce boilerplate of varying adhesiveness and one-sidedness. Perhaps malleable consent is evidence in support of the feedback loop, in which individual interpretation of these unique and ubiquitous contracts trickles up at the same time as the law on the books (demonstrated in part, by courts' and commentators' strain to apply objective theory of contract to form-adhesive contracts) trickles down.[28]

Limitations

This portion of the dissertation is intended as grounded theory based on the limited evidence currently available. This part represents the first step in this line of research; the construct of malleable consent was born from an inductive study about exchange and conflict at the workplace. It offers preliminary evidence of the construct's existence and an argument for its inclusion in the panoply of ways we study how law emerges. Moreover, it takes form and evolves in our collective conscious, along with its potential variation across structural constraints, social strata and individual level constructions. The hope is to generate hypotheses and provoke further discussion, in part from some of the questions raised but not answered herein. The second part of the dissertation therefore picks up where this part leaves off. For instance, this part of the work does not explain *when* actors form beliefs about enforceability or whether these beliefs are mutable in the short term (for the instant transaction) or the long term, such that they carry over from one transaction to another. Similarly, this part raises several additional questions, some discussed below.

Other questions raised include: What effect does malleable consent play in negotiations, particularly in repeated transaction relationships?; does variation in malleable consent reveal

[28] This notion was suggested to the author in a conversation with Stewart Macaulay. Courts too, could be said to have some *malleableness* in rulings on enforceability of form-adhesive agreements. This portion of the dissertation begs the question of the extent to which individuals' malleable consent jives with that of the courts, and the extent to which courts influence individuals and vice-versa.

differences in actions and outcomes even when actors have not signed form-adhesive agreements?; and how does malleable consent affect litigant decision making, and how does the construct affect judicial decision making and legislation? If the feedback loop described at the outset of this Article is valid, and the law is informed by norms of exchange and vice versa, laws and judicial decisions should accord increased levels of malleability of consent. More research examining the prevalence of this theorized phenomenon is warranted.

Four limitations of this part of the work exist. First, this part offers only proposed hypothetical relationships and offers evidence in support of component parts of these relationships. Much remains to be seen as to whether malleable consent carries with it the extent of negative repercussions it is theorized to carry.

Second, it is unclear at what point interpretations of contract enforceability are formed. This presents some difficulty for two reasons: one, the responses to the vignettes are measured before malleable consent; and two, it weakens the ability to draw comparisons across the InnoTech and MBA groups. There are some obvious apples-to-oranges problems comparing across the two groups, a clear limitation of this research. For example, the MBAs are asked about a contract they imagine signing at a future job, while the InnoTech subjects are asked about a contract they have actually signed as a condition of their current employment. Understanding when malleable consent is formed may help to account for the socio-economic differences described in this part. Future research measuring the construct over time could lead to useful causal findings indicating what experiences affect these interpretations and whether actors' views of malleable consent are mutable—a measure of the malleability of malleableness, if you will.

Third, this part of the dissertation lacks a basis for determining the effect on actual behavior of being "right" or "wrong" about the enforceability of the agreement. As mentioned earlier, InnoTech fully enforces the agreement in question, and agreements to arbitrate such as the one hypothesized in the MBA survey are mostly enforceable *legally*; most of the time that organizations implement such agreements, it is because they fully intend to use them to reduce the costs of employment litigation. They are loath to make exceptions for fear of setting an undesirable precedent. What happens to the MBAs with high malleable consent who attempt to

sue? Do they behave differently than those with low malleable consent who assume the worst about their employers? How so? How does this experience alter their behavior with respect to form-adhesive agreements in the future, if at all?

Fourth, and unexplored in this part, but with potentially important implications, is the effect of malleable consent on signing habits. That is, what if malleable consent beliefs carry over from one contract area to another, leading one to believe that form-adhesive agreements are not binding when they are? For instance, if one learns to have high malleable consent from interacting with credit card companies that routinely grant leniency on late payments, over time this person will believe that all form-adhesive agreements, like credit card "Terms of Agreement," are really unenforceable, and will become less concerned about signing forms, even if they contain unfair terms. To continue the hypothetical, this person then signs up with a private military company like Blackwater, which similarly requires new hires to sign a form-adhesive agreement that purports to release Blackwater and all of its agents, officers and shareholders from "any liability whatsoever" even when death or injury is "caused in whole or in part by the negligence" of the company (Eviatar 2007: 74-75), the signer thinks this form is no different from an American Express contract, and signs without worry over the enforcement of the draconian provisions that may lurk within. Blackwater relies on this form-adhesive agreement to prevent the huge number of injured and dead from suing them. Understanding how malleable consent carries over across contexts, and otherwise affects signing habits, may contribute to a decrease in the abuse of such forms, or may inform policy in ways not explored before this research.

Conclusion

Apparently, the devil *is* in the details. And, it has been said that "[t]here are no honorable bargains involving exchange of qualitative merchandise like souls for quantitative merchandise like time and money."[29] But what happens when we do not realize that we have traded our souls

[29] William S. Burroughs, *Words of Advice for Young People*, http://www.jjjwebdevelopment.com/306sites/burroughs/burroughs.shtml (last visited Sept. 29, 2008).

away until it is too late? The hope of this line of research is to illuminate one subtle, yet ubiquitous exchange and its effects. This part of the dissertation highlights the difference between law on the books (embodied by what the forms purport to do) and law in action (how signers experience and interpret the forms) and explores the gap between the two. The point, however, is that this gap is a "space, not a vacuum" (Ewick and Silbey 1999: 1040). It is not enough that we recognize this space, but that we seek to understand what fills it, and how what fills it in turn affects the law and our interpretations of ourselves relative to others as actors bound by laws and normative constraints. Through such work, we hope to gain a better understanding of citizenship across socio-economic boundaries. As has been done in other areas, this classic socio-legal approach may open doors to explain this space to inform policy and future research.

Part 3: The Performance Puzzle: When and Why Individuals Comply with Form-Adhesive Contracts They Have Signed

Introduction

The amount of time individuals spend *negotiating* in the traditional "arms'-length" sense of the word, where parties exchange positions, discuss options and alternatives integratively or distributively, and otherwise seek to advance their interests in accord or in opposition to another party or group of parties, *before* reaching agreement has likely diminished over time (Ben-Shahar 2007; Slawson 1971). This is particularly true if one subcategorizes all exchanges to those occurring between individuals and organizations. Anyone who has received medical services, a loan or mortgage, used a credit card or cell phone or downloaded media or software will likely agree that they spent almost no time *negotiating* such exchanges prior to reaching agreement on the terms. Even in exchanges in which traditional negotiations occur such as salary discussions or buying a car, more often than not, such negotiations are limited to the terms of the *primary* exchange, and not the *secondary* terms governing that exchange. That is, we might haggle for hours or days over the price of a new car, but how often do we negotiate over the terms in the form-purchase agreement invariably proffered by the auto dealership once the price is settled upon? We might sign these contracts, which often dictate important terms including changes in price, penalty fees, interest rates, what the organization can do with confidential information of ours, and dispute resolution clauses, without reading or understanding them.

The second part of this work seeks to establish the connection among how individuals experience and interpret the rule of law, how they experience and interpret form-adhesive contracts, and how these things are connected to the relationship underwriting the particular kind of contract at issue —in this case, the relationship between employer and employees. In exploring these connections, the second part of this dissertation supports existing scholarship's assertion that

there is a nexus between perceptions of the rule of law and socio-economic status by positing evidence of higher socio-economic actors' higher malleable consent.

Left unexplored, however, are several critical components. First, the second part only examined individuals' *reported attitudes* about enforceability of form-adhesive contracts. No measure was observed of individuals' *behavior* with respect to enforceability of form-adhesive contracts. Also, while the employment relationship is an extremely important one in which to observe and study these concepts, there are several problems with relying solely on this relationship to articulate the type of contractual theory intended. This is because the employment relationship involves many elements that may distort or confound the observations made about how individuals regard form-adhesive contracts per say. First, employment is an ongoing relationship. Subjects' reported attitudes might be colored by this fact. In fact, there is evidence to suggest that this could be the case. Subjects often contemplate elements like reciprocity more saliently in repeated transaction settings, as opposed to one-shot interactions. As Posner notes, "when people have repeated interactions with each other, they have an incentive not to breach or "cheat" in one interaction, because then people will not trust them in later transactions....As long as both parties value future payoffs to a sufficient degree and as long as the value of breach is never too high, it is possible (as a matter of theory) and likely (as a matter of common sense) that they will not breach in any round" (1999: 15). What is needed to overcome this shortcoming of the first set of studies then is a single-shot interaction governed by a form-adhesive contract.

Second, the first set of studies report on something for which there are relatively few alternatives to exchange, or at a minimum, there are significant costs associated with terminating the exchange. That is, employees of InnoTech had few alternative job opportunities, and even the MBA students with many alternative job opportunities would acknowledge that there are some costs associated with changing jobs. What is needed is a setting involving many low cost or no cost readily available alternatives to the exchange for the object of the form-contract. This is the optimum way to try to answer the question, is there variation in how subjects interpret enforceability of form-adhesive contracts when there are numerous alternatives to the exchange at low or no cost to the individual signers?

Third, the first set of studies examined the construct in a *non-anonymous* setting. I mean this in two ways—first, subjects were aware of the fact that they were being asked about the enforceability of a contract. This might lend some to feel more pressure to respond in an honorable way—however they view honor. It might also lend some to feel more pressure to respond by demonstrating that they are not naïve—they might be more likely to posture as if they would try to escape from the contract, when they really would not. In either event, there may have been a tendency for the presence of the interviewer to impact how subjects responded. Second, subjects were interviewed or surveyed about an employment setting in which they were presented with a contract by an individual (an HR representative). Subjects' views about employment generally, particularly the moral obligation or social expectation to be a productive member of society, could have interfered with subjects' reported attitudes about enforceability of contract. For instance, David Hume proposed that the external sanction of public shame, or loss of reputation for honesty, which is attached to promise-breaking, is internalized and likely the underlying explanations for moral behavior, which necessarily exists in an observed setting (Fried 1981: 15; Hume 1888). What is needed then, is a relatively anonymous setting in which individual signers of a contract are less likely to be affected by social, normative of moral suasion.

Fourth, the first paper explored only a setting with a *constant* degree of adhesiveness of the setting in which subjects consented to the contract. That is, subjects were not offered any opportunity to provide input into *any* terms to which they consented. As discussed in greater detail below, negotiation scholarship suggests that varying the adhesiveness of the setting in which subjects enter into a contract might affect the perceived enforceability of the contract's terms. What is needed then, is variation in the adhesiveness of the setting in which individuals are given the opportunity to consent to the form-adhesive agreement to determine if the relative adhesiveness is an important situational factor influencing contract performance.

As such, the primary goal of this component of the dissertation is to empirically observe how individuals *behave* (not just their reported intent to behave) with respect to a form-adhesive contract they have signed in a relatively anonymous setting, where the contract governs a single-shot transaction (not a repeated exchange situation), and there are numerous free or low-cost

alternatives available for signers to obtain the sought-after benefit of the bargain. It is also the goal to observe if variation in the degree of adhesiveness of the setting in which individuals are given the opportunity to consent to the contract impacts perceived enforceability and performance.

What follows are descriptions of two categories of hypotheses to be evaluated in exactly this experimental setting. That is, given a relatively anonymous, one-shot exchange involving something that is easily available at low/no cost to signers, and variation of the adhesiveness of the form-contract, how do individuals behave consistently or inconsistently with a contract term to which they have consented? Further, to ensure consistent measurability and to optimize the interpretability of the findings, it is important for the contract and communications about the contract to be objectively measurable, and for the behavior to be objectively measurable and as continuous as possible. The first category of hypotheses described below is about the degree of adhesiveness in the consent stage of contracting and the impact on post-agreement performance. The second category is about varying prompts used to convince contract-signers to continue to perform following their attempted breach and the impact of these prompts on performance following attempts to breach. The theoretical bases for the two categories of hypotheses are articulated below as well.

Hypotheses

A. Predicting Adherence to Contract Terms Based on Pre-Agreement Conditions

Existing literature has much to say about how individuals behave in *traditional* negotiation settings. It is the hope of this section to construct hypotheses about predicting when and why individuals adhere to form-contracts they have signed by extending some of the ideas represented by this rich body of scholarship. By a "*traditional negotiation setting*" I mean one in which parties exchange proposals and then finalize their agreement by signing a contract that memorializes their understanding of how each party will behave in the future. The resulting contract is a set of bilateral commitments. In the form-adhesive setting, this is not how it most

often works. In this setting, the organization drafts a contract intended for many signers. The resulting contract is less likely perceived by signers as a "set of bilateral commitments" and is perhaps better described as offers to commit to terms conceived and drafted unilaterally. Signers elect to accept the unilateral terms or not in order to receive the benefit of the exchange. If they want the job, the medical care, the cellular telephone service, the rental car, gym membership, in some instances, the mortgage, or other benefit of the bargain, they sign the contract as is.

Some might construe this exchange narrowly as the absence of negotiation, but in line with others (see, e.g.: Curhan, Elfenbein and Xu 2006; Pruitt 1983), I take a somewhat broader view. First, it can be said that *some* form of traditional bargaining takes place prior to agreement—there is an offer and acceptance after all—the two critical predecessors of traditional contract formation. Second, it would seem that the social context in which form-adhesive agreements arise tends to shift the opportunity for traditional bargaining from pre-agreement to post-agreement, if such an opportunity is perceived at all.[30]

Pre-agreement based research on the behavior of negotiators may shed light on post-agreement behaviors. It might also be that form-adhesive agreements are a useful context in which to adjudicate among behavioral theories about how such pre-agreement negotiation behavior carries over into the post-agreement phase. Decades of research on behavior of parties in negotiations *prior* to reaching agreement has shown that individuals systematically deviate from rational behavior for many reasons (see, e.g.: Neale and Bazerman 1991). It might be the case that heuristics in effect prior to reaching agreement do not turn off because an agreement has been struck. In fact, if not all parties uniformly regard agreements as enforceable, it could be not only the case that heuristics remain at play in the post-agreement period, but are extremely important in understanding behavior. For instance, the theory of escalation of commitment (Brockner 1992; Staw 1976; Staw 1981; Staw and Ross 1987) posits that commitment to a failed course of action is likely to escalate in spite of negative feedback about the consequences of such commitment because one feels responsible for the choice he has made and has justified his

[30] The notion of variation in perceived opportunities to initiate negotiation parallels another stream of research in negotiations focused on gender differences in the propensity to initiate negotiations. Babcock, Linda C., and Sara Laschever. 2003. *Women Don't Ask: Negotiation and the Gender Divide*. Princeton, N.J.: Princeton University Press.

actions accordingly. It would seem then, that this theory would predict a greater degree of commitment to negotiated agreements when the signer of the agreement learns that the contract contains terms not in his interest. Interestingly, the magnitude of the escalation of commitment would theoretically be inversely proportional with the degree of control over the negotiation process that brought the actor to enter into the contract. That is, the more form-adhesive the agreement, the greater the theorized perceived unenforceability of the agreement.[31] Understanding how variation in perceived enforceability interacts with such heuristics may be the key to explaining when and why individuals comply with contract terms to which they have consented.

Interestingly, in evaluating the possible extension of decision-making heuristics studied in the pre-agreement phase to the post-agreement phase, it becomes clear that some theories contradict one another. Dissonance theory, for instance, may conflict with the predictions for behavior made by escalation of commitment theory. Dissonance theory asserts that individuals try to reduce cognitive dissonance, the state of psychological uneasiness brought on when actors freely choose to perform a behavior that does not jive with their preexisting attitudes, which could induce an aversive event or block one's self-interests (Cooper and Worchel 1970; Festinger 1957; Festinger and Carlsmith 1959). This theory predicts that in order to reduce dissonance experienced by signing form-adhesive agreements with terms adverse to their interests, signers would feel *more bound* by the terms.[32] The greater the dissonance experienced due to the worse the choice is (the more oppressive the terms in the form-adhesive agreement), the greater the theorized perceived enforceability of the agreement.

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[31] This jives with Law and Society literature on individuals' perceptions of law and contract Ellickson, Robert C. 1991. *Order Without Law: How Neighbors Settle Disputes*. Cambridge and London: Harvard University Press, Ewick, Patricia, and Susan S. Silbey. 2003. "Narrating Social Structure: Stories of Resistance to Legal Authority." *American Journal of Sociology* 6:1328-1372..

[32] To the extent that signing a form-adhesive agreement appears to be a choice between two unattractive options, dissonance theory predicts that this would result in an inflated valuation of the selected option's perceived desirability. (Bendersky, Corinne, and Jared R. Curhan. Under Review. "Cognitive Dissonance in Negotiation: Free Choice or Counter-Attitudinal Justification.", Shultz, Thomas R., Elene Léveillé, and Mark R. Lepper. 1999. "Free Choice and Cognitive Dissonance Revisited: Choosing "Lesser Evils" Versus "Greater Goods"." *Personality and Social Psychology Bulletin* 25:40-48.) To the extent that signing appears to be a choice between two relatively attractive options, the theory predicts a resulting deflation in valuation of the rejected alternative.

The two theories seem to be at odds in predicting behavior in the post-agreement phase. Escalation of commitment would likely posit that the more form-adhesive the agreement is, and hence the less control over the process of negotiating, the *less* is the individual's perceived enforceability of that agreement. Dissonance theory, however, might theorize that the more form-adhesive the agreement, the greater the dissonance reduction required, and hence the *greater* the likelihood of perceived enforceability.

Closely related to these theories and their application to post-agreement behavior is the question of the existence of a relationship between *perceived control* over the consent-phase of the process and post-agreement contract performance. In the broadest sense, numerous studies, mostly in psychology, have repeatedly demonstrated that inflating subjects' feelings of efficacy or control (even when illusory) improves their sense of well-being and everyday functioning (Bandura 1977; Langer 1975). Much closer in application to the instant research is the work by Tyler and Lind demonstrating the connection between perceived control over a decision-making process and the positive impression that one has been treated fairly (Lind and Tyler 1988; Tyler 1997; Tyler 2006). Similarly, in research on job satisfaction and labor-management relations, numerous studies have shown the nexus between increased perceived control over the process of work and employees' work and job-satisfaction, performance and other positive metrics (Folger and Konovsky 1989; Rusbult et al. 1988; Thibaut and Walker 1975; Turnley and Feldman 2000).

The ultimate question then is what effect, if any, does the degree of adhesiveness in the consent phase of contracting have on the degree of commitment to perform the contract's terms in the performance phase? It would seem in adjudicating among competing theories on this front, that it is more likely that *less adhesiveness* would result in greater commitment and hence more performance. The first hypothesis is therefore as follows:

> *(H1) Individuals given a choice between two contract terms (i.e.: a less adhesive presentation than the traditional take-it-or-leave-it format) in the consent phase will commit and adhere to the terms of the contract they signed more than individuals not offered such a choice.*

Similarly, research on the pre-agreement phase of negotiations has identified how individuals deviate from what would otherwise be in their rational best interest by altering their valuation of offers they propose ("preference inflation") or that they turn down ("reactive devaluation"). This research has demonstrated how people tend to overvalue things they choose and devalue options they forego or turn down. Researchers have varied the degree of the relative attractiveness of the options between which individuals choose, and then observe how cognitive dissonance is reduced. For instance, Shultz, Léveillé and Lepper (1999) found that when subjects choose between equally attractive options, dissonance is mostly reduced by *devaluing* the foregone option. But, where subjects choose between two relatively equal unattractive options, dissonance is mostly reduced by augmenting the value ascribed to the selected option (Shultz and Lepper 1996; Shultz, Léveillé and Lepper 1999). The overall thrust of this research is that the act of choosing among options is the key action that affects how dissonance generated by the choice is reduced.

In contrast, other researchers evaluating the pre-agreement negotiation phase consider the fact that subjects are forced to somehow publicly justify their choices (typically to fellow-subjects or the researchers). In this line of research, the act of justification is the key behavior that affects how dissonance generated is reduced. This is the so-called "justification method," or "forced compliance," (Festinger and Carlsmith 1959).[33] As Bendersky and Curhan aptly summarize this research, "cognitive dissonance is induced when people's counter-attitudinal behavior is done voluntarily, cannot be attributed to external causes, and could produce and adverse event. Dissonance is alleviated when people revise their attitudes to be more consistent with their behavior." ((Under Review): 7).

Most previous research confounds choice and public justification (Bobocel and Meyer 1994). In seeking to adjudicate between the two competing bases for dissonance reduction, Bobocel and Meyer find that the act of justifying a choice, whether publicly or privately significantly increases subjects' propensity to escalate their commitment to the justified option, but that choice

[33] Bendersky and Curhan note that it is also referred to as: "insufficient justification" (Shultz & Lepper, 1996) or "induced compliance" (Cooper & Fazio, 1984; Cooper & Worchel, 1970).

alone did not have a significant effect. Curhan et al. (2004) have conducted additional experimental research in this area demonstrating how situational changes in the negotiation setting induces dynamic valuation of proposals or offers. In a set of additional experiments, Bendersky and Curhan found that "dissonance induced by choosing between unattractive offers is alleviated primarily by inflating one's valuation of the selected offer" (in press: 25).

This set of research highlights the importance of the relationship between choice and justification and resulting reduction of dissonance vis-à-vis escalation of commitment to a course of action. But this research is all based on pre-agreement negotiations. One question begged is whether these effects carry over to post-agreement behavior. More specifically, in the context of form-adhesive contracts, does selection of one of two relatively unattractive contract terms in the pre-agreement phase result in greater adherence to perform the chosen contract term in the post-agreement phase? Thus, the second hypothesis is:

> *(H2) Individuals who choose a contract term from two options to be included in a final contract they sign will commit and adhere to perform that contract term more than individuals not given such a choice, and, more than those given a choice between two other contract terms unrelated to performance.*

Lastly, there are a number of opinions about the effects of form-adhesive contracts broadly (Ben-Shahar 2004; Ben-Shahar 2007; Hillman 2007; Marotta-Wurgler 2007a), but less empirical evidence on their effects. Indeed, it would be very difficult to study their effects as rigorously as one would like because of their ubiquity. As Silbey observed, it is akin to studying the effects of exposure to violence in popular media. If anything, form-adhesive contracts are more unavoidable than violence on television, movies and advertising. I am not in a position to offer *direct* empirical evidence on the broad effects of exposure to form-adhesive contracts; this is beyond the scope of this work. However, as I argue in the first part of this work, one theorized effect of constant and repeated exposure to form-adhesive contracts is a dilution of respect for the rule of law. I also assert that in the wake of contract's death, we have returned not to "status" as some have suggested, but rather to extra-legal bases of authority independent of the rule of law. While it is an admittedly imperfect and incomplete test of these theories, it would offer partial and incremental evidence in support thereof if signers of a form-adhesive agreement

purporting to require them to perform in some way were no more likely to perform in that way as individuals who were not asked to sign a form-adhesive contract memorializing the parties' mutual obligations to perform. Hence, hypothesis three is as follows:

> *(H3) Individuals who sign a form-adhesive contract binding them to perform a task will be no more or less likely to perform that task than those who did not sign any contract purporting to bind them to perform.*

To test these three hypotheses, four pre-agreement settings need to be fabricated: (1) a standard boilerplate condition in which subjects are presented with a form-adhesive contract in the typical manner—without any opportunity afforded the signers to affect the terms, (2) a choice condition in which subjects choose between two relatively equally unattractive terms to be included in the contract they will sign, but neither of the choices impact contract performance as measured; (3) a second choice condition in which subjects choose between one term that will be used to measure contract performance directly and a second term of no consequence; and, (4) a fourth condition that operates as a control in which subjects are not asked to sign any contract at all. Comparing the choice condition to the standard boilerplate condition will directly test the first hypothesis. Comparing the choice condition in which subjects select to include in the contract the term that will measure performance directly with the plain choice condition as well as the standard boilerplate condition will directly test the second hypothesis. The third hypothesis requires a comparison between the standard boilerplate condition and the control condition in which subjects are not asked to sign any contract at all.

B. Predicting Continued Contract Performance Based on Legal and Extra-Legal Appeals

The prior section articulates several theories' predictions of how the setting in which the contract is signed—how consent is initially given—affects contract performance. This section addresses theories predicting how individual signers of form-adhesive contracts respond to prompts to continue performing after they attempt to breach, where the prompts vary according to theoretically disparate bases for contract performance. When do individual signers conform to the request or threat and discontinue breaching, and continue performing? How likely are

individuals to listen to a request or threat and continue performing? Is one basis for contractual authority more persuasive than other bases? Does a request to perform the same task where no contract has been signed yield the same rate of performance as when individuals are contractually bound to perform? These are the questions addressed in this section.

A starting point for this discussion is a brief reflection on the qualitative data from the previous part of this work. In reviewing the qualitative data from the first set of studies, it appeared clear that there are different ways in which individuals think about and discuss enforceability of contract. Recall that subjects were not asked about the "enforceability" of contracts per say. They were asked a much more rudimentary question—specifically, if they signed a document that contained a provision with the form, "*if X happens, then Y happens,*" where *Y* was something that could be construed as limiting their ability to act if they had not signed the contract. In the specific case of the first set of studies, *X* was equal to an employment related dispute arising in the course of their work, and *Y* was equal to an obligation to bring such claims to final and binding arbitration in lieu of court. I proposed the hypothetical situation that *X* happened and asked them whether *Y* would follow.

Deconstruction of the qualitative responses revealed that this open-ended structure produced an array of ways of contemplating the ultimate question of contractual *enforceability*. Subjects thought about the same question of the "legal" enforcement of the contract they had signed (a constant) along very different lines. Careful evaluation of the data revealed that the mechanisms underlying the responses seemed to align according to four distinct categories: (1) legal, (2) moral, (3) social, and (4) instrumental concerns. How subjects thought about whether *Y* would happen given *X* varied substantially along these dimensions. Subjects often mentioned more than one—the categories were not mutually exclusive of each other in how subjects responded. Indeed, there is substantial room for overlap. However, the nice thing about the form of the question to which subjects responded is the reductive effect of needing to ultimately state whether *Y* would happen or not, and the ultimate reason for this. For instance, individuals may contemplate *moral* reasons why the contract is enforceable (i.e.: "signing a contract is like making a promise, and it's the morally correct thing to do to live up to one's word"), but may ultimately decide that he contract is unenforceable because it is *illegal* (many subjects thought,

incorrectly, that the law prohibited employers from requiring employees to waive their right to a jury trial as a condition of employment). Similarly, subjects could regard the enforceability of the contract along social terms (i.e.: "everyone has to sign these things, so everyone probably has to go along with them…") and instrumental concerns (i.e.: "I couldn't afford to try to get around it…"). Thus, there is empirical support for dividing the bases for contractual performance up into the four categories identified above (legal, moral, social and instrumental).

What follows is a brief explanation of the theoretical support for each of these categories. Much research has already been conducted on optimizing the likelihood of successfully eliciting cooperation or obedience (Deutsch et al. 1967; Milgram 1965; Tyler 2006). This research focuses on the *pre-agreement* phase of negotiations, and adjudicates among competing strategic approaches in a dyadic or triadic exchange relationships. In the four sections below, I develop hypotheses regarding the application of the wide range of research on these areas to the *post-agreement* performance phase of contractual relationships between organizations and individuals.

1. Legal Threat

All contracts, including the "civil contract," create ***legal*** obligations for signers (McIntyre 1994: 20). As McIntyre notes, the word "obligation" comes from the Latin, "*obligato*," which originally referred to a "sealed bond." How much of a legal obligation is created by contract is difficult to discern and likely varies to a great extent depending on the circumstances, the parties and the kind of contract entered into. It should come as no surprise to anyone familiar with the history of contract law in the United States that early opinions went out of their way to decry extra-legal bases for contractual enforcement, insisting instead that contracts be upheld only on legal grounds vis-à-vis application of existing case law. In accord with the theories of contractual evolution articulated in the introduction to this dissertation, this is apparent in many opinions, including watershed early Supreme Court decisions such as *Ogden v. Saunders*. In that case the court grappled with the ultimate authority underlying enforceability of contracts. The court noted first the existence of a "universal law of all civilized nations, which declares that men shall perform that to which they have agreed" (1827). The majority opinion went on to write that "[w]hile I admit…that this common law of nations… may form in part the obligation

of a contract, I must unhesitatingly insist, that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed." That is, contracts are to be enforced when the law of the land requires it, not when universally accepted principles or norms so dictate. This 1827 opinion represents the tip of the iceberg on this point. Courts have repeatedly and consistently adhered to this principle.

The question is whether social actors follow the courts. Do individuals think that contracts they sign are enforceable because, in positivist terms, the law requires it, independent of economic constraints, moral concerns or social settings? In a properly functioning trickle-down model, where social views of law emanate from court opinions (the model often assumed to exist), this would be the case. But this is not the entire picture. Perceptions of law come from other sources than the courts. Views of law come about indirectly. For instance, some have shown how law influences individuals' behaviors indirectly, as what some have called "expressive law" (Nadler 2005; Sunstein 1996). This is the notion that independent of law's function of imposing punishment and setting specific guidelines for civil obedience, that the law symbolically transmits "statements" to citizens that "strengthens desirable norms and weakens undesirable ones" (Nadler 2005: 1402). The question of the extent to which the values that law expresses can induce compliance, *independently from sanctions and threats*, is an important one, to which a substantial amount of attention has been paid (Bohnet, Frey and Huck 2001; Huang and Wu 1994; McAdams 1997). It seems that some individuals find a "natural duty" arises because one is a member of society to obey the law (Greenawalt 1985). Greenwalt distinguishes this natural duty to obey the law from moral constraints like the obligation to keep one's promise, because in the latter case, individuals voluntarily subject themselves to the obligations (1985: 4).

As articulated in the previous two parts of this work, consistent with the behavioral theory of contract is the diminished positivistic regard for the rule of law, or the "natural" derivation of the rule of law, particularly with respect to contract enforceability. The forth hypothesis, below, reflects this. Threatening legal sanctions (independent of economic sanctions, social pressure or moral suasion) will be as effective at compelling performance as when individuals who have not signed any contract are merely asked to perform.

(H4) Threatening individuals who have attempted to breach a form-adhesive contract by warning them that they are in breach of contract will be no more effective at inducing performance than requesting individuals who have not signed a contract to continue performing the same task after they have attempted to discontinue performing it.

2. Moral Appeal

As discussed in the first part of this work, there is much discussion by philosophers, legal historians and contract scholars regarding the moral basis for contract. For some, embedded in the "morality of the negotiation relation" as the "foundation of orthodox contract" is the expectation that one may not retract from something that she agreed to do (Ben-Shahar 2004; Markovits 2004: 1913). Indeed, this notion of "keeping one's promise" has origins in the bible: "[i]f a man...takes an oath to bind himself...he shall not violate his word" (Numbers 30:2). The first part of this dissertation took pains to trace the origin of contract as an embedded form of promise-keeping in line with several notable scholars' work (Atiyah 1979; Fried 1981; Friedman 1965). As described in greater detail there, promise and doctrinal contract have clearly intertwined roots, but there is little empirical evidence of how social actors interpret the promise implicitly made by signing a contract, and less evidence (to my knowledge) of the perceived relationship between promise making and form-adhesive contracts. Durkheim (1933) argued that contracts could not exist without a preexisting set of institutionalized moral agreements. As Sutton describes, "in effect, contract law—that defines the nature of contractual obligations and invokes a transcendent authority to ensure that they will be enforced" (2001: 33).

Craswell (1989) offers a detailed account of how philosophers have sought to explain the moral basis of living up to promises made. He groups previous efforts to do so into two categories. First are explanations that argue that obligations created by a promise can only be explained by "positing that individual promisors possess 'norm-creating powers' under which they are authorized to create new moral obligations merely by agreeing to do so" (1989: 496-97). Second are those who argued that no such powers are necessary and that the "moral obligation to keep a promise is merely a particular instance of a more general obligation, such as the obligation not to cause harm to others or the obligation to tell the truth" (1989: 497). In either case, the effect of a moral framing of promise would likely augment the chances of contractual adherence. But,

neither offers a fully satisfactory explanation of how individuals respond to a prompt to perform as contractually obligated with a promissory framing for form-adhesive contract to which they may have consented *without knowing what the underlying thing to be performed is.*

How do individuals respond to a moral appeal to perform a form-adhesive contract? Even if subjects do not initially regard the contract they signed in moral terms—they might not even have read the contract itself, so do not even know for sure what the contract requires them to do—how well does an appeal to the morality in the procedure of consent? That is, does signing something mean "giving one's word"? And, does giving one's word to do something make one more likely to do it? This feeling is likely related to the social contract—which could be thought of as a promise individuals make to obey the law. It is possible that some individuals feel obligated "*by virtue*" to obey, instead of feeling legally bound for the sake of obeying the law (Raz 1981: 104). A promise is different from consent. With a promissory framing of a request to perform a contract to which an individual consented comes a very different set of associated perceived rights, responsibilities and perceived obligations (Raz 1981: 120-122). This is one reason why a morally grounded framing of a request to perform would yield a greater likelihood of contractual performance. Compounding this theorized effect of such a framing on contractual performance is the Rawlsian (1955) approach to promises. All else being equal, once someone has promised to do something, it is no longer an option for that person to not do that which he as promised to do on the grounds that it is something he prefers not to do, all things considered. That is, promising to do something increases the marginal moral cost associated with refusing to perform the task at issue. This too, adds to the theoretical effectiveness of a moral framing of an obligation to perform as contractually obligated.

Consistent with Atiyah, (1979) Fried (1981) and others, the theory advanced by this work is that even when it is a form-adhesive contract, individuals will respond more favorably to framing a request to comply with the contract in moral terms. Hence, hypothesis five is as follows:

(H5) Appealing to universally held moral standards of living up to one's promise and keeping one's word will effectively induce continued contract performance following attempted breach of contract as compared to other methods of communicating the same intended result.

3. Social Pressure

Conformance with social norms has repeatedly proven to be a powerful motivator for a wide gamut of behaviors (Cialdini 2001; Ellickson 1991; McAdams 1997; Troyer and Younts 1997). By "social norms," I mean to refer to the set of informal social guidelines for behavior to which individuals tend to feel obligated to conform due to an internalized sense of duty, or because of the fear of a socially-imposed sanction. This scholarship evaluates how and when norms of social interaction explain behavior more realistically the effect of legal rules. Sometimes social norms govern behavior regardless of the legal rule, rendering the construction of the codified version of the formal rule obsolete (McAdams 1997: 340). As McAdams notes,

> ...sometimes legal rules facilitate or impede the enforcement of a norm, and the selection of the formal rule matters in entirely new ways, the exact consequence depending on whether the formal rule strengthens or weakens a desirable or undesirable norm. Indeed, in some cases, new norms arise in the presence of different legal rules, making the relevant policy choice one between two or more law-norm combinations (1997:340).

Troyer and Younts explain that the social cues that often dictate how we behave are based on two determining categories of expectations: first order expectations, which are the expectations an actor holds for herself, and second order expectations, which are the expectations an actor believes others hold for her (1997: 693). They argue that interaction is assumed to be guided by three motives: contributing to group performance, preserving status, and facilitating interaction. Essentially, as this applies to the behavior around contracting, individuals would theoretically adhere to contracts when doing so conforms to expectations about how they should behave given their set of beliefs about who they are, and when doing so conforms to the expectations they believe others hold for them. They will be motivated primarily by preserving status and facilitating interaction, likely to a lesser degree, contributing to group performance. Contracts, particularly form-adhesive contracts, are interesting indicia of social status. They signal that the

drafter has the power to unilaterally impose its will on signers. They also send a signal that the document and text are unimportant, that terms are merely *fine print*, and that any hold-up caused by the signers would retard the primary exchange instead of facilitating it. The message a typical form-contract sends could be summarized as follows: "*This company does a lot of business and has sufficient legal power and control over resources many demand that it can dictate terms of a contract to which, you, the signer, have to agree in order to receive the benefit of the bargain. But, don't worry about the terms of the agreement. You are not alone. Everyone signs, and you are expected to behave like everyone else. That is the optimum way to ensure that you get the benefit of the primary exchange, and thus, help contribute to the smooth running economy. Lastly, this company has a team of lawyers that draft these forms. We don't really fully understand all the legalese, nor should you expect to be able to understand it—the best thing to do is to do what everyone else does and just sign.*" As such, appealing to this propensity to conform to first and second order social expectations for behavior would likely have a strong, positive effect on inducing contract performance. Hypothesis six summarizes this prediction.

> *(H6) Appealing to the common tendency to desire to conform to social norms of behavior will effectively induce continued contract performance following attempted breach of contract as compared to other methods of communicating the same intended result.*

4. Instrumental Appeal

Within liberal theory, the clearest main competitor to a social contract theory explanation of when individuals are more likely to perform pursuant to contracts they have signed has been utilitarianism (Greenawalt 1985: 5). Numerous scholars have studied the relationship between norms of contractual exchange on the one hand and power-dependency over contracted-for resources on the other (Blau and Richardson 1973; Thibaut 1968). Other scholars have carefully evaluated the notion of efficiency in contractual enforceability (Bebchuk and Posner 2006; Ben-Shahar 2004; Jolls 1997; Schwartz and Scott 2003; Williamson 1985). Cotterrell describes this approach as "law's relation to instrumental community is one of promoting efficiency, reliability and predictability; facilitating the rational pursuit by each contracting party of his or her self-interest" (2000: 22). Parties contract for efficiency reasons—they evaluate their available alternatives and enter into the contract that maximizes the likelihood that they will receive a

marginal rate of return greater than the next best alternative to the sought-after exchange. Contracts are breached for efficiency's sake in this model, where the costs associated with breach are outweighed by the anticipated benefits. In this way, all are encouraged to cooperate in the economic sphere by "defining the terms of a valid economic exchange and enforcing penalties against parties to a contract who fail to honor their obligations" (Sutton 2001: 40).

Under this model, individuals sign form-adhesive contracts in order to receive the benefit of the bargain—they need a job or they want the goods being sold. If later, they are prompted to continue to perform as the contract obligates them, the sole criteria on which signers base their decisions to comply is this efficiency calculus.

However, there is a good deal of evidence undermining the behavioral assumptions underlying this model, particularly when it comes to contracts. Williamson summarizes the argument against the efficiency approach to contract behavior as follows:

> I have previously argued that contracting man is distinguished from the orthodox conception of maximizing man in two respects. First, his ability to receive, store, retrieve, and process information is strictly limited. Second, contracting man is given to self-interest seeking of a deeper and more troublesome kind than his economic man predecessor (1985: 180).

This lament is echoed by others who similarly argue that the rational-actor model in modern economics is typically lacking emotional or other cognitive motivation. When such extra-rational motivations and heuristics are recognized, they are often regarded as sustaining behavior motivated not by rationality but by compliance with social norms (Huang and Wu 1994: 401). It seems that the orthodox utilitarian perspective would discount the role played by the alternative prompts evaluated in this study—morality, social constraints or even the role of the law in the positivistic sense or the "natural" sense, to borrow Greenawalt's (1985) terminology. However, based on the evidence that instrumental concerns are not as salient as others in evaluating notions of reciprocal exchange and ideal of justice and fair treatment, it is likely the case that appeals to instrumentality will not work as well as other methods of prompting continued contractual performance. Hence, hypothesis seven is as follows:

(H7) Appealing to instrumental concerns will not effectively induce continued contract performance following attempted breach of contract as compared to other methods of communicating the same intended result.

Methods

The experiment ran for 46 days, from October 1, 2008 through November 15, 2008. Subjects were recruited to participate in the experiment via three methods: (1) pop-under advertising[34] via two centralized internet-based advertising companies, (2) key-word search advertising on popular web-based search engines, and, (3) direct advertisements placed on various websites such as facebook.com and myspace.com. The method by which subjects were solicited to participate does not seem to have a significant effect on the results. These methods, combined, yielded 1,860 participants, all of whom resided in the United States and were at least 18 years old. Table 1 reflects descriptive statistics of participants including their reported gender, annual household income and highest level of educational attainment. Figure 1 demonstrates the distribution of participants' reported age. The mean age was 31 years old, (std. dev. = 10.7 years). The minimum age was 18, and the oldest participant was 68.

Table 1: Descriptive statistics of all participants

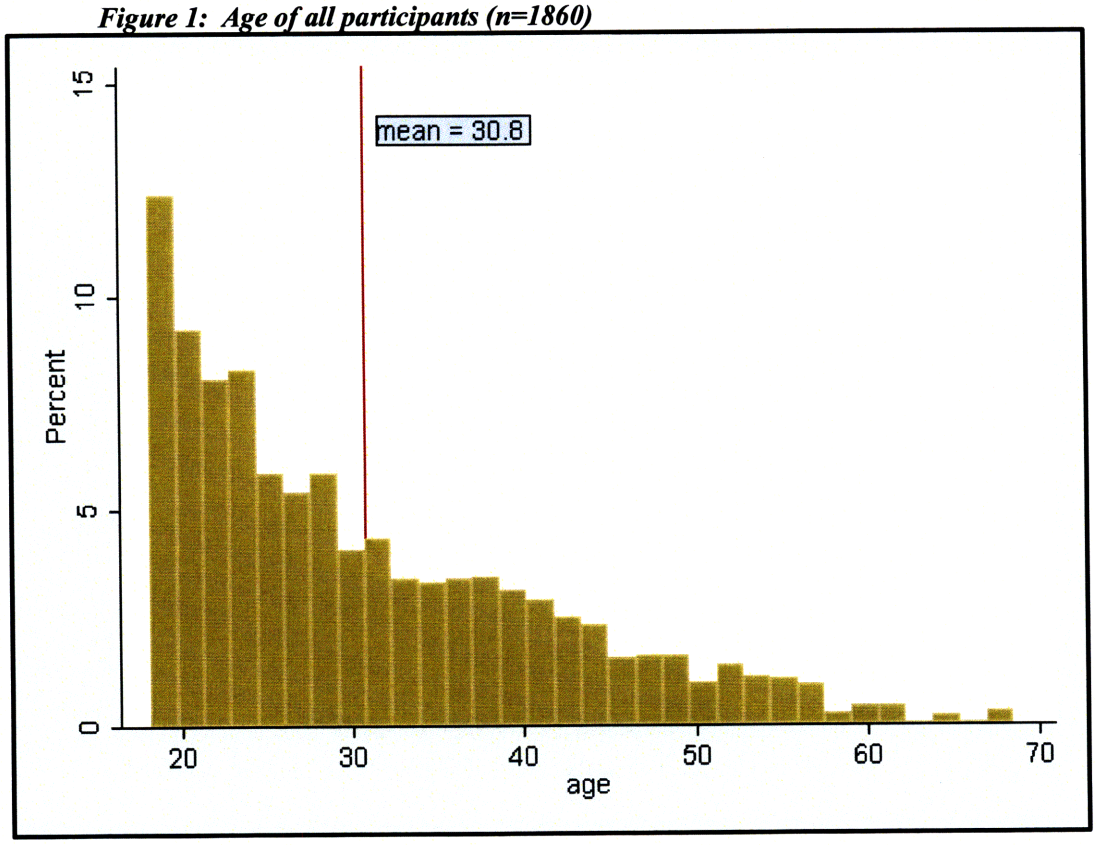
Category		n	Percentage
Female		1,035	56.40%
Education			
	Less than High School	37	2.03%

[34] "Pop-under" advertising is a webpage containing an advertisement that displays in a new browser window behind or underneath the current browser window. This type of web-advertising is reputedly more effective than "pop-up" advertising that appears on top of the current browser. The latter is more likely to be closed before the content is fully loaded, while the latter is able to load undetected while users browse the web in their current window. When they close it, they see the pop-under advertisement. In both instances, the advertising is triggered by the user visiting a target website or clicking on a link.

	High School	877	48.08%
	Junior College	370	20.29%
	Bachelor's Degree	430	23.57%
	Graduate Degree	110	6.03%
Household Income			
	Less than $10,000	77	5.03%
	$10,000 to $19,999	172	11.24%
	$20,000 to $39,999	356	23.27%
	$40,000 to $59,999	284	18.56%
	$60,000 to $99,999	246	16.08%
	$100,000 or more	142	9.28%
	Prefer not to answer	109	7.12%
	Don't know	144	9.41%
Employment Status			
	Working full time	534	36.25%
	In school	334	22.67%
	Working part time	242	16.43%
	Home maker	140	9.50%
	Temporarily not working	84	5.70%
	Unemployed or laid off	65	4.41%
	Other	31	2.10%
	Retired	26	1.77%
	Prefer not to answer	17	1.15%
Marital Status			
	Never married	798	59.24%
	Married	420	31.18%
	Divorced	72	5.35%
	Separated	22	1.63%

	Widowed	12	.89%
	Prefer not to answer	23	1.71%
Race/Ethnicity			
	White	1,064	81.22%
	Asian or Pacific Islander	64	4.89%
	Black	52	3.97%
	Hispanic, Chicano or Latino	45	3.44%
	American Indian or Alaskan native	19	1.45%
	Middle Eastern	6	.46%
	Don't know	7	.53%
	Prefer not to answer	32	2.44%

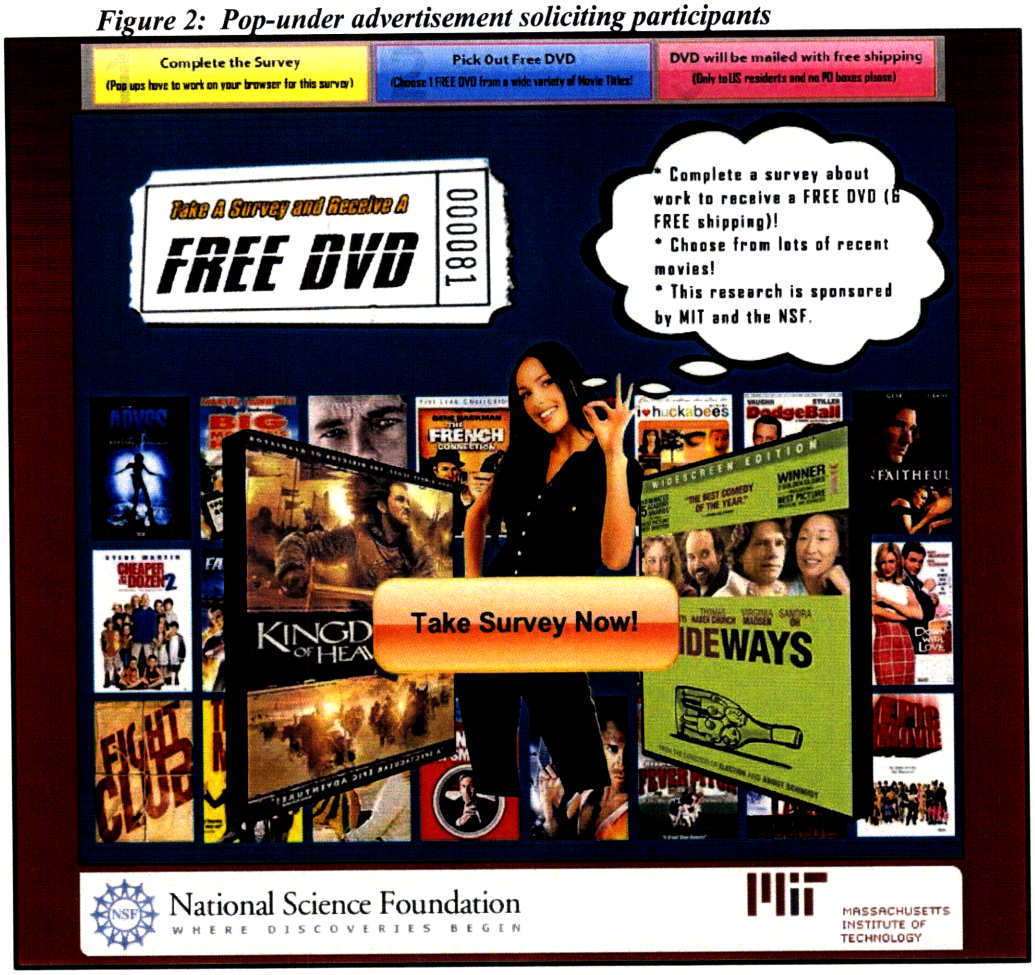
Figure 1: Age of all participants (n=1860)



Web-based experiments involve less control over participant solicitation and behavior than in laboratory experiments (Skitka and Sargis 2006). To compensate for this, I took several steps to maximize the likelihood of ensuring exclusion of dubious data, and to increase the likelihood that subjects from diverse socio-economic backgrounds participate. Specifically, several system-gaming prevention measures were put in place on the front-end such as using numerous timed, coded URLs that changed daily, and designing the experiment to load and run only once on any given IP address. On the back-end, every participant's activity and response data are carefully screened to include only instances where no server errors or other activity that is of questionable interpretation occurred. Additionally, the advertisements targeted a wide swatch of potential participants, borne out by the relatively normal distribution of income and other related measures.

Subjects were solicited to participate in a survey about work and employment issues in exchange for which they were allowed to select a DVD from the thirty titles available. Figure 2 is the pop-under advertisement soliciting participation in the survey. It depicts some of the DVD titles available for subjects to select.

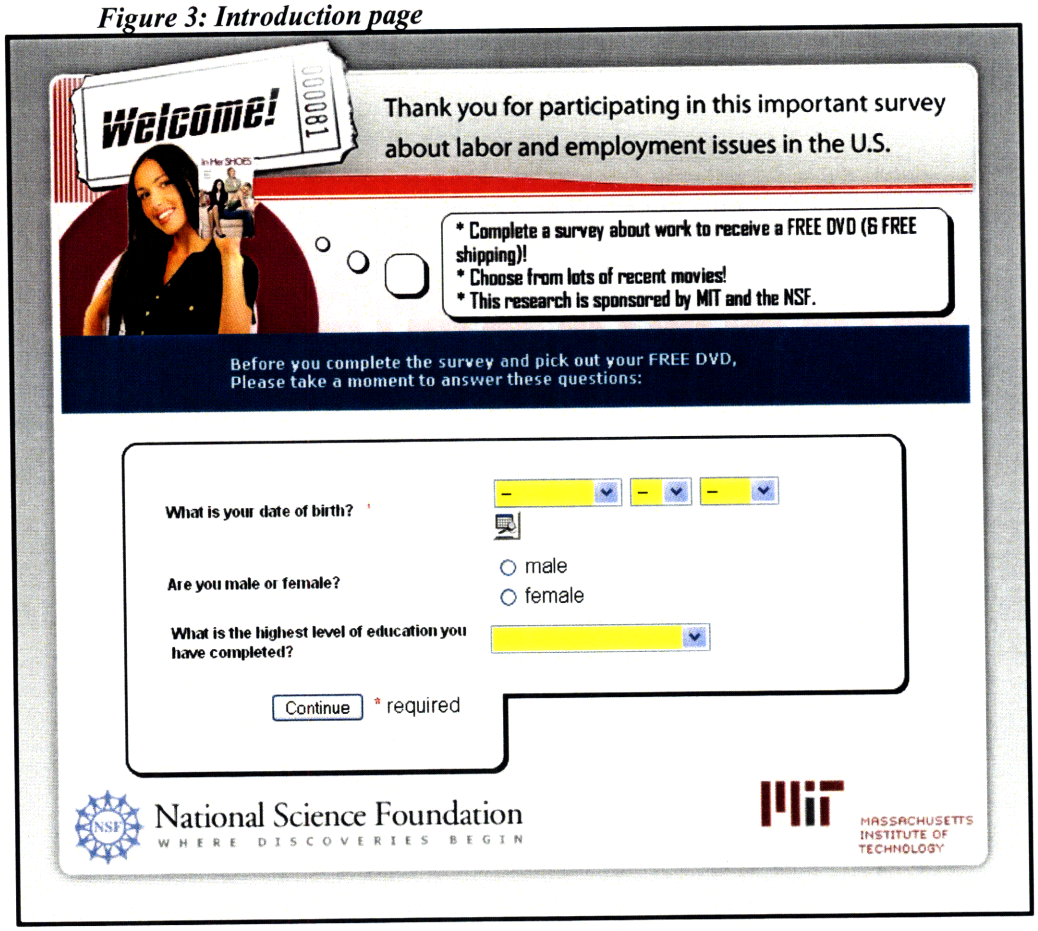
Figure 2: Pop-under advertisement soliciting participants



When subjects clicked to take the survey, they were sent to a page that first checked to ensure that pop-ups were enabled in their browsers.[35] If their browsers were not set to accept pop-ups, they were instructed on how to do this. Following this check, which was likely experienced as a slight pause in the loading of the next page for most subjects, the introduction page was loaded. Figure 3 is this introduction page.

[35] The experiment was designed and tested to ensure functionality in the most popular web browsers—Internet Explorer, Mozilla Firefox and Safari.

Figure 3: Introduction page

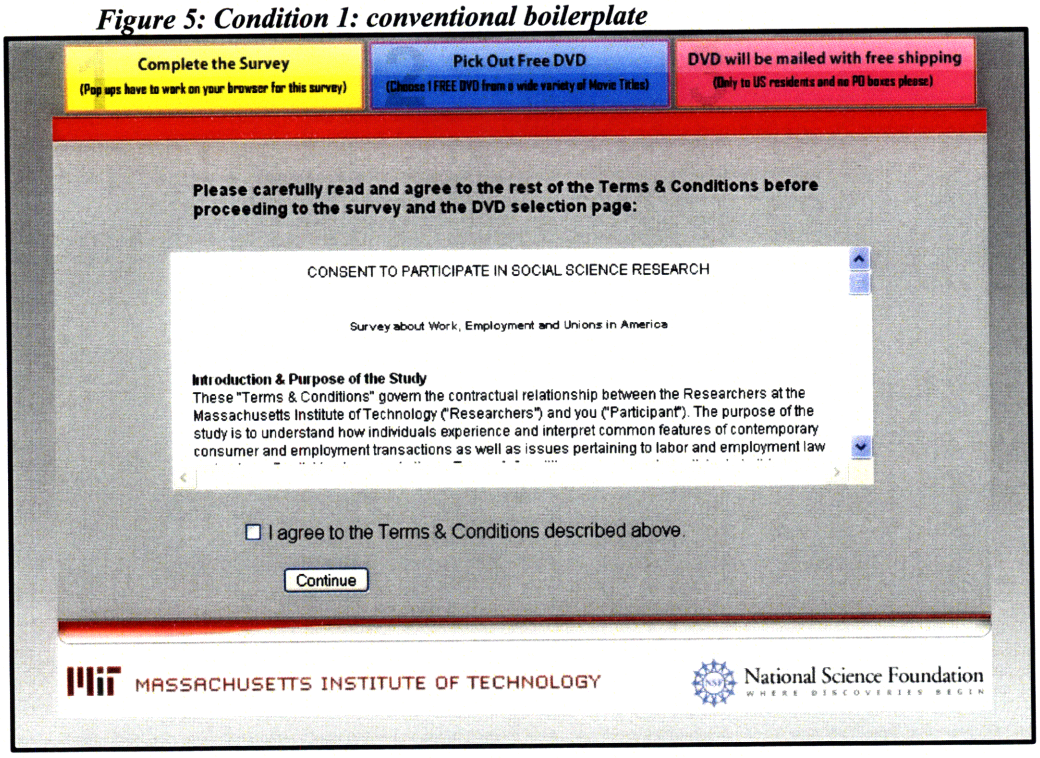


Subjects answered these three demographic questions (date of birth, gender and educational attainment) before proceeding. If subjects entered a birthday indicating an age less than eighteen years old, they received a message indicating that they were not able to participate in the survey at this time, and the IP address from which they attempted to take the survey was locked out—preventing any future access to the site via any URL at any future time.

Unbeknownst to the other subjects over eighteen who clicked the "continue" button on the Introduction page, everyone else was then randomly assigned to one of four experimental conditions. For ease of reference, these conditions are: (1) conventional boilerplate, (2) non-substantive choice, (3) substantive choice, and (4) control condition. These will each be described in greater detail below.

Subjects randomly assigned to the first condition were sent to a page intended to simulate conventional on-line boilerplate form-adhesive "terms and conditions". Figure 4 is a screen-shot of this condition. Subjects are instructed to "please carefully read and agree to the Terms & Conditions before proceeding to the survey and the DVD selection page." There is a scroll window in the middle of the screen with a scroll bar on the right-side of the window. Nested inside the window is a seven paragraph contract entitled, "CONSENT TO PARTICIPATE IN SOCIAL SCIENCE RESEARCH," and subtitled, "Survey about Work, Employment and Unions in America."

Figure 5: Condition 1: conventional boilerplate



The full text of the nested contract is as follows:

CONSENT TO PARTICIPATE IN SOCIAL SCIENCE RESEARCH

Survey about Work, Employment and Unions in America

Introduction & Purpose of the Study

These "Terms & Conditions" govern the contractual relationship between the Researchers at the Massachusetts Institute of Technology ("Researchers") and you ("Participant"). The purpose of the study is to understand how individuals experience and interpret common features of contemporary consumer and employment transactions as well as issues pertaining to labor and employment law and unions. By clicking to agree to these Terms & Conditions, you agree to participate in this research study pursuant to the terms described herein. You should read the information below before deciding whether or not to agree to participate.

Confidentiality

No personal information gathered in this study will be disclosed and no data you may contribute will be published unless your anonymity is maintained, or your permission for the publication is obtained beforehand. To insure confidentiality of the information derived from your responses, a subject number will be assigned to you and all information will be stored under this number. At the conclusion of the study, your name will be removed from our files. All research data and related records associated with this study shall be coded and stored on a secure server to prevent access by any unauthorized personnel and shall remain in the possession or control of the Researchers or their agents throughout the process.

Pursuant to these restrictions and assurances, Participant agrees to permit Researchers full license to use any of Participant's responses and comments for any purpose, in perpetuity, so long as those responses are not associated or identifiable as the participant's. Specifically, as an example, Participant agrees to permit Researchers to use Participant's responses and comments as the basis of any research intended to be published and disseminated as widely as Researchers desire, in their sole and unilateral discretion and judgment, again, without identifying or associating the information with the participant's name.

Payment for Participation

Participant will be allowed to select one of the DVDs from the titles that are available. The selected DVD will be mailed to Participant after the study is completed, which may be four to seven weeks from the time that Participant completed the survey. Participant agrees that the physical address he or she provides for the purpose of mailing the selected DVD is accurate. DVDs will only be shipped to physical addresses (no PO boxes) in the United States. No returns or exchanges of DVDs will be permitted. Further, Participant agrees to use the DVD for personal, home-use only and to comply fully with any and all license agreements associated with the DVD. No additional compensation will be proffered in exchange for Participant's participation in this study. After mailing the DVD, the participant's name and address will be removed from the research data.

Participation & Withdrawal
Participant is free to choose whether to be in this study or not. Participant agrees to only complete the survey one time. Researchers may withdraw Participant from this study if circumstances arise that warrant doing so. Participant acknowledges and agrees that it is in all of our collective interest and hence our collective obligation to the social sciences to advance the state of knowledge about the relationship(s), in whole or in relevant part, among law, citizenship and civil liability, employment and consumer transactions, on the one hand and our social positions and other institutional relationships, on the other. Therefore, if Participant elects to be in this study, he/she agrees to complete the survey in its entirety, and in so doing, to respond to all questions as honestly and carefully as possible, and to participate to the best of Participant's ability. This is a material term of these Terms & Conditions.

Identification of Investigators
If you have any questions or concerns about the research, please feel free to contact Susan Silbey, the Faculty Sponsor of this research or Zev Eigen, the co-investigator at surveyresearch@mit.edu.

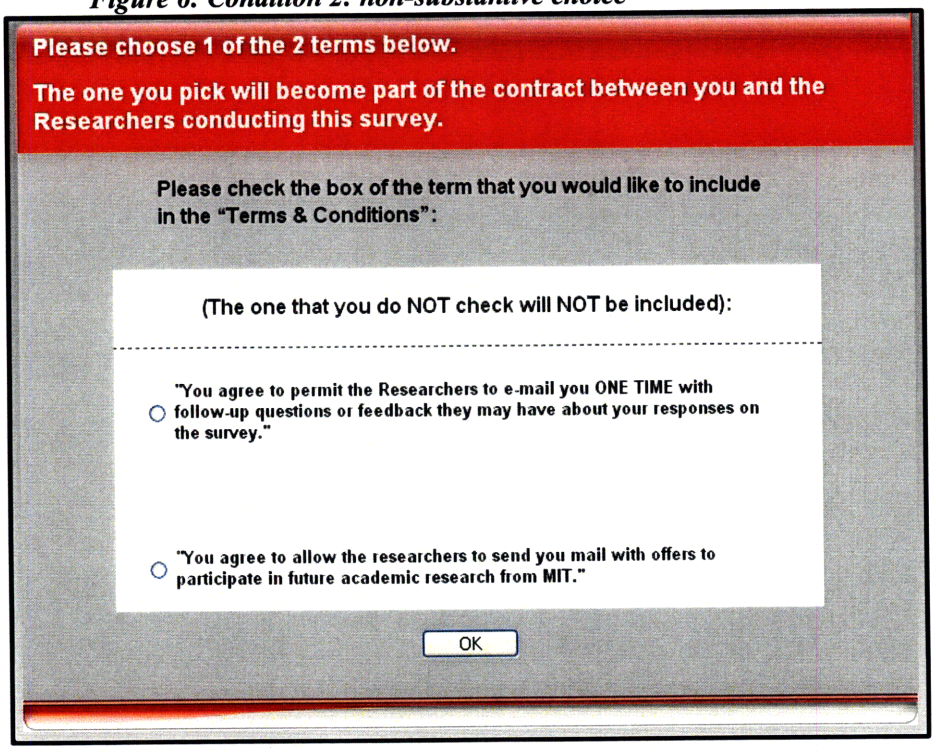
Rights of Research Subjects
These Terms & Conditions shall be governed by, construed and enforced in accordance with the laws of the State of Massachusetts. In the event that any covenant, condition or other provision herein contained is held to be invalid, void or illegal by any court of competent jurisdiction, the same shall be deemed to be severable from the remainder of these Terms & Conditions and shall in no way affect, impair or invalidate any other covenant, condition or other provision contained. If such condition, covenant or other provision shall be invalid due to its scope or breadth, such covenant, condition or other provision shall be deemed valid to the extent of the scope or breadth permitted by law. You are not waiving any legal claims, rights or remedies because of your participation in this research study. If you feel you have been treated unfairly, or you have questions regarding your rights as a research subject, you may contact the Chairman of the Committee on the Use of Humans as Experimental Subjects, M.I.T., Room E25-143B, 77 Massachusetts Ave, Cambridge, MA 02139, phone 617.253.6787.

I recorded the total number of seconds subjects spent on this page. The total number of seconds spent scrolling through the contract was measured as well. The size of the scroll window and the paragraph spacing were calibrated such that it was relatively easy to gauge the number of seconds subjects spent by paragraph. Subjects had to click the box indicating their agreement with the Terms and Conditions above, in order to proceed to the survey. If subjects did not

check the box agreeing ot the contract, but tried to click the continue button, this incidence was recorded (although this only happened twice), and subjects were issued a notice asking them to please read the terms and conditions and then click the box indicating their agreement before proceeding.

Subjects randomly assigned to the second condition, "*non-substantive choice*," were shown the screen-shot depicted in Figure 6. They were instructed to pick one of the two terms listed. The one that subjects pick will "become part of the contract between you and the researchers conducting this survey." Subjects choose between permitting the researchers to email them with follow-up questions or feedback about their responses to the survey, OR agreeing to allow the researchers to send them mail offers to participate in future research. They have to pick one before clicking the "OK" box at the bottom of the screen.

Figure 6: Condition 2: non-substantive choice

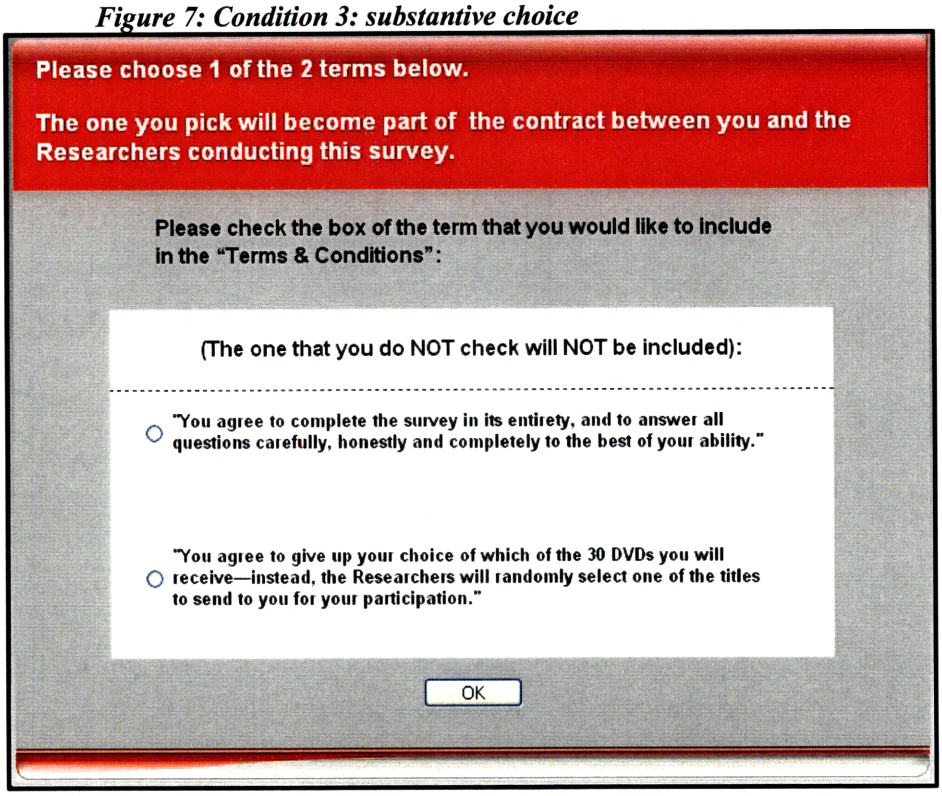


This condition is called "non-substantive choice" because it does not matter (from the researchers perspective) which of these two choices subjects select. No matter which one they

pick, after clicking the box labeled "OK" they are then sent to a page depicted in Figure 8. Whichever of the two terms subjects picked appears under the heading, "you have selected the following term to be added to the 'Terms & Conditions':"

Subjects randomly assigned to the third condition, "*substantive choice*," were shown the screen-shot depicted in Figure 7. They were instructed to pick one of the two terms listed. The one that subjects pick will "become part of the contract between you and the researchers conducting this survey." Subjects choose between agreeing to complete the survey in its entirety, and to answer all questions carefully, honestly and completely to the best of their ability, OR agreeing to give up their choice of which of the thirty DVDs they'll receive. They have to pick one before clicking the "OK" box at the bottom of the screen.

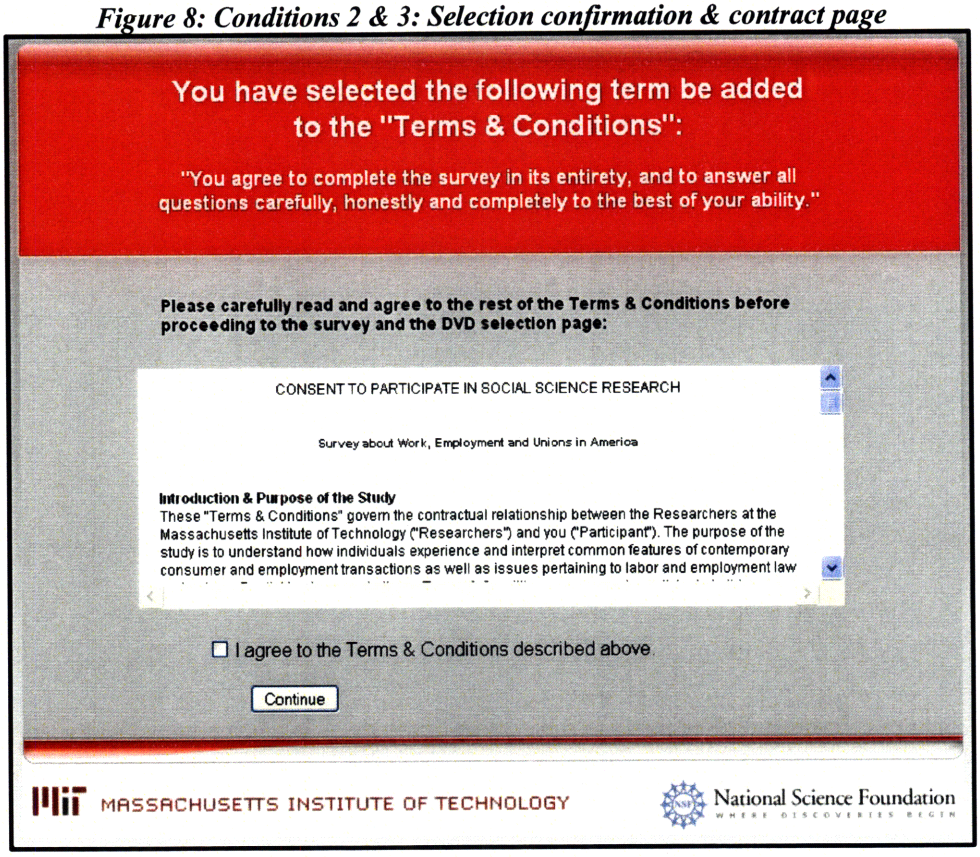
Figure 7: Condition 3: substantive choice



Subjects who picked the option of giving up their choice of DVDs received a message saying that they were dropped from the survey. 26 subjects, or six percent of those assigned to the third

condition, selected this option. The other ninety-four percent (n=413) of subjects in the third condition[36] selected the first option (of completing the survey in its entirety), and were then directed to the selection confirmation page depicted in Figure 8.

Figure 8: Conditions 2 & 3: Selection confirmation & contract page



As in the first condition (conventional boilerplate), whether subjects scroll through the contract, and how many seconds they spend scrolling are recorded for those in the second and third conditions as well. Subjects randomly assigned to the fourth "control" condition were not asked to review and sign anything. After they completed the three questions on the introduction page, they were directed immediately into the survey itself. Table 2 lists the four conditions and the associated numbers of participants.

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[36] Fifteen subjects picked neither option and elected instead to discontinue their participation in the survey after being randomly assigned to the third condition. By comparison, twenty-three subjects selected neither option in the non-substantive choice condition.

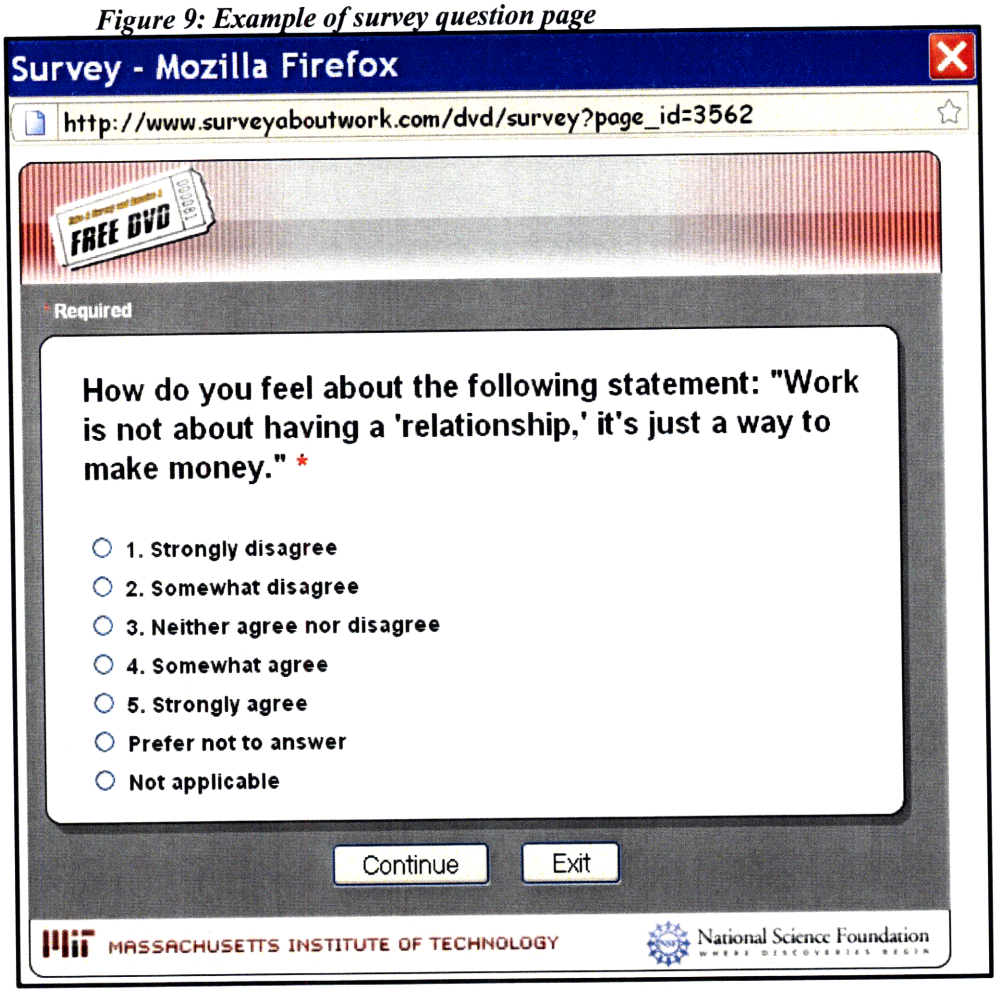
Table 2: Descriptive statistics by conditional assignment

Condition	n	Percentage
1. Conventional Boilerplate	484	26.02%
2. Non-substantive choice	458	24.62%
3. Substantive choice	454	24.41%
4. Control (no contract)	464	24.95%
Total:	**1,860**	**100%**

All subjects except for those randomly assigned to the fourth condition (control) entered the survey having agreed to do the whole survey as accurately and honestly as possible to the best of their ability. Those in the first condition (conventional boilerplate) and those in the second condition (non-substantive choice) have only had the opportunity to see this term as it appeared at the end of the fifth paragraph of the contract (entitled "Participation and Withdrawal") nested in the scroll window. That is, they may or may not have seen it or read it. Those in the third condition (substantive choice) chose this term and are therefore much more likely to have seen it and read it.

All participants then enter the survey. The survey is 480 questions long, spread out over 480 individual pages. There is no indication given to participants at any point in the experiment of the length of the survey or the estimated time it takes to complete it. Each question appears in a new browser window with no navigation buttons. The only way to navigate to the next question from any survey question window is to click the "CONTINUE" button at the bottom of the question. Figure 9 is a screen-shot of one page of the survey.

Figure 9: Example of survey question page

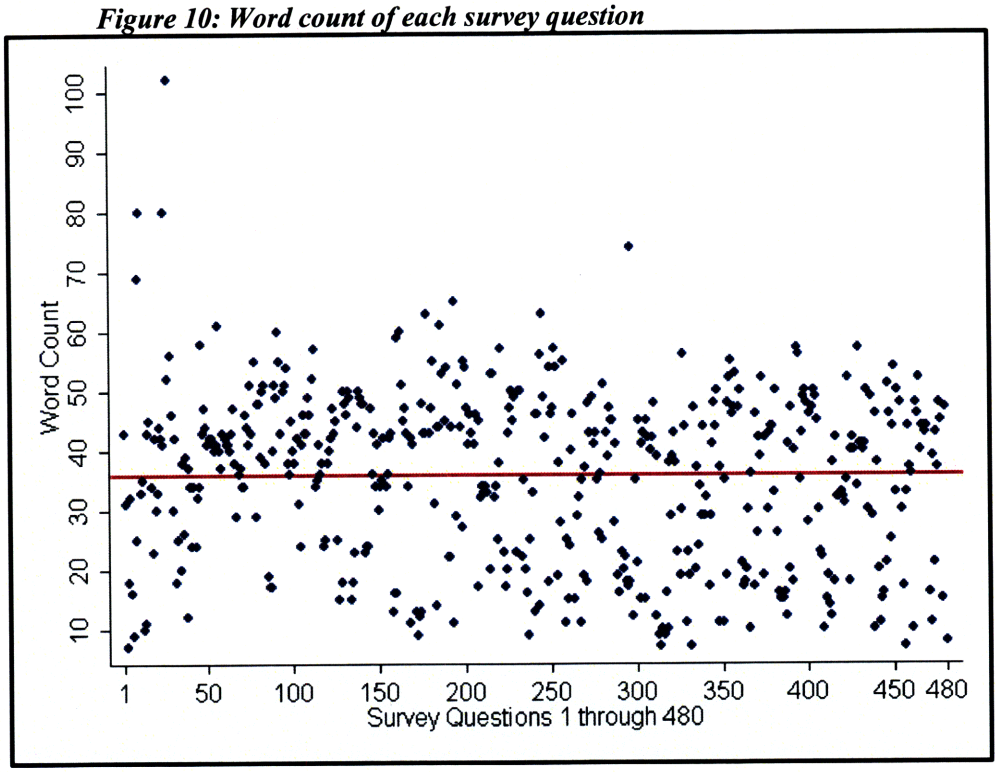


The survey windows are designed to limit the ability of subjects to exit or go-back. Subjects are able to exit the survey in one of three ways: (1) closing the tab by clicking the red X in the upper right-hand corner of the question window, (2) closing the browser, or (3) clicking the "EXIT" button at the bottom of the question window. There is a four-second delay that is programmed into the survey in between every survey question such that clicking the "CONTINUE" button triggers this four-second delay before the next survey question loads.

Appendix 1 contains a list of all 480 questions in the survey. 321 of the 480 questions, or sixty-seven percent, are multiple choice questions like the one depicted in Figure 9. Of these, most are likert-style. The remaining 159 (33%) require subjects to answer the questions by typing in text in the text-boxes provided. The mean number of words per question is 35.75 (std. dev. = 14.33).

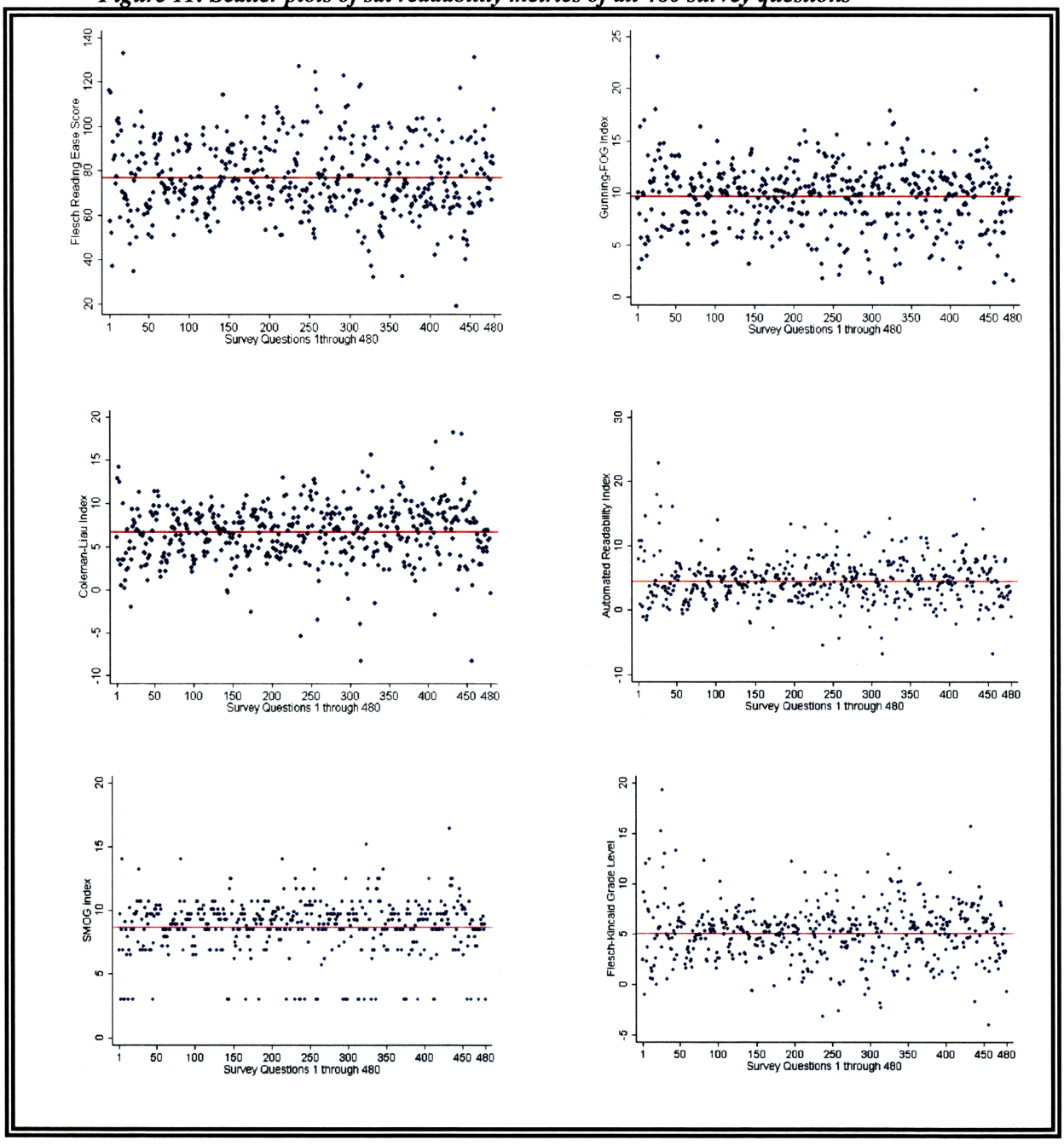
Figure 10 shows the word-count for each question in the survey. The red line represents the mean.

Figure 10: Word count of each survey question



Each survey question's reading ease score was measured along six dimensions: (1) Flesch Reading Ease Score, (2) Automated Readability Index, (3) Flesch-Kincaid grade level, (4) Coleman-Liau Index, (5) Gunning-Fog Index, and, (6) the SMOG Index (Flesch 1951; Harrison 1977; Klare 1974-75). These measures account for things like the word-count, syllables per word, number of letters per word, number of sentences, and number of "complex" words. Figure 11 depicts the scatter plots of these six measures across all 480 survey questions. The horizontal red lines depict the means. For the most part, these readability measures seem to have little, if any effect on how much of the survey subjects complete, or the question on which subjects try to quit.

Figure 11: Scatter plots of six readability metrics of all 480 survey questions



Demographic questions appear at the beginning of the survey for obvious reasons. The remainder of the survey is mostly devoted to questions about employment and unions. Many of the questions come from pre-existing surveys. For instance, all of the questions from Robinson

and Rousseau's (1994) article about the psychological contract at work were included (see Appendix 1, questions 23, 53, 105, 460, 107, 108, 109 among others. Other sources of questions include the General Social Survey, Coyle-Shapiro's (2002) article about the psychological contract at work, Eisenberger, Cotterell and Marvel's (1987) article examining the incidence of use of reciprocity for self-gain, Folger and Konovsky's (1989) article evaluating the impact of distributive and procedural justice on the reaction of employees to decision about pay raises, Moorman's (1991) article assessing the relationship between perceptions of fairness and organizational citizenship at work as well as questions from other sources including earlier research by the author. Questions that could tip the hand of what is ultimately being measured were excluded.

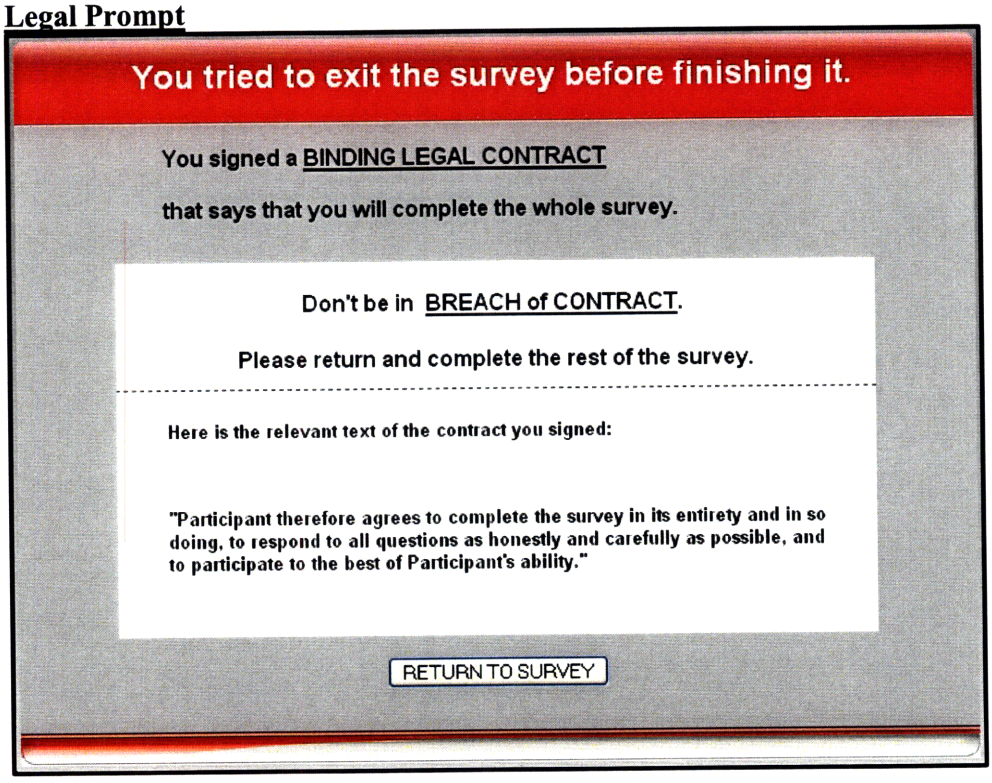
As the survey is specifically engineered to induce participants to try to quit, it is not surprising that almost all of the participants did attempt to quit doing the survey at some point, which, in the case of subjects assigned to conditions 1 through 3, constituted breach of the contract (because the contract required them to complete the survey in its entirety as honestly and accurately as possible). There were a total of forty-seven subjects who completed all 480 questions without trying to quit even once. Interestingly, and perhaps as a pseudo-check on the randomness of the distribution of subjects across the conditions, these forty-seven individuals with the fortitude, patience, tolerance and perhaps strong desire to obtain a free DVD were nearly uniformly distributed across the conditions: thirteen in conditions 1, 2 and 4, and eight in condition 3.

When subjects attempt to exit the survey in any way possible—by closing the tab or browser or by clicking the "EXIT" button—they are randomly assigned to receive a prompt that asks them to return and finish the survey. For subjects in conditions 1 through 3, there are four possible prompts: (1) legal, (2) moral, (3) instrumental, or (4) social. For subjects assigned to condition 4 (control), there is only one "generic" prompt available. The legal, moral, social and instrumental prompts all remind subjects that they clicked to sign a contract that requires them to complete the survey in its entirety as accurately and honestly as possible. They all quote the same sentence from the contract purporting to bind subjects to do so. They all ask the subjects to return and complete the remainder of the survey. The prompts vary in the basis on which this appeal is made. As their names suggest, the legal prompt bases its plea to complete the survey on legal

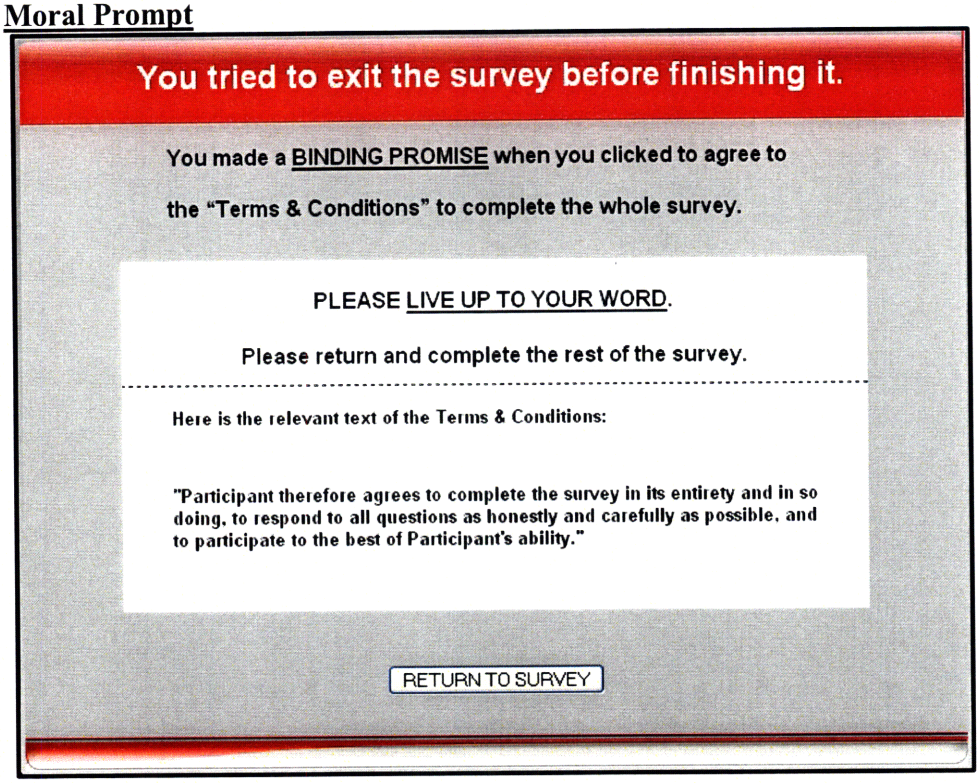
grounds—suggesting that subjects who do not complete the survey are in "breach of contract." The moral prompt grounds its authority for the request to finish the survey and comply with the agreement in moral terms—suggesting that subjects made a "binding promise" by signing and that they should therefore "live up to their word" to finish the survey as the contract requires. The instrumental prompt grounds its authority to return and complete the survey strictly on the desire to receive a free DVD of the subjects' choice. The social prompt lends the impression that a high percentage of subjects have complied with the contract and that this subject was one of very few who did not comply. As subjects in the fourth condition did not enter into a contract obliging them to complete the whole survey, when these participants attempt to quit, they receive a generic prompt simply asking them to return and complete the remainder of the survey. In all instances, no indication is given to subjects of the percentage of the survey completed or remaining. All five the prompts are depicted in Figure 12.

Figure 12: Screen shots of prompts

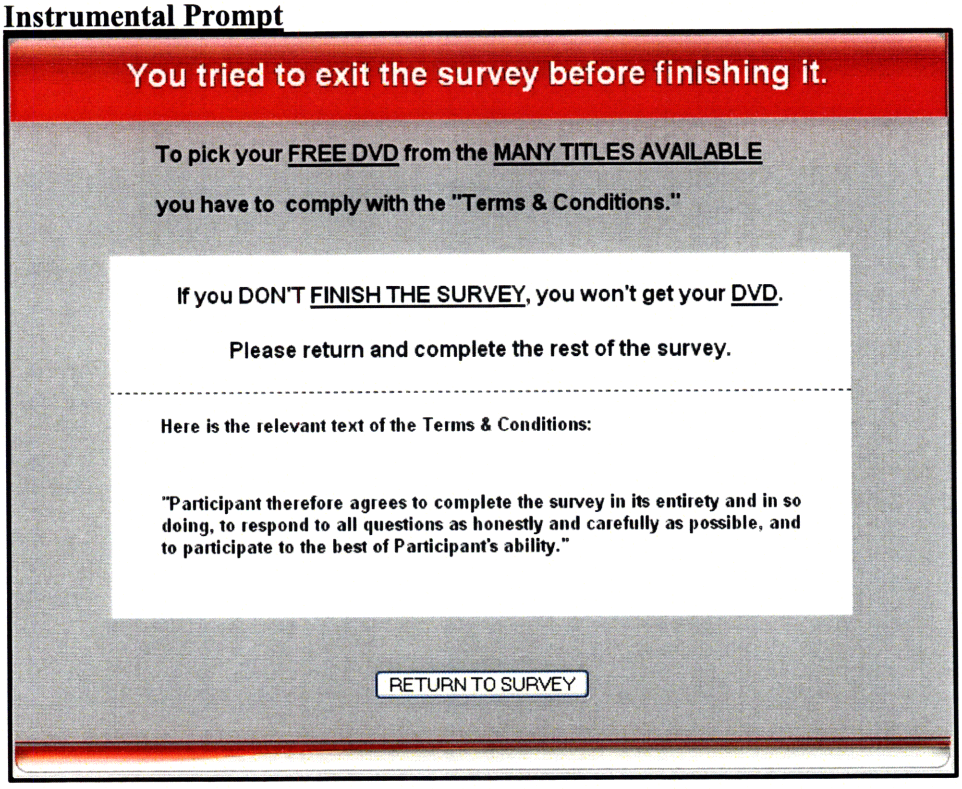
Legal Prompt



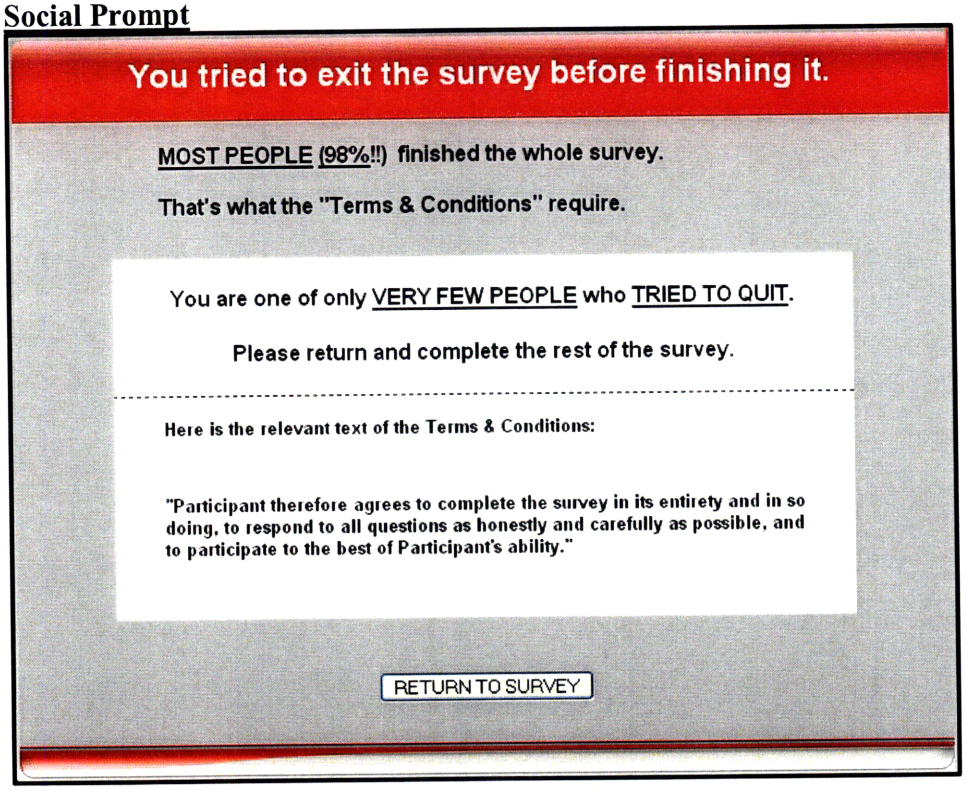
Moral Prompt



Instrumental Prompt



Social Prompt



Generic Prompt

Table 3 lists the descriptive statistics regarding random prompt assignment.

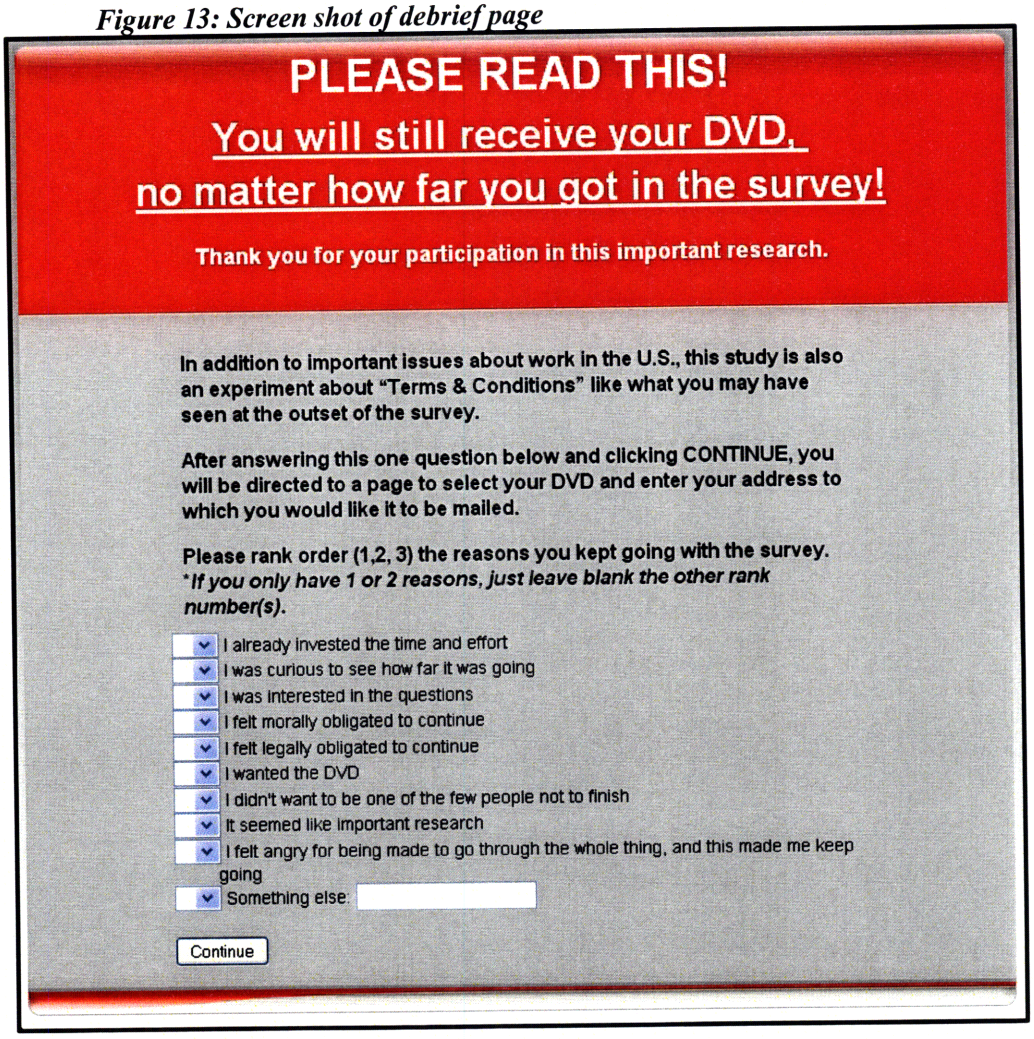
Table 3: Descriptive statistics of prompt assignment

Prompt	n	Percentage
Legal	315	21.36%
Moral	234	15.86%
Instrumental	257	17.42%
Social	258	17.49%
Generic	411	27.86%
Total:	**1,475**	**100%**

After participants receive one of the prompts, they can either continue answering survey questions, or they terminate their participation. Either way, the second time subjects try to exit the survey, they are immediately directed to a "debrief page," (Figure 12) that informs them that they will still receive a DVD of their choice when they enter in their shipping information on the following web page. The debrief page also asks participants to rank-order the reasons why they kept going with the survey. After subjects answer this question and click on the "CONTINUE" button at the bottom of the screen, they are immediately directed to a page where they fill out their address information and select one of the DVDs[37] to be shipped to them free of charge.

[37] The list of DVD titles available from which participants could select is as follows: The Abyss (special edition), Big Mama's House, Cast Away (2 disc special edition), Cheaper by the Dozen 2, The Commitments (2 disc special edition), Daredevil, Die Hard (special edition), Dodgeball, Down with Love, Epic Movie, Fantastic 4, Fever Pitch (special edition), Fight Club, The French Connection (special edition), Full Monty (special edition), A Good Year, I Heart Huckabees, In Her Shoes, Kingdom of Heaven, Lake Placid, Mr. & Mrs. Smith, Napoleon Dynamite, Nine to Five, Office Space, Pathfinder, Point Break, The Sentinel, Sideways, Thank You for Smoking, and, Unfaithful. The DVDs (approximately 30 copies of each title listed above) were generously donated by Twentieth Century Fox Film Corporation.

Figure 13: Screen shot of debrief page



Research Findings

A. Adherence to Contract Terms Based on Pre-Agreement Conditions

The first three hypotheses involve assessments of the effects, if any, of the pre-agreement conditions under which subjects enter form-adhesive contracts on subjects' subsequent performance of a contract term. The first hypothesis states that having some choice in the pre-agreement phase will induce greater contract performance than when contract signers have no choice at all. Testing this hypothesis requires a comparison of the contract performance of

subjects randomly assigned to the conventional boilerplate condition to subjects in the non-substantive choice condition. The second hypothesis states that choosing the salient contract term will correspond with greater performance of that contract term than the other conditions. Testing this hypothesis requires a comparison of the contract performance of subjects assigned to the substantive choice condition to subjects in the non-substantive choice condition and to the conventional boilerplate condition. The third hypothesis states that subjects with bound by a form-adhesive contract with no choice will not perform under the contract any differently than subjects who asked to perform who had not entered into any contract at all. Testing this hypothesis requires a comparison of contract performance across the boilerplate condition and the control condition.

Two dependent variable measures of contract performance were used: (1) the number of pre-prompt survey questions answered (that is, the number of questions subjects answered before they tried to quit the survey), and (2) the total number of survey questions answered. As a reminder, all subjects except for those assigned to the control condition had consented to finish the entire survey, answering all questions as accurately and honestly as possible, so both of these dependent variables are offered as relatively continuous, behavioral measures of contract performance.

ANOVA results showed that the condition to which subjects were randomly assigned significantly affected the degree to which subjects performed under the contract. ($F_{3,1349}= 4.07$; $p < .007$ for pre-prompt questions, and $F_{3,1396} = 3.86$; $p < .009$ for total questions). However, mean contract performance as measured by pre-prompt questions answered and total questions answered is not significantly different for those assigned to the conventional boilerplate condition from the contract performance of those assigned to the non-substantive choice condition. Table 4 sets forth the relevant statistics. There is therefore insufficient evidence to support the first hypothesis.

Table 4: Contract performance across conditions

	Pre-Prompt Questions Answered			Total Questions Answered		
	n	mean	sd	n	mean	Sd
Condition						
1. Conventional Boilerplate (no choice)	381	82.4	112.1	394	124	148.1
2. Non-substantive Choice	322	91.9	103.2	335	132	138.9
3. Substantive Choice	266	106.8	116.7	274	150.3	145.6
4. Control	384	78.1	109.9	397	112.6	144.8

In evaluating the second hypothesis, the mean pre-prompt questions for subjects assigned to the substantive choice condition (106.8; s.d. = 116.7) is significantly different from the mean number of pre-prompt questions answered by subjects assigned to the conventional boilerplate condition (82.4; s.d. = 112.1) ($p < .008$). The mean total questions answered by subjects from the substantive choice condition (150.3; s.d. = 145.6) is also statistically significantly different from the mean total survey questions answered by subjects randomly assigned to the conventional boilerplate condition (124; s.d. = 148.1) ($p < .02$). This supports the second hypothesis.

In evaluating the third hypothesis, neither the mean pre-prompt questions answered nor the mean total questions answered of the conventional boilerplate condition is significantly distinguishable ($p = .59$ for pre-prompt questions; $p = .27$ for total questions) from the control condition (no contract). Figures 13 and 14 are graphical representations of the means of the pre-prompt questions and total questions respectively for the four conditions. The horizontal lines represent 95% confidence intervals around the means, a more conservative estimation than may be necessary. The graphs demonstrate two key points. First, there is no significant difference in the contract performance of individuals who signed a form-adhesive contract purporting to legally obligate them to take a survey versus individuals who signed no contract at all. Second, there is some, but only slight evidence to support the "choice" model influencing post-agreement

contract performance. Third, the most profound effect is the effect of selecting the salient term (the substantive choice condition).

Figure 14: Pre-prompt contract performance (questions answered) across conditions

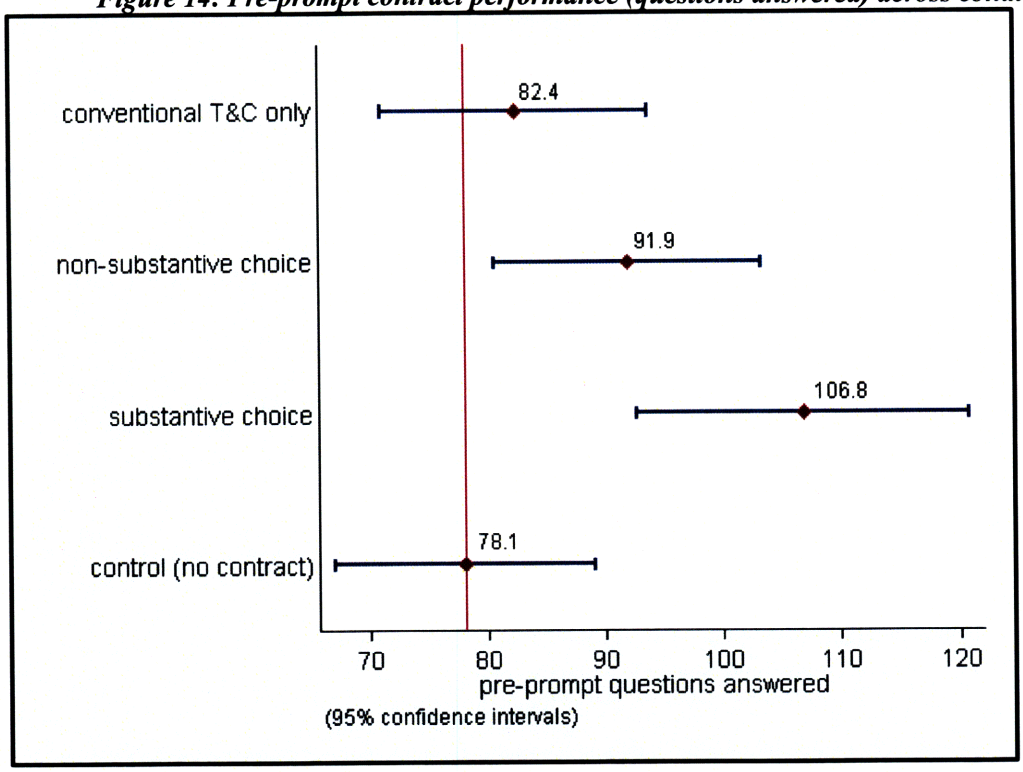
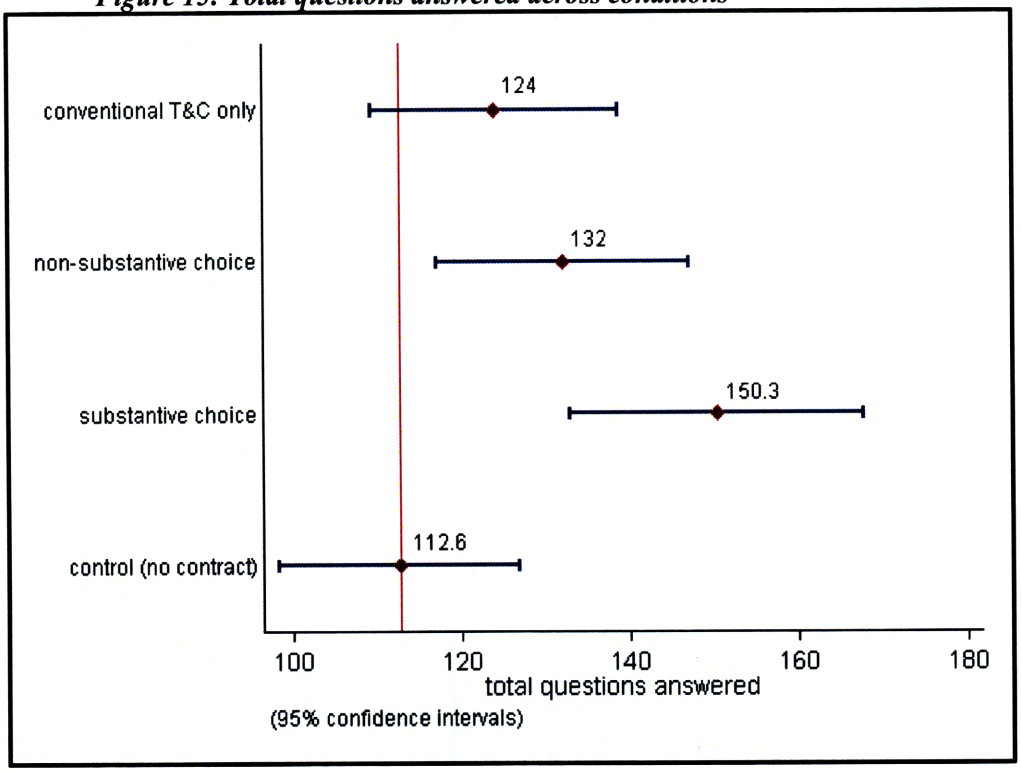


Figure 15: Total questions answered across conditions



B. Continued Contract Performance Based on Legal and Extra-Legal Appeals

The second set of four hypotheses addresses participants' behavior when they try to quit the survey. All but forty-seven subjects try to quit at some point. When they do try to quit, subjects in all conditions except for the control are randomly assigned to receive one of the four prompts described above: legal, moral, instrumental and social. Subjects assigned to the control condition (no contract) were all prompted with the "generic" prompt (*See figure 12*). For ease of reference, please refer to table 5. Hypothesis four states that the legal prompt will not elicit greater contract performance than the generic prompt. On table 5, this corresponds with comparing 1L, 2L and 3L to 4G. Hypothesis five states that the moral prompt will do better in this respect. Again, on table 5, this corresponds with comparing 1M, 2M and 3M to the other prompts (1L-3L, 1I-3I, 1S-3S and 4G). Hypothesis six states that the instrumental prompt will not fare as well as the other means of communication. On table 5, this entails a comparison of 1I, 2I and 3I with the other prompts (1L-3L, 1M-3M, 1S-3S and 4G). Hypothesis seven states

that the social prompt will elicit better contract performance than the other means of communication. On table 5, this entails a comparison of 1S, 2S and 3S with the other prompts.

Table 5: Experimental design overview

Prompts▶ / Conditions▼	Legal	Moral	Instrumental	Social	Generic
1.Conventional boilerplate	1L	1M	1I	1S	
2. Non-substantive choice	2L	2M	2I	2S	
3. Substantive choice	3L	3M	3I	3S	
4. Control (no contract)					4G

Two measures are used to test this set of hypotheses. The first is a continuous measure of contract performance following receipt of any of the prompts. The total number of post-prompt questions ranges from zero to 479. It would be zero if a subject received a prompt and answered no additional survey questions. The second measure reported below is a dichotomous variable indicating whether subjects went back to do at least one additional question following receipt of a prompt. This variable takes the value zero if subjects do zero questions following receipt of the prompt, and takes the value one if subjects answer at least one question following receipt of a prompt. This latter variable could be thought of as a contract recidivism rate, independent of a measure of the quantity of performance, while the former variable is a measure of the quantity of contract performance following receipt of a prompt. In tandem, both measures offer a useful picture of how subjects behave following receipt of the prompts. Below, hypotheses four through seven are evaluated first based on a comparison of the number of post-prompt questions answered, and then based on a comparison of the percent of subjects assigned to each prompt who returned to do at least one question following receipt of a prompt.

1. Post-prompt survey questions answered

ANOVA results showed that the prompt subjects were randomly assigned to receive significantly affected the degree to which subjects' performed under the contract following attempted breach ($F_{4,1347}$= 5.96; p < .001 for post-prompt questions). Table 6 sets forth the relevant statistics.

Table 6: Post-prompt questions answered by prompt

Prompt	n	Mean	sd
Legal	285	18.1	41.5
Moral	200	47.7	100.2
Instrumental	252	28	74
Social	231	29.5	72.4
Generic	384	22.1	66.2

Hypothesis four is supported as there is no significant difference (p=.17) between the post-prompt contract performance for those legally threatened (m=18.1; sd=41.5) versus those who were assigned to the generic prompt (m=22.1; sd=66.2), which requested that they return and finish the survey where no contract was signed or referenced in the prompt (see Figure 12).

Hypothesis five receives the most support of all the hypotheses. Those assigned to the moral prompt did significantly more post-prompt questions (m=47.7; sd=100.2) than each and every group of subjects assigned to the other prompts (legal: m=18.1; sd=41.5; p<.0001, instrumental: m=28; sd=74; p<.01, social: m=29.5; sd=72.4; p<.02, and generic: m=22.1; sd=66.2; p<.001). Table 7 lays out the significance level of the Welch estimations of t-test scores of all of the relevant comparisons.

There is mixed support for hypothesis six. There is no significant difference (p=.15) between the post-prompt contract performance of subjects randomly assigned to receive the instrumental prompt (m=28; sd=74) versus those who received the generic prompt (m=22.1; sd=66.2). There is also no significant difference (p=.41) between the post-prompt performance of the

instrumental group as compared with the social prompt group (m=29.5; sd=72.4). However, those assigned to the instrumental prompt did significantly more post-prompt questions than those assigned to the legal prompt ($p<.03$), but significantly fewer questions than those assigned to the moral prompt ($p<.01$).

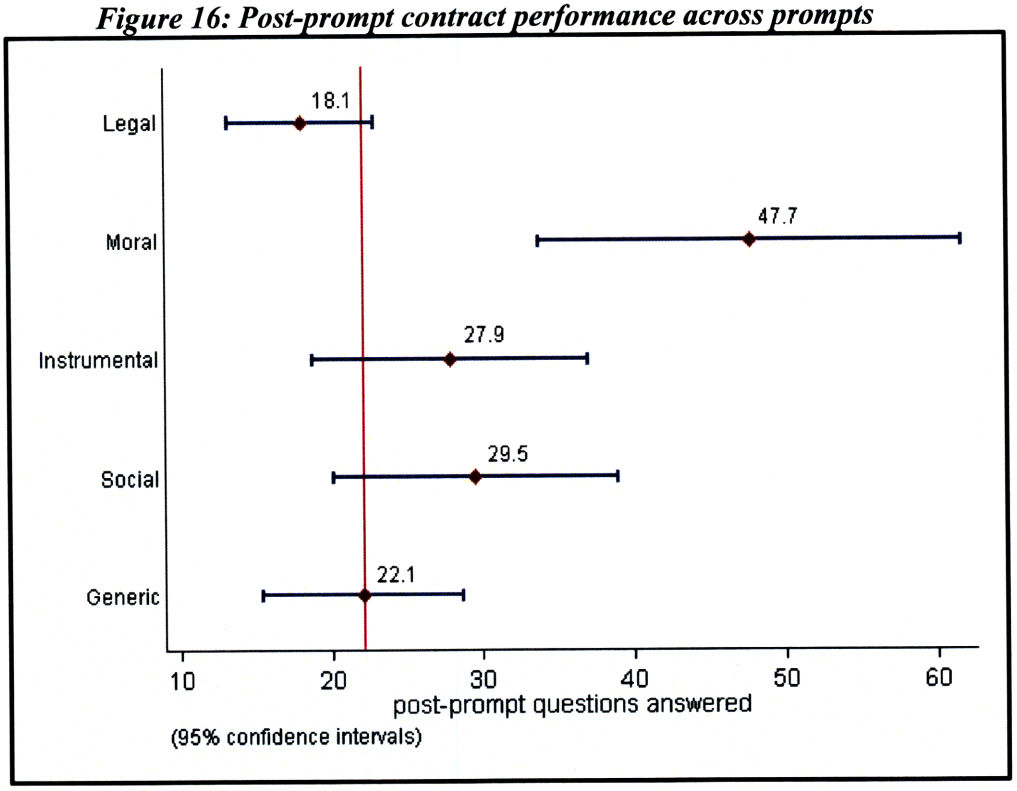
Hypothesis seven also receives mixed support. Those randomly assigned to the social prompt (m=29.5; sd=72.4) did significantly more questions than those assigned to the legal prompt ($p<.02$), but significantly fewer questions than those assigned to the moral prompt ($p<.02$). The post-prompt performance of those assigned the social prompt is only marginally different from the performance of the generic prompt ($p=.10$), and not significantly different from the post-prompt performance of the instrumental prompt group ($p=.41$).

Table 7: One-sided t-test significance levels for post-prompt questions answered by prompt

	Legal	Moral	Instrumental	Social
Legal	--			
Moral	p<.0001	--		
Instrumental	p<.03	p<.01	--	
Social	p<.02	p<.02	ns	--
Generic	ns	p<.001	ns	p<.10

Figure 16 is provided as a visual comparison of the data. It is a more conservative estimate, as it depicts 95% confidence intervals around the means.

Figure 16: Post-prompt contract performance across prompts



2. Percent of subjects who return to do at least one survey question following receipt of a prompt

A chi-square test is applied to test for the existence of a relationship between random prompt assignment and whether subjects returned after receipt of a prompt to answer at least one more question. The results indicate that there is a highly statistically significant relationship between prompt assignment and whether subjects go back (chi-square with four degrees of freedom = 46.3; $p < .0001$). Also, for each prompt, a one sample binomial test is applied to test whether the percentage of subjects assigned significantly differs from fifty and one-half percent, which is the rate at which subjects returned who were assigned to the generic prompt. Table 8 sets out all of the return rates for the five prompts and the p values for the binomial tests against the control.

Table 8: Percent who return to do at least one question following receipt of prompt

Prompt	n	return	% return	p value for 2-sided binomial test against generic (50.5 %)
Legal	285	131	46.0%	p = .14
Moral	200	141	70.5%	p < .0001
Instrumental	252	108	42.9%	p = .02
Social	231	139	60.2%	p = .004
Generic	384	194	50.5%	--
Total	1,352	713	52.7%	

In support of the fourth hypothesis, the recidivism rate for subjects assigned to the legal prompt (46%) is the only prompt that does *not* differ significantly (p = .14) from the rate for those assigned to the generic prompt (50.5%) in terms of the rate at which subjects returned following receipt of the prompt to do at least one more survey question. That is, the post-attempted-breach likelihood of compliance of those prompted to continue taking the survey by being threatened by a legally valenced warning not to breach the contract is statistically indistinguishable from the likelihood of compliance of subjects who took the survey without first entering into a contract purporting to require them to take the whole survey when generically asked to return to finish taking the survey.

Again, the fifth hypothesis (that the legal prompt would do the best job at inducing contract performance), received the most support. Seventy and one half percent of those assigned to the legal prompt returned following receipt of the prompt. This is highly, significantly different from the post-prompt recidivism rate of each of the other prompt groups (legal: p < .0001; instrumental: p < .0001; social: p < .001; generic: p < .0001). Table 9 sets forth the p-values for the two-sided binomial tests among the various prompt groups.

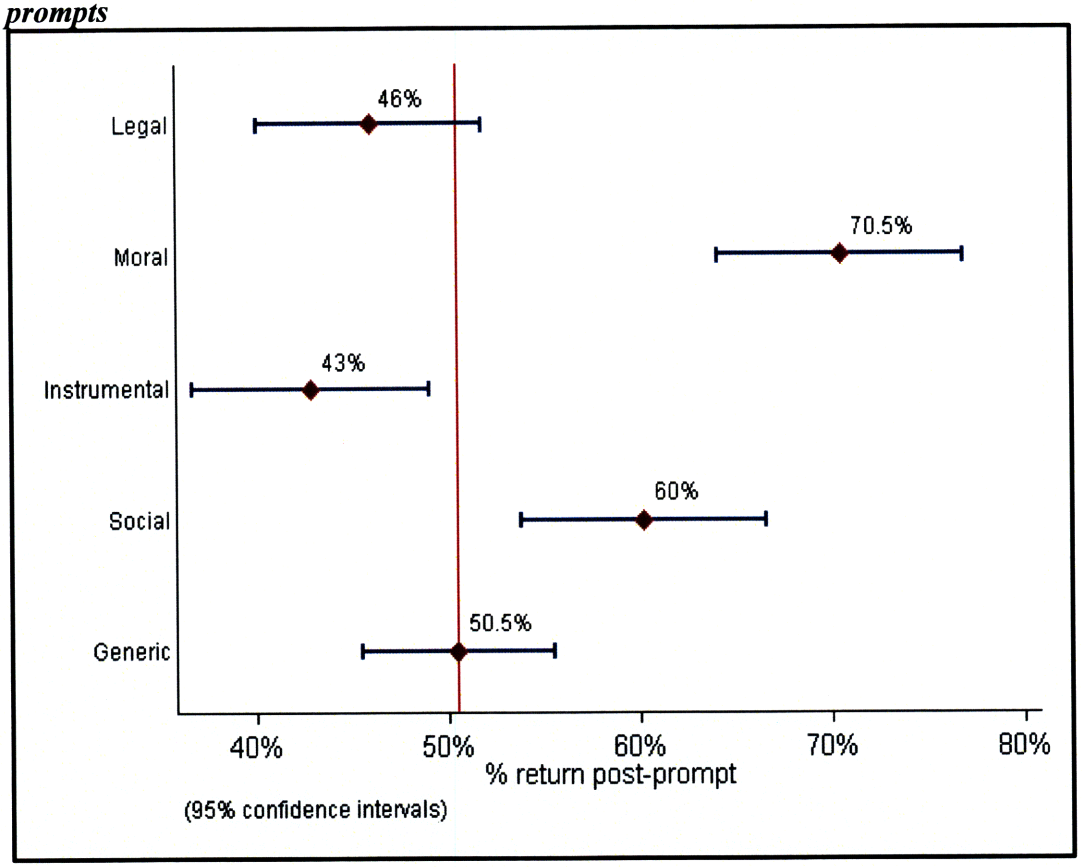
Table 9: 2-sided binomial test significance levels for post-prompt return rate by prompt

	Legal	Moral	Instrumental	Social
Legal	--			
Moral	p < .0001	--		
Instrumental	ns (p = .34)	p < .0001	--	
Social	p < .0001	p < .001	p < .0001	--
Generic	ns (p = .14)	p < .0001	p < .05	p < .01

The sixth hypothesis (that the instrumental prompt would not do better than the other groups) is supported. At only a forty-three percent return rate following prompt receipt, the instrumental prompt is the least effective at inducing subjects to return to do at least one more question. This makes sense assuming that *all* participants taking the survey are doing so (at least in part) to receive the offered incentive—a free DVD of their choice. Presumably, subjects' individual levels of tolerance for taking an online survey in order to receive a free DVD was maxed out when they first attempted to quit. If they then received a reminder telling them that if they do not continue, they won't receive a free DVD, it is not surprising that less than half of them do not do any additional questions. They already reached their maximum threshold for survey taking and had tried to quit for the very reason that the instrumental prompt reminds them.

The seventh hypothesis (the social prompt will do well compared to the other prompts at inducing post-attempted-breach performance) received substantial support vis-à-vis the rate of return. Approximately sixty percent of those assigned to the social prompt returned following receipt of the prompt. This is highly, significantly different from the post-prompt recidivism rate of each of the other prompt groups (legal: $p < .0001$; moral: $p < .0001$ (although, legal is the only prompt that does better than social at inducing performance); instrumental: $p < .0001$; generic: $p < .01$). Figure 17 provides a graphical, conservative representation of the recidivism rates by prompt, with the associated 95% confidence intervals around the means.

Figure 17: Percent of subjects returning to the survey following receipt of prompt across prompts



Additional Findings

In addition to the hypotheses and results discussed above, it is worth noting several additional findings emergent from this experiment. First, I discuss the likelihood of subjects taking time to scroll through and possibly read the contract into which they are entering and the relationship between the conditions and the amount of time spent reading. Second, and closely related to this, I then discuss the relationship between how much time subjects spend scrolling through the contract and contract performance (survey questions answered). Third, it is worth exploring the effects of several demographic characteristics including age and gender on dependent variables of interest.

A. When are Contract-Signers More or Less Likely to Scroll (Read) the Contract?

As mentioned in the Methods section, I measured how many seconds per line subjects spend scrolling through the contract embedded in the scroll window for all subjects in all conditions except for the control condition, where subjects were not exposed to a contract at all. Figure 5 shows the contract embedded in the scroll window as experienced by subjects in the conventional boilerplate condition, and Figure 8 shows the contract in the scroll window for subjects in the non-substantive choice and the substantive choice conditions. One assumption often made in the literature on form-adhesive agreements is that signers often do not bother to read these agreements (Ben-Shahar 2004; Eisenberg 1995)[38]. As with the first part of this work, examining the actual behavior of individuals confronted with a form-adhesive agreement has unveiled information that calls into question the uniformity of this assumption. Perhaps, as with perceptions of enforceability of form-adhesive contracts explored in the first part, different conditions affect the likelihood of signers reading the contract before consenting to it, and perhaps this variation is at least in part, systematic and observable.

As it turns out, there seems to be some systematic difference in the amount of time subjects in the experiment spent scrolling based on conditional assignment. Subjects in the conventional boilerplate condition spent 92.1 seconds scrolling (sd = 587.8) versus 38.3 for the non-substantive choice subjects (sd = 82.0) and 30.2 (sd = 79.0) for those randomly assigned to the substantive choice condition (Table 10).

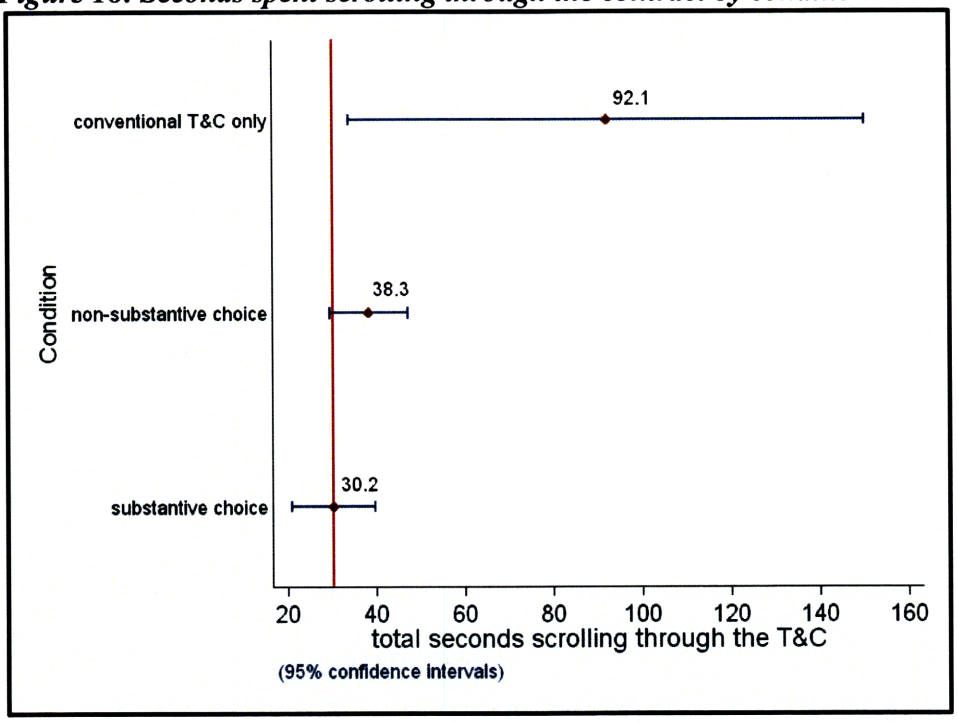
Table 10: Seconds spent scrolling through contract by condition

Condition	n	mean	sd
1. Conventional boilerplate	394	92.1	587.8
2. Non-substantive choice	335	38.3	82.0
3. Substantive choice	274	30.2	79.0

[38] A recent *New York Times* article cited Greg Lastowka, an associate professor at the Rutgers School of Law as saying, "most web sites today offer terms of service that are designed to protect and further the interests of the company writing the terms, and most people simply agree to terms without reading them." Stelter, Brian. 2009. "Facebook's Users Ask Who Owns Information." in *The New York Times*. New York.

The difference between the conventional boilerplate time spent and the non-substantive choice time is only marginally significant at a 90% level (p = .07), but the difference between the conventional boilerplate condition and the substantive choice condition is significant at the 95% level (p = .04). There seems to be some inverse effect of amount of information provided upfront in big, bold font on the likelihood of spending time reading the "fine print" nested in a scroll window. Figure 18 is included as a visual, more conservative (95% confidence intervals) representation of this effect.

Figure 18: Seconds spent scrolling through the contract by condition



B. The Relationship Between Scrolling through the Contract and Contract Performance

Does it make a difference whether contract signers spend zero seconds (as most assume they do), thirty seconds (as they seem to do in the choice conditions) or three times that amount (as they seem to do in the conventional boilerplate condition)? This section tests the relationship (if any) between time spent scrolling and contract performance. For the sake of simplicity, I compare

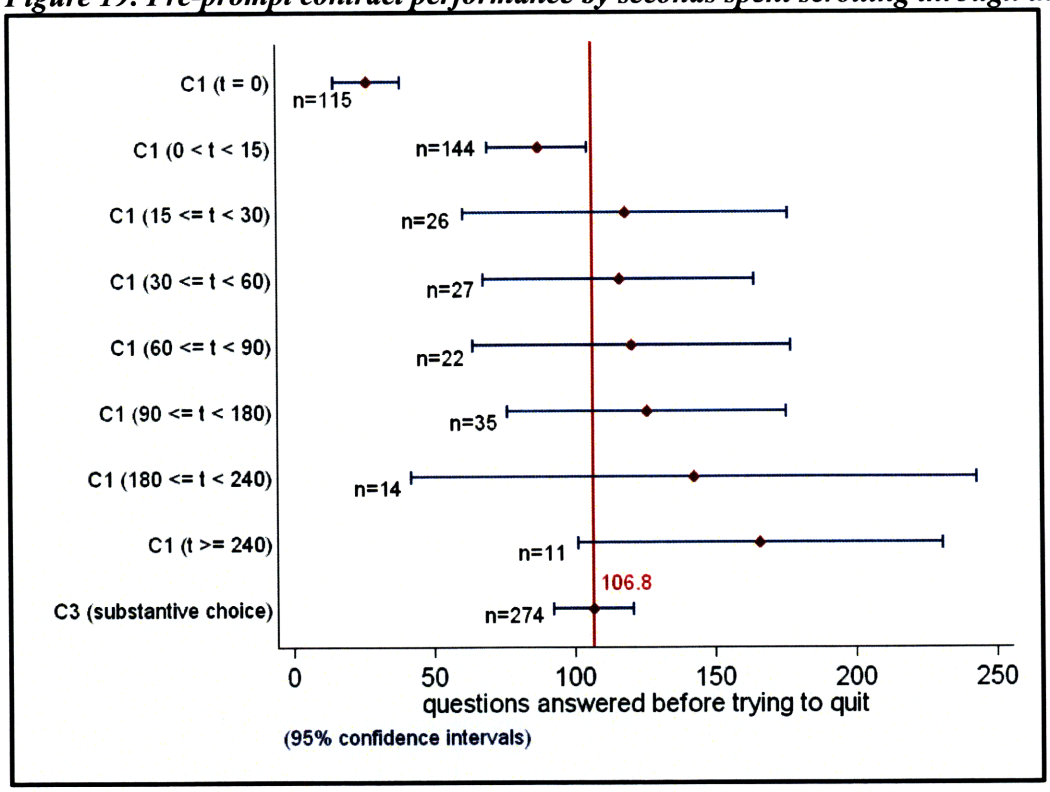
only the boilerplate condition and the substantive choice condition. I subdivide the standard boilerplate condition subjects into eight categories according to the number of seconds spent scrolling: 1. zero seconds; 2. greater than zero and less than fifteen seconds; 3. greater than or equal to fifteen seconds and less than thirty seconds; 4. greater than or equal to thirty seconds and less than sixty seconds; 5. greater than or equal to sixty seconds and less than ninety seconds; 6. greater than or equal to ninety seconds and less than one-hundred and eighty seconds; 7. greater than one-hundred and eighty seconds and less than two-hundred and forty seconds; and 8. equal to or greater than two-hundred and forty seconds. The number of questions these subjects answer before first trying to quit (pre-prompt questions) is compared to the number of pre-prompt questions answered by all subjects assigned to the substantive choice condition. This comparison is made because all subjects in the substantive choice condition saw and chose the salient term of interest—to complete the whole survey as accurately and honestly as possible. So, this is a useful comparison between reading the contract and those who saw and chose the critical term, in terms of contract performance. The contract performance of those who spent time scrolling in the conventional boilerplate condition is roughly indistinguishable from the contract performance of those in the substantive choice condition. As demonstrated by Table 11, the mean for all subjects in the substantive choice condition was 106.8 pre-prompt questions answered (sd = 116.7). The mean pre-prompt questions answered for all subjects in the conventional boilerplate condition was 82.4 (sd = 112.1). While this difference is statistically significant ($p < .008$), the difference between the substantive choice's group's contract performance is *not* statistically significantly distinct from subjects contract performance in the conventional boilerplate condition who had spent some time scrolling through the terms and conditions at the consent phase. Table 11 lists the means and two-sided t-test p values comparing the eight subgroups of the conventional boilerplate condition with the substantive choice condition.

Table 11: Pre-prompt questions answered by seconds spent scrolling through contract

Condition	Time spent scrolling	n	Mean	sd	2-sided t test p values compared to subst. choice
Conventional boilerplate	0 seconds	114	26.80	63.8	$p < .0001$
" "	$0 < t < 15$	141	87.5	106.6	90% ($p = .09$)
" "	$15 < t < 30$	25	118.52	140.0	ns ($p = .69$)
" "	$30 \leq t < 60$	25	116.6	116.6	ns ($p = .70$)
" "	$60 < t \leq 90$	19	120.6	117.0	ns ($p = .62$)
" "	$90 < t \leq 180$	33	125.8	140.0	ns ($p = .46$)
" "	$180 \leq t$ 240	13	142.5	166.2	ns ($p = .46$)
" "	$t \geq 240$	11	166.0	96.6	90% ($p = .07$)
Substantive choice	all times	266	106.8	116.7	--

As this comparison demonstrates, those who read the contract or at least make an effort to scroll through it, seem to perform the contract like those in the substantive choice condition who had read and chose the condition. This lends support to the theory that the act of choosing the contract term is perhaps not as important as knowing that the term is there. In short, it is the surprise aspect of the form-adhesive contract that seems to have the most detrimental impact on contract performance, perhaps less so than the adhesive nature of the contract. Figure 19 is included below as a graphical representation of the data comparative results described herein.

Figure 19: Pre-prompt contract performance by seconds spent scrolling through the contract



C. Effects of Age and Gender on Contract Performance

A thorough investigation of all demographic characteristics collected is beyond the scope of this work, but it is worth discussing briefly two of these traits and their effects on contract performance. It appears that both age and being female have a negative effect on contract performance as measured by both pre-prompt questions and total questions answered. Both are negatively correlated with performance (-.15 for both age and being female for pre-prompt questions; $p < .0001$; and -.12 for age and -.18 for being female; $p < .0001$). Interestingly, there is no correlation between age and the likelihood of returning after being prompted to do so ($p = .57$), but there women are slightly more likely to return ($p = .06$). Table 12 contains the relevant statistics.

Table 12: Correlations between age and gender and contract performance

	Pre-prompt questions	Total questions	Post-prompt return
age	-.15 (p < .0001)	-.12 (p < .0001)	.02 ns (p = .57)
female	-.15 (p < .0001)	-.18 (p < .0001)	.05 (p < .10)

These effects are quite robust. Fitting the data to several models including various other independent variables reproduces these results, in some instances with greater magnitude and significance. For instance, in applying a logistic regression of the likelihood of post-prompt return on subjects' age, gender, education and income, controlling for the other included characteristics, the odds of a woman returning to do at least one more question following receipt of a prompt is 129% greater than the odds of a male returning to do at least one more question (n = 1,086; $chi^2(4) = 7.03$; $p < .05$; std error = .16). In short, older subjects and female subjects are each apparently less willing to spend their time taking the survey to receive a free DVD, but women are significantly more likely to return to do at least one more question when prompted to do so. This finding appears consistent with research on the relationship between gender and the propensity to initiate negotiations (Babcock and Laschever 2003; Babcock et al. 2006) that tends to find that women are less likely than men to initiate negotiations.

Implications

This portion of the dissertation contributes important behavioral evidence to the discussion about the place of form-adhesive contracts in contemporary life. It also advances the behavioral theory of contract in significant ways by documenting how form-adhesive contracts are experienced and interpreted, and how, in turn, this set of observed behaviors relates to perceived contract enforceability and contract performance. In the broadest sense, this part of the work offers evidence supporting the theory about the bifurcated reciprocal relationship articulated in the first part of this work. Individuals reciprocate contractual treatment with the organizations that mediate the relationship between the state and citizens (see Figure 2 in Part 1). They do this

based in part on their experiences with how the organization treats them. The evidence of the substantive choice condition eliciting greater contract performance than the other conditions supports this—so does the lack of difference between the conventional boilerplate condition and the no-contract control condition. Evidence presented in this part also broadly supports the notion that individual social actors also reciprocate with the state with a diminished respect for the rule of law, turning "law" in the expressive sense into a prism, reflecting the light of other extra-legal sources of authority (see Figure 2 in Part 1). The various prompts are like twists of the prism, through which the light of these extra-legal sources effectively shines. Consistent with prior research, the moral prompt shines the brightest.

More specifically, the findings lend support for several noteworthy effects. First, this study demonstrates support for the connection between how individuals experience the consent phase of contracting and their post-agreement behavior vis-à-vis the contract's terms. When subjects see and actively select the contract term, they are significantly more likely to perform that contract term's requirements than when they have no such choice or input into the process. Indeed, even when subjects have no choice, as in the conventional boilerplate condition, but they spend some time scrolling (reading) the contract, they are more likely to adhere to the contract's terms. This could be regarded as an extension of other findings by Ward, et al. (2006; 2008) of the positive effects of acknowledging negative elements of proposals in negotiations. That work shows that in traditional pre-agreement dyadic negotiations, the effect of acknowledging a negative proposal results in a greater likelihood of a positive reception of that proposal. Perhaps, the evidence from this study demonstrates that subjects who see and choose the terms, thereby participating, even only marginally in the "negotiation" process, are less likely to feel duped later when they are expected to perform according to the term that was presented to them up-front.

Second, this study demonstrates, *ceteris paribus*, the most support for the moral prompting of contract performance, as compared to a legal threat, an instrumental reminder or social pressure. Those randomly assigned to receive the moral prompt—reminding them that they had made a binding promise to do something and that they should therefore live up to their word and do it—answered more questions than those assigned to the other groups, and were more likely to return and do at least one question when prompted. Perhaps this result supports theories that suggest

that the rule of law is enhanced to the degree that it bends to morality, particularly in the context of power-imbalanced exchanges like those invariably underlying form-adhesive contracting between organizations and individual signers.

There was mixed support for the effects of the social prompt. Those receiving the social prompt were significantly more likely to return to do at least one more question, but their contract performance in terms of number of questions answered was not significantly different from the instrumental prompt, and was only marginally statistically distinct at the ninety percent level from the generic group where no contract was signed requiring them to answer the whole survey. That said, the social prompt group still answered significantly more questions than those who received the legal prompt. In all, it seems that these results are indicative of the need to conduct more research on the relationship between social pressures and constraints and contract performance.

Third, this study reveals some clear carryover from the pre-agreement phase to the post-agreement phase of several important relationships between demographics and contract performance including age and gender. This too seems worthy of additional study, as the findings are consistent with several theories. The post-agreement phase of negotiations could prove a further useful testing ground for adjudicating among competing theories.

Lastly, it is worth noting the following example of how these effects studied in this experiment come to bear in the *real world.* Recently, the most popular on-line social networking site with almost 175 million active users worldwide, "*Facebook*," received media attention when some consumer groups pointed out that the form-adhesive agreement *Facebook* has all of its participants digitally sign contained provisions allegedly "unknown to many users" according to the *New York Times*, that give "broad power to the Web site operators" (Stelter 2009). The issue came to light when a blog, "Consumerist," part of the advocacy group "*Consumers Union*," interpreted changes *Facebook* made to its "Terms & Conditions" that all *Facebook* users signed to mean that "anything you upload to *Facebook* can be used by *Facebook* in any way they deem

fit, forever, no matter what you do later."[39] This blog post received approximately 300,000 views (Stelter 2009). *Facebook* responded by saying that in spite of the contract's clear language allowing this, "that people own their information and control who they share it with has remained constant." But the company did not change the language in the Terms and Conditions to reflect this. As the *New York Times* article on the subject noted, Sasha Frere-Jones, a writer for *The New Yorker* observed that "Zuckerberg's response to protest is just the modern version of 'ignore the fine print, ma'am, just sign here'" (Stelter 2009). Ms. Frere-Jones goes on to say, "why would anyone trust a company with his or her personal information, especially when that company's explicit legal language claims eternal rights to exploit that information, and there is good reason to expect that they will?" (Stelter 2009). Her response is a good example of the reciprocal response theorized by the behavioral theory of contract. In the model depicted in Figure 2 of the first part of this work, her response is represented by the upwards arrow from the "individuals" box pointing towards the "corporations" box.

The progression described above is not uncommon. Indeed, something very similar happened when *Myspace* changed its form-adhesive license agreement with artists posting their content on *Myspace*'s website. A company drafts a contract, revises its terms unilaterally, attempting to sneak in provisions clearly in its interest and against the interest of the individual signers. When the terms come to light, then and only then does the company claim not to have intended to enforce the agreement's clear and unambiguously broad language against its customers. Lastly, the response theorized and observed in part by this study is encapsulated by Ms. Frere-Jones' comment. The first and foremost reaction is a negative reciprocal reaction to the drafting organization—"why would anyone trust a company with his or her personal information…". Second is the implicit reciprocal relationship with the state: "there is good reason to expect that they will [claim eternal rights to exploit personal information]." The law stands idly by, enabling the power-imbalanced contractual exchange to permit *Facebook* to exploit unwary individual signers to forfeit "legal rights". It is not the law, or the expressive nature of the law that is dictating how individual signers behave, nor is it the law that drives how *Facebook* responds, nor is it the law that determines the extent to which *Facebook* or individual signers

[39] See http://consumerist.com/5154745/facebook-clarifies-terms-of-service-we-do-not-own-your-stuff-forever (last visited April 12, 2009).

will be bound by the contract. Rather, extra-legal sources of authority dictate behavior at each and every step.

But this is not the end of *Facebook*'s terms and conditions revision saga. The story has a happy ending (maybe). The company's experience led it to believe in the importance of transparent and fair contracting. Over a thiry-day period ending on April 16, 2009, *Facebook* solicited comments from "users and experts" on revisions to its "Statement of Rights and Responsibilities."[40] From April 16 through April 23, *Facebook* is allowing users to vote on which version of this document would go into effect—the existing version drafted unilaterally by the company, or the revised version based on users comments. Here is the text of Facebook's communication about this vote that is prominently displayed in a text box when users log onto the site:

> About the Vote
>
> On February 26, Facebook announced plans to make site governance more transparent and democratic. Since that time, users and experts around the world have been providing comments on the new documents Facebook proposed to govern the site and replace the existing Terms of Service – the Statement of Rights and Responsibilities and Facebook Principles. Facebook has read the comments on these documents and has revised the documents based on this feedback. Now, please vote to let Facebook know which documents you think should govern the site.
>
> To be notified about future proposed changes to the documents governing Facebook, please become a Fan of the Facebook Site Governance Page.[41]

At the very least, this move by *Facebook* to respond to the previous bad press on its unilateral amendments to its terms and conditions offers some hope that organizations will pay attention and respond when employees, consumers, and citizens generally voice their concern over

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40 http://apps.facebook.com/fbsitevote/contests/208/entries/new?_fb_fromhash=38a3f23685c1f65f7cfe9115a4a3ee3c is a link to Facebook's page on which users may vote. Additional information is available from this site as well on the content of the proposed revisions to the agreement (last visited on April 15, 2009).

41 http://apps.facebook.com/fbsitevote/contests/208?_fb_fromhash=38a3f23685c1f65f7cfe9115a4a3ee3c (last visited on April 17, 2009).

contractual freedom. What is even more interesting in this example is how marginal the services provided by *Facebook* are relative to other organizations. *Facebook* provides a template for users to freely upload pictures and other information about themselves and enables them to search for others on the site. It is a social networking site. It provides a free service in exchange for the slight inconvenience of exposure to advertisements on the side of the screen. *Facebook* provides no essential goods or services. It does not employ site users, it does not provide them medical treatment, nor does it even sell them goods or services. Site users are customers only as viewers of advertisements. As such, the company controls no resource that its users *need.* This point is significant because of the theorized relationship between the power and resource dependence of the drafting organization and the individual signers. *Facebook* is at a polar opposite position on this sliding scale of needs from InnoTech. Does this make the entity less likely or more likely to reduce the adhesiveness of its form-contracting practices? It would seem to make it more likely to do so because of the available alternatives to *Facebook*, or the potential for available alternatives and costs associated with switching. It is more costly for someone to quit a job when labor supply exceeds demand, especially a job that is easily substitutable, than it is for someone to cancel her account on *Facebook.*

It can also be said that the results of this experiment lend empirical support for the behavioral theory of contract in the following ways: First, speaking to the story of contract's "death" as told by Macaulay, Friedman and Gilmore, contract is only as "alive" as the signers perceive it to be. Doctrinal contract law and the associated freedom of contract cannot be resurrected by legal doctrine or by amending the Uniform Commercial Code or other laws as much as it can be brought back to life by returning contract to its common law roots—as something that comes out of the parties' concepts of fair exchange, as opposed to something that comes from the law's institutional power. Second, capitalism needs contract to enable free market exchange by not imposing substantive limitations on the parties. But, to the extent that principles of contract are at odds with notions of fairness and norms of morality, contract does indeed "die"—that is, there's somewhat of a paradox: *more* morality and *less* law lead to *more perceived* legal enforceability. Lastly, if contract evolved out of status towards an embodiment of economic freedom, these *marginal* contracts represent the next step of that evolution where trust for enforceability shifts away from the state, towards extra-legal sources of authority. It is not the

case that we have regressed back to status as the dominant basis for contractual authority, as some have suggested, but rather, that we have so diluted contract's legal authority, that contracts become transparent instruments, through which the light of these other forces readily shine.

Limitations

First, I will address the methodological limitations, followed by the theoretical, substantive limitations. As several scholars have noted, internet-based experimentation is a relatively new, untapped forum in which to study a wide range of behavior (Reips 2002; Skitka and Sargis 2006). As Reips (2002) notes, the internet offers many tradeoffs and associated advantages and disadvantages methodologically. It is worth briefly mentioning some of the advantages of internet experimentation before addressing the limitations. Just like the choice of any forum for experimental methodology, the internet needs to be assessed for viability on a case-by-case basis. The internet offers a relatively productive forum in which to study individual behavior with respect to form-adhesive contracts; it is likely less well-suited to studying face-to-face social interactions or behavior (Buchanan 2002). The internet offers ease of access to a large number of demographic categories. There is therefore the advantage of increased generalizabilty through a wider dispersion of non-local sampling with a wider distribution of demographic characteristics (Krantz and Dalal 2000). Similarly, there is a greater likelihood of "ecological validity" with web experiments like this one (Reips 2002). This means that participants' behavior is less influenced by the physical setting because they typically participate on their computers at home or at work—in their chosen environments (natural habitats) as opposed to a laboratory, where the physical environment and social context associated therewith potentially diminish the likelihood that behaviors exhibited are *really* reflective of how subjects behave outside of the laboratory setting. In the current instance, the internet is well-suited for the purpose because the behavior observed is ecologically dependent. Individuals would likely behave quite differently if they came into a laboratory and were asked to complete a survey. They might feel more obligated to read the fine print. Although, the evidence from the first part of this work offers evidence to the contrary.

Related to the higher potential for ecological validity associated with web experimentation is a greater degree of voluntariness. As Reips explains,

> [b]ecause there are fewer constraints on the decisions to participate and to continue participation, the behaviors observed in Internet-based experiments can be generalized to a larger set of situations. ... Voluntariness refers to the voluntary motivational nature of a person's participation, during the initial decision to participate and during the course of the experiment session. It is influenced by external factors, for example, the setting, the experimenter, and institutional regulations (2002: 247).

The enhanced voluntariness and ecological validity may come at a price. There is a risk of multiple submissions, collusion among participants, and otherwise "gaming the system." As described earlier in this paper, numerous precautions were taken to reduce or eliminate the likelihood of these methodological limitations. For instance, time-stamps were checked to ensure no page-skipping or other oddities that may indicate non-legitimate behavior. IP addresses were tracked and locked out after a single entrance into the experiment. The links to the experiment were coded (for instance: "http://www.surveyaboutwork.com/4dwdqv30a"), and timed to expire shortly after being promulgated (the average time period was less than twenty-four hours per coded URL). Numerous such links were used across various advertising portals. Further, to receive a DVD, subjects had to enter a physical address. We made it clear that only one DVD would be shipped to one address, and this further deterred the likelihood of multiple submissions.

Even with all of these safeguards and precautions on the front end (to reduce the likelihood of subjects entering the experiment more than once or system-gaming), *and* on the back end (carefully reviewing all available data to exclude even questionable data in the analyses), it is impossible to rule out the possibility of subjects tricking the system and somehow avoiding detection. While I took great pains to review all of the data carefully for any possible oddities, and excluded any and all data that could not definitively be construed as legitimate, it is possible that the safeguards were not perfect. Although, I note that even in laboratory experiments, there is a similar risk of system-gaming or collusion, (perhaps not multiple submissions), in that subjects leaving the experiment may talk to their friends and tell them to participate, perhaps also revealing the part of the experiment that they should not reveal. In fact, there is an argument that

due to the wider, non-local geographic dispersion of the subjects in a web-experiment like this one, there might be *less* of an effect of these issues on the results. Lastly, these problems are not as big of a concern because, if present, they would diminish the effects' magnitude across all conditions and prompts, not introduce bias. This is because of the double-random assignment to conditions and prompts.

A related disadvantage commonly lamented in web-experimentation generally is the diminished capacity for successful experimental control (Reips 2002: 245; Skitka and Sargis 2006). This is not as important in this study because of the between-subject design with random distribution of participants to experimental conditions.

Another methodological limitation has to do with the external validity of the results. This boils down to a matter of degrees of removal from the experimental population. That is, the subjects who took participated all responded to an advertisement on the internet soliciting participation in a survey about work (by MIT and funded by the National Science Foundation) in exchange for a DVD of their choice. It could be argued that this is a special category of individual, generalization of the results beyond which is unwarranted. These people might be more gullible ("*who would click on an ad on the internet?*" as one person in the audience inquired when I presented these findings several months ago) than others, and hence the results might only be generalizable to the millions of U.S. citizens with internet access gullible enough to click on this type of advertisement. Still, this is a valid concern, as innate trust of internet sources may weaken the external validity of the results. Still, it is key to remember that the salient results reported are comparisons between groups of individuals randomly assigned from the same population pool. Venturing one further degree away from this group would include the population of individuals with internet access, excluding those without access to the internet. A Neilsen report from 2004 estimated that 75% of American households have some form of internet connection.[42] More recent statistics estimate this number to be higher.

[42] See http://www.websiteoptimization.com/bw/0403/, http://www.nielsen-online.com/, and http://www.ntia.doc.gov/ntiahome/dn/html/Chapter1.htm#_ftnref2 (last visited on April 17, 2009).

Next, the substantive limitations. One limitation is the fact that the experiment measures performance of a contract term, not non-performance. In the second part of the work, the contract term at issue was a mandatory arbitration clause purporting to prevent employees from suing their employers. It would be difficult to create an experimental situation in which subjects are contractually obligated not to do something, and then their non-performance, or refusal to adhere to the contract term is measured. It could very well be that the extra-legal mechanisms underlying non-performance differ from those measured in this experiment. A second limitation is the extent to which the instrumental prompt paralleled the underlying motivation for all subjects, who presumably entered the experiment in the first place in order to receive a free DVD of their choice. As noted earlier, this would reduce the marginal effectiveness of the prompt as compared to some other instrumental concerns, which may be present and even strong, but difficult to measure. A third substantive limitation has to do with the social prompt. It is possible that the effect of social forces is under-estimated by these results. It is very difficult to signal the necessary social evidence that has been demonstrated in other studies to compel performance (Troyer and Younts 1997). The social prompt *informs* subjects of the "*social proof*" (Cialdini 2001) that many others ("98%!!") have completed the survey, but it does not *show* them this. Seeing others finishing the survey would have a stronger effect. Social proof telling individuals to conform because others do so abounds in advertising, and has been demonstrated as an effective means of compelling performance. However, showing is better than telling. Also, it might be the case that subjects interpreted the social prompt to imply that they should keep going in the survey because they are almost at the end. This might explain the higher recidivism rate for the social prompt group (60%), even though they did fewer post-prompt questions (29.5) than those assigned to the moral prompt.

Conclusion

The devil may not be in the details after all. Contract terms are important, but the way that individuals interpret the terms of the exchange seems to be in part a function of the conditions under which terms are presented and experienced, and the framing of the authority prompting adherence to them. The conclusion one might draw from this is that it is insufficient to study doctrinal contract without regard to the context in which contracts arise. This is particularly true

if one cares at all about how contract "*lives*"—that is, what practical effects contract has on the lives of the signers. It is likely the case that a doctrinal approach without the kinds of information discussed in this part of the dissertation would be at best incomplete and at worst, dead wrong when it came to predicting how and why individuals behave the way they do with respect to form-contracts or even more broadly, contracts in general. Courts and contracting parties alike are influenced by the interaction between the framing of the agreement, social and economic constraints in the pre-agreement phase and the performance phase on the one hand, and the contract's actual terms on the other. To borrow Suchman's (2003) term again, *contract as artifact*, as a critical element of law's "*expressive*" function (Sunstein 1996) must be evaluated along-side contract's doctrinal elements. This is the only way to continue to develop contract theory that matters.

A second important conclusion from this portion of the work is that promise is different from consent. The former creates obligations and the latter sets limits on rights foregone. This is why framing a request to adhere to a contract in terms of living up to a promise generates more contractual performance, *more law*, than does a legal threat. The reminder that the law requires adherence to contract terms, on its own, without the instrumental force of a threat of damages or the likelihood of getting caught due to the relative anonymity of the experimental design, is about as effective, perhaps even less-so, than a request to perform the same task where no contract was signed at all. This is the limit of consent to rights foregone. The evidence presented to this effect lends support for the behavioral theory of contract's model of contractual exchange and the notion of the importance of studying the interconnectedness of individuals' experiences with and interpretations of contract and trust in the rule of law. However, more questions may have been raised than answers provided about the overall effects of form-adhesive contracts on the range of exchange relationships between organizations and individuals in contemporary life. For instance, is there a difference between performance (or non-performance) of contracts purporting to restrict action versus contracts purporting to bind actors to perform in some way? To what extent do the results of this experiment change if the organization drafting the contract changes? The drafter in this instance was MIT and the National Science Foundation. What if the drafter were a social networking site? Or AIG or a wall-street banking firm? Further research is necessary to explore these questions and others.

Part 4: Conclusion

Concluding Remarks

Charles Fried concluded his book, *Contract as Promise: A Theory of Contractual Obligation*, in a chapter entitled, "The Importance of Being Right" by arguing that contract is rooted in "right and wrong," so-called, "primitive principles" that determine "the terms on which free men and women may stand apart from or combine with each other" (1981: 132). He ended with the words, "these are indeed the laws of freedom." But this is clearly an incomplete picture, divorced from the realities of contemporary life and the context in which individuals experience the bulk of the contracts into which we enter. Contract law is less about freedom and more about oppression. This is the classic socio-legal view of how more powerful actors exploit the law to reduce the freedom enjoyed by individuals and is a view incorporated in part into the behavioral theory of contract. The second part of this dissertation offered empirical evidence supporting this view. It is perhaps a little ironic then, that in the third part of this work, that the moral prompt—the one that Fried would likely root for the strongest—seemed to win out as a basis for contractual authority.

The behavioral theory of contract may reduce any dissonance experienced as a result of this seeming contradiction. Promise-keeping as a strong, lively basis for contractual performance prevails. This is a part of Fried's argument with which I agree, and believe to have presented empirical evidence in support thereof. However, it is not the case that the moral basis of contractual authority is tantamount to imbuing law with freedom. Individuals are less free the more they see a form-adhesive agreement they signed in terms of a promise made and necessarily kept. This is precisely the problem with how form-adhesive agreements fit into the historical evolution of contract. Because the extra-legal basis for performance (morality) is still very much alive and well, but because the consent component (the real freedom of contract) is on its deathbed, the law of contract actually stymies the progression envisioned by Nonet and Selznick from Autonomous Law to Responsive Law (1978). Instead, it seems that we are marching in the wrong direction.

As Nadler observes, "[w]hen a person evaluates particular legal rules, decisions, or practices as unjust, the diminished respect for the legal system that follows can destabilize otherwise law-abiding behavior" (2005: 1401). This is the fear I have of form-adhesive contracts—that their termite-like gnawing away at our collective respect for the rule of law destabilizes otherwise law-abiding behavior. It seems fitting that something as subtle and relatively unnoticed as form-adhesive contracts would accomplish this, considering how consistently over history and political systems, powerful actors have used law to subtly and covertly shore up their power and ensure continued legitimized protection of their accumulated wealth.

However, there is hope. Simple awareness of the issue can reduce the scope and danger associated with the problem. The *Facebook* example cited above is one instance of an organization realizing the importance of contractual freedom. Hopefully, with continued work in this area, and continued attention given to form-contracting by consumer groups, in time, trust in the rule of law and the associated social contract will be restored.

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APPENDIX A: SURVEY QUESTIONS

Q #	Question
1	In which of these groups did your total family income, from all sources, fall last year before taxes? *
2	Which best describes your current employment status? *
3	Were you born in the United States?
4	Which best describes your current marital status? *
5	Which best describes your race or ethnicity? *
6	What would you say that you do for a living? (i.e.: carpenter, doctor, cashier, etc...) *
7	Have you ever been a member of a union?
8	If you have been a member of a union, please list the name(s) of all unions of which you are or have been a member?
9	Some of the questions in this survey assume that YOU (the person answering the questions) are an EMPLOYEE. If you are self-employed, unemployed or otherwise don't think of yourself as an "EMPLOYEE", please think about your MOST RECENT JOB where you were an EMPLOYEE in answering these questions. Please select "yes" to indicate that you've read this. *
10	If you are NOT considering your CURRENT job in answering the questions in this survey, how long ago was the job that you are thinking about?
11	How much would you say you enjoy your work? *
12	How likely are you to recommend your job to your friend? *
13	What one word would you use to describe your job?*
14	In general, do you think your employer treats you well? *
15	How likely are you to do extra work assignments beyond your job description if your employer asked you to? *
16	To what extent do you do things during working hours that you know that you are NOT supposed to be doing? *
17	How frequently do you download movies longer than 15 minutes from the internet? *
18	How would you describe your experience using the internet? *
19	How many on-line surveys have you done in the past six months? *

Q #	Question
20	How frequently do you download music from the internet? *
21	Is it ever justified for an employee to use work time for personal, non-work things like phone calls or chatting with friends on-line?
22	Please rate how much you agree or disagree with this statement: "I consider my current job part of my career." *
23	Please rate your agreement or disagreement with this statement: "I am not sure I fully trust my employer." *
24	How likely is it that you will be working for the same company one year from now? *
25	Which of these is the BEST reason NOT to download music, movies or software (that are being sold for money) without paying for these things? *
26	Please rate how you feel about this statement: "It is OK for people to download music, movies or software (that are being sold for money) without paying for these things." *
27	Which of these would convince you to download a copy of a movie you really want to see (that is being sold for money) without paying for it? *
28	Which of these is the BEST reason TO download music, movies or software (that are being sold for money) without paying for these things? *
29	Do you think that downloading music, movies or software (that are being sold for money) without paying for these things is the same as shoplifting a CD or DVD from a store at a mall? *
30	Please share with us your opinion generally on downloading music, movies or other media (that is being sold for money) without paying for these things in the text box provided.
31	Please rate how positively or negatively you feel towards the movie studio Twentieth Century Fox Film Corporation? *
32	Is how you feel about FOX approximately the same as you feel towards other large movie studios? *
33	How would you rate your negotiation skills generally? *
34	Have you ever negotiated your pay with an employer? *
35	How likely are you to initiate a negotiation with your employer about your pay? *
36	Do you know any lawyers you could call for help with a problem at work? *
37	How likely are you to call a lawyer for help with a problem at work? *
38	What is your opinion generally on employment law in the US? *
39	How important is it to you that your rights in the workplace are safeguarded?

Q #	Question
	*
40	In general, to what extent can lawyers be trusted? *
41	What would you do if a coworker bothered you to the point that it made it hard for you to do your job? *
42	What would you do if your supervisor told you to come in to work on a day that you had already scheduled off and you had plans to be with family or friends? *
43	What would you do if your supervisor at work told you that if you didn't sleep with him/her that you would be fired? *
44	What would you do if you were fired from your job, and you were sure that the reason you were fired was because of your gender, race, national origin or religion? *
45	In response to this question, please pick "Something else." *
46	Which of the following would you most want to receive from your employer in return for being a loyal employee? *
47	How likely is it that your employer would reward your loyalty with what you picked for the last question? *
48	Please rate your agreement or disagreement with this statement: "Work is not about having a 'relationship,' it's just a way to make money." *
49	Please rate your agreement or disagreement with this statement: "My supervisor takes steps to deal with me in a truthful manner."
50	Please rate your agreement or disagreement with this statement: "Negotiating with an employer over pay is usually pointless."
51	Please rate your agreement or disagreement with this statement: "Working where I work is very satisfying to me." *
52	Please rate your agreement or disagreement with this statement: "I am not sure I fully trust my employer." *
53	Please rate your agreement or disagreement with this statement: "My employer is open and upfront with me." *
54	Please rate your agreement or disagreement with this statement: "My supervisor is friendly and considerate towards me."
55	Please rate your agreement or disagreement with this statement: "My supervisor seems genuinely concerned for my rights." *
56	Please rate your agreement or disagreement with this statement: "The law should allow unions to freely and easily access employees so that the unions are able to tell employees why they should sign up with the unions." *
57	To what extent do you feel obligated to your employer to work extra hours if

Q #	Question
	asked? *
58	To what extent do you feel obligated to your employer to be loyal? *
59	To what extent do you feel obligated to your employer to volunteer to do non-required tasks on the job? *
60	To what extent do you feel obligated to your employer to give advance notice if taking a job elsewhere?
61	To what extent do you feel obligated to your employer to accept a transfer to a different location?
62	To what extent do you feel obligated to your employer to refuse to support the employer's competitors? *
63	To what extent do you feel obligated to your employer to protect the employer's secret, proprietary information?
64	To what extent do you feel obligated to your employer to work there for a minimum of two years? *
65	To what extent do you feel obligated to your employer not to take things home from work that you are not supposed to take?
66	In response to this question, please ignore the other choices and select, Not sure. *
67	Please briefly describe, in your own words, how you feel about your relationship with your employer, or your most recent employer. Use as many descriptive terms as possible. *
68	How important is it to you that your workplace be free of sexism? *
69	How important is it to you that your workplace be free of age discrimination? *
70	How important is it to you that your workplace reward seniority? *
71	How important is it to you that your workplace reward performance? *
72	How much do you agree or disagree that employers in the US are LESS generous with vacation time than employers in Europe. *
73	Please rate how you feel about this statement: "Employers have a legal obligation to keep their promises to their employees." *
74	Please rate how you feel about this statement: "I would expect my employer to treat me fairly." *
75	Please rate how you feel about this statement: "It is reasonable for my employer to expect me not to do anything that conflicts with my employer's interests." *
76	Please rate how you feel about this statement: "I would expect my employer to

Q #	Question
	reward me for my loyalty." *
77	Please rate how you feel about this statement: "If my employer fired me, I would want to talk to a lawyer to see if there were anything I could do about it."
78	Please briefly describe the most recent employment lawsuit that comes to mind. This could be a publicly well-known case or it could be something from your personal life. *
79	In general, do you think that when employees sue their employers for RACE discrimination in the U.S. that they end up getting too much, too little or about the right amount of money? *
80	In general, do you think that when employees sue their employers for GENDER discrimination in the U.S. that they end up getting too much, too little or about the right amount of money? *
81	Please rate how much you would like to voluntarily resign from your current job? *
82	Please rate how easy or difficult it would be for you to find another job in the same field as you are in now if you had to do so tomorrow? *
83	How likely are you to try to negotiate for more if your employer offered you a pay raise that was MUCH less than you thought was fair? *
84	How important is it to you that your current employer treat you with respect and dignity?
85	What things do you expect from your employer (ie: what is your employer obligated to do for you?) *
86	Has or had your employer ever failed to meet the obligation(s) that were promised to you? *
87	Which obligation(s) did your employer fail to meet? (if not applicable, simply write "not applicable" below) *
88	Please rate how much you would like to change careers-- (go into a different field entirely) *
89	Please rate how much you agree or disagree with the following statement: "If someone does something for you, you should do something of greater value for them." *
90	Please rate how much you agree or disagree with the following statement: "If someone does you a favor, you should do even more in return." *
91	Please rate how much you agree or disagree with the following statement: "If someone goes out of their way to help me, I feel as though I should do more for them than merely return the favor."

Q #	Question
92	Please rate how much you agree or disagree with the following statement: "If a person does you a favor, it's a good idea to repay that person with a greater favor." *
93	Please rate how much you agree or disagree with the following statement: "It's not necessary to return favors quickly." *
94	Please rate how much you agree or disagree with the following statement: "As a rule, I don't accept a favor if I can't return the favor." *
95	Please rate how much you agree or disagree with the following statement: "If you frequent a certain restaurant, you should leave large tips to ensure good service." *
96	Please rate how much you agree or disagree with the following statement: "If a stranger helped you start your stalled car, you would not feel obligated to return the favor." *
97	To what extent do you believe that your employer is obligated to promote you? *
98	To what extent do you believe that your employer owes you high pay?
99	To what extent do you believe that your employer is obligated to pay you based on your current level of performance? *
100	To what extent do you believe that your employer is obligated to provide you with training? *
101	To what extent do you believe that your employer owes you long-term job security? *
102	To what extent do you believe that your employer owes you a fair process to resolve disputes at work?
103	Please describe a situation in which you would demand that your employer do what it is obligated to do (if the employer wasn't doing that thing in the first place): *
104	Please describe a situation in which you would quit your job if your employer refused to do what it is obligated to do: *
105	Please rate how much you agree or disagree with this statement: "I believe my employer has high integrity."
106	Please rate how much you agree or disagree with this statement: "In general, I believe my employer's motives and intentions are good." *
107	Please rate how much you agree or disagree with this statement: "My employer is not always honest and truthful." *
108	Please rate how much you agree or disagree with this statement: "I don't think my employer treats me fairly." *

Q #	Question
109	Please rate how much you agree or disagree with this statement: "I can expect my employer to treat me in a consistent and predictable fashion." *
110	Please rate how much you agree or disagree with this statement: "Employers like mine only care about profits, not their employees' well-being." *
111	Please rate how much you agree or disagree with this statement: "I define myself through my 'occupational identity.' That is, I identify myself mostly by what I do." *
112	Please rate how much you agree or disagree with this statement: "If I could get away with it, I would do as little as possible at my current job to avoid getting fired." *
113	How important is it to you that your employer promote you? *
114	How important is it to you that your employer pays you well? *
115	How important is it to you that your employer pay you based on your current level of performance? *
116	How important is it to you that your employer provide you with on-the-job training?
117	How important is it to you that your employer provide you with long-term job security? *
118	What is the MOST important thing that you feel your employer is obligated to do for you or provide for you at work? *
119	Would you join a union if you had 100% certainty that the union could make sure that your employer would provide this for you? *
120	Would you join a union if you knew that the union would fight to make sure that your employer would provide this for you, but you didn't know how likely it is that the union would succeed? *
121	Please rate how much you agree or disagree with this statement: "My supervisor considers my viewpoint." *
122	Please rate how much you agree or disagree with this statement: "My supervisor is able to suppress personal biases."
123	Please rate how much you agree or disagree with this statement: "My supervisor provides me with timely feedback about decisions and their implications." *
124	Please rate how much you agree or disagree with this statement: "My supervisor treats me with kindness and consideration." *
125	Please rate how much you agree or disagree with this statement: "My supervisor shows concern for my rights as an employee." *
126	If someone at a party asked you to describe your supervisor (or your most

Q #	Question
	recent supervisor if not currently supervised), what would you say? *
127	Have you ever deliberately refused to do something that your supervisor told you do? *
128	Have you ever deliberately slowed down the pace of your work in order to make a point? *
129	Please rate how much you agree or disagree with this statement: "I took my current job as a stepping stone to a better job somewhere else." *
130	Please rate how much you agree or disagree with this statement: "I expect to work for a variety of different places in my career." *
131	Please rate how much you agree or disagree with this statement: "I do NOT expect to change jobs often during my career." *
132	Please rate how much you agree or disagree with this statement: "There are many career opportunities I expect to explore after I leave my present job." *
133	Please rate how much you agree or disagree with this statement: "I am really looking for a job where I can spend my entire career." *
134	Have you ever responded to an advertisement saying that you could work from home? *
135	What would you do if your current (or most recent) employer asked you to shred corporate documents? *
136	What do you think your employer would do if you quit and started a business of your own that competed with hers? *
137	Please rate how much you agree or disagree with this statement: "At work, I am fairly rewarded considering my responsibilities." *
138	Please rate how much you agree or disagree with this statement: "At work, I am fairly rewarded in view of the amount of experience I have." *
139	Please rate how much you agree or disagree with this statement: "At work, I am fairly rewarded for the amount of effort I put forth." *
140	Please rate how much you agree or disagree with this statement: "At work, I am fairly rewarded for the work I have done well." *
141	Please rate how much you agree or disagree with this statement: "At work, I am fairly rewarded for the stresses and strains of my job."
142	If you felt that you were not rewarded fairly for the amount of work that you do, what would you do, if anything?*
143	Do you feel that a LAWYER could help you if you were not paid fairly for the work that you did? How so? *
144	Do you feel that a UNION could help you if you were not paid fairly for the work that you did? How so? *

Q #	Question
145	To what extent would you say that you use your professional judgment to assess what is right/wrong for the organization where you work?
146	To what extent do you make creative work-related suggestions to co-workers? *
147	To what extent do you make innovative suggestions to improve the functioning of the department where you work? *
148	To what extent do you help others at work? *
149	To what extent would you say that you waste time while at work on personal matters? *
150	If you were passed over for a promotion you thought you deserved, and you were sure that the reason you were passed over was illegal, what would you do? *
151	Do you think employees in the U.S. sue their employers too much, too little or about the right amount? *
152	Do you think that employers in the U.S. discipline their employees too much, too little or about the right amount? *
153	To what extent does your supervisor take steps to deal with you in an open and honest manner? *
154	To what extent does your supervisor treat you fairly, overall? *
155	To what extent does your supervisor give you adequate explanations for decisions taken?
156	To what extent can your employer be trusted to make sensible decisions for the future of the business? *
157	How do you feel about this statement: "My employer would be quite prepared to gain advantage by deceiving employees." *
158	How important is it to you that your employer provide healthcare benefits? *
159	How important is it to you that your employer provide access to varied lunch options? *
160	How important is it to you that your employer provide a 401(k) retirement investment program? *
161	Please rate how much you agree or disagree with this statement: "I would expect my employer to allow me to use the company's e-mail system for personal use, as long as I did so within reason."
162	Please rate how much you agree or disagree with this statement: "I would expect my employer to allow me to take time off from work without penalty if I needed to help out a close friend." *
163	Please rate how much you agree or disagree with this statement: "I would

Q #	Question
	expect my employer to respect my privacy and not monitor my e-mails at work." *
164	Please rate how much you agree or disagree with this statement: "Employers should expect employees not to bad-mouth them in public." *
165	Please rate how much you agree or disagree with this statement: "Employers should expect employees to go "above and beyond" their job descriptions." *
166	What would you do if your employer told you that you had to work through the weekend, but you had told your employer two weeks earlier that you had plans to go to a party in Las Vegas for your best friend? *
167	How frequently would you say that you fantasize about finding a different job? *
168	Do you think your current employer monitors your e-mail correspondence? *
169	To what extent do you believe that your employer is obligated to assist you in your career development? *
170	To what extent do you believe that your employer is obligated to support you with personal problems? *
171	Do you think that all in all, one can live well in America?
172	Do you think that employers are generally greedy? *
173	Do you think that unions are good for the U.S. economy? *
174	Please elaborate on your opinion of unions in the space provided below: *
175	To what extent do you agree or disagree that you would be better off doing the same work you do now, but in Europe? *
176	Do you think that European employers treat their employees better than how U.S. employers treat their employees, on average? *
177	Please rate how you feel about this statement: "Employers have a moral obligation to keep their promises to employees." *
178	Please rate how you feel about this statement: "If employers don't keep their promises, employees are justified to take revenge by doing things the employer definitely wouldn't want them to do. (ie: work less hard, come in late, etc.)" *
179	Please rate how you feel about this statement: "Employees have a moral obligation to keep their promises to employers." *
180	Please rate how you feel about this statement: "If an employer doesn't keep a promise it made to an employee, the employee should quit."
181	Please rate how you feel about this statement: "If an employer doesn't keep a promise it made to an employee, that employee should resort to the law to remedy the situation." *

Q #	Question
182	What would you do if you noticed that your employer was not properly disposing of chemicals that could be hazardous to your health, and to the health of your coworkers? *
183	Have you ever felt that your employer tried to bribe you in any way?
184	Do you agree or disagree that it's fair for an employer to pay less than minimum wage to illegal immigrants? *
185	How do you feel about the following statement: "Sometimes, it is OK for an employee to steal things from work." *
186	How do you feel about the following statement: "If an employee is given 'sick days' that are lost if not used, it is OK for that employee to use a 'sick day' even when he isn't sick." *
187	How do you feel about the following statement: "Using 'sick days' even when not sick, or stealing small things from work are acceptable responses to unfair treatment at work." *
188	How do you feel about the following statement: "Work is not about having a 'relationship,' it's just a way to make money."
189	How do you feel about the following statement: "Most big companies do everything in their power to make sure that employees have no opportunity to voice their concerns in the workplace."
190	What should an employee do if she notices a health-code violation at work that could be pretty serious if left un-fixed? *
191	What should someone do if he finds documents at work that prove that the CEO of the company is involved in fraud?
192	What do you think someone should do if she notices that she was paid incorrectly in her last paycheck (after she voluntarily resigned from the company)? Should she should keep quiet about it or bring it to the Company's attention, or something else? *
193	Would you recommend your current job to your best friend? *
194	How many steps of reporting are there between you and the CEO of the company where you work? (If you are the CEO, then your response should be zero, if you report directly to the CEO, then your response should be one, etc. etc.) *
195	Please rate your level of frustration with your current employment situation. *
196	If you had a choice, which would you prefer as a means of addressing and resolving employment disputes at your current workplace?
197	To what extent are you satisfied with your current job? (Please refer to your last job if not currently employed.) *

Q #	Question
198	What would you do (if anything) if your employer posted a notice saying that it had installed surveillance cameras in all common areas and break rooms? *
199	Do you agree or disagree that employees should be allowed to sue their employers for same-sex sexual harassment (that is, when the harassment is done by someone of the same gender)? *
200	Do you agree or disagree that unions should be allowed to promise employees anything (no matter how unlikely they are to happen) in order to get them to sign up? *
201	How long do you expect to remain with your current employer in the specific job or position for which you were hired? *
202	How likely is it that you will be working for the same company one year from now? *
203	Please rate how strongly you agree or disagree with this statement: "On the whole, I get along well with others at work." *
204	Please rate how strongly you agree or disagree with this statement: "I feel good about my work on the job."
205	How likely is it that you will be working for the same company 5 years from now? *
206	How likely do you think it is that you will lose your job or be laid off in the next six months? *
207	Please describe, in your own words, your opinion on the current economic crisis in the U.S. *
208	What is the likelihood that the current economic crisis in the U.S. will have a NEGATIVE impact on your employment situation? *
209	Please rate how much confidence you have in ORGANIZED RELIGION on the following 1-7 scale:
210	Please rate how much confidence you have in the U.S. CONGRESS on the following 1-7 scale: *
211	Please rate how much confidence you have in the POLICE on the following 1-7 scale: *
212	Please rate how much confidence you have in U.S. SUPREME COURT on the following 1-7 scale: *
213	Please rate how much confidence you have in MAJOR COMPANIES on the following 1-7 scale: *
214	In general, how would you describe your attitude towards BIG employers in the U.S., like Wal-Mart, McDonalds or General Electric?

Q #	Question
215	Google is frequently ranked among the top 5 "best companies to work for" in the U.S. One of the reasons for this is its flexibility and responsiveness to employee needs. To what extent do you think that flexibility and responsiveness to employees' needs make an employer a great company to work for? *
216	Do you agree or disagree with this statement: "When workers are given the opportunity to offer their input to improve the company's business, the company will likely do better financially."
217	Please rate how much confidence you have in UNIONS on the following 1-7 scale: *
218	Please rate how much confidence you have in the CURRENT U.S. PRESIDENT on the following 1-7 scale:
219	In response to this question, please ignore the other choices and select "Other". *
220	How important is it to you that your employer treat you with dignity and respect? *
221	How do you feel about this statement: "In today's economy, employees are wise to try to get away with whatever they can, so long as it doesn't get them in trouble or fired." *
222	What would you do if a fellow employee verbally harassed you making it really difficult for you to do your job effectively? *
223	Should people who are in the U.S. illegally be allowed to sue their employers in court? *
224	Should unions in the U.S. should be allowed to represent workers who are in the U.S. illegally ("illegal immigrants")? *
225	How important is the following element in your current job? (If not employed, please answer this question in general): INCOME *
226	How important is the following element in your current job? (If not employed, please answer this question in general): NO DANGER OF BEING FIRED *
227	How important is the following element in your current job? (If not employed, please answer this question in general): WORKING HOURS ARE SHORT, LOTS OF FREE TIME *
228	How important is the following element in your current job? (If not employed, please answer this question in general): CHANCES OF ADVANCEMENT *
229	How important is the following element in your current job? (If not employed, please answer this question in general): WORK IMPORTANT AND GIVES A FEELING OF ACCOMPLISHMENT
230	If you could change one thing about your current (or most recent job where

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	you were an employee), what would it be? *
231	If Barak Obama is elected the next president of the United States, to what extent do you think that there will be more jobs available? *
232	If John McCain is elected the next president of the United States, to what extent do you think that there will be more jobs available? *
233	Have you ever threatened to initiate litigation against someone or something (such as a company, the state, etc.) in the U.S.? *
234	Please rate your knowledge and experience with Civil Law in the United States. *
235	Have you ever brought litigation against someone or something (such as a company, the state, etc.) in the U.S.? *
236	Has anyone or anything ever threatened to bring a lawsuit against you in the U.S.? *
237	Have you ever been sued in the U.S.? *
238	Please describe your experience with litigation in the space provided below. (If you have had no experience at all, please simply write, "not applicable".) *
239	How frequently do you watch "Judge Judy" or similar court-related television programs? *
240	Overall, do you think there is justice in the workplace in the U.S.?
241	Which of these job types best matches your job now? (If you are not working now, please tell us about your last job.)
242	Thinking about the next 12 months, how likely do you think it is that you will lose your job or be laid off? *
243	Did you ever work for the same employer for as long as one year?*
244	Please rate your level of agreement or disagreement with this statement: "If I work hard and exceed my employer's expectations, he will reward me with job security and by treating me fairly." *
245	Please rate your level of agreement or disagreement with this statement: "If my employer treats me unfairly, I would be justified if I took 'revenge' by slacking off at work or stealing small items from work like office supplies." *
246	Do you agree or disagree with this statement: "I would expect my employer to reward me for my hard work and devotion to my job." *
247	Do you agree or disagree with this statement: "Employers in the U.S. expect too much from their employees." *
248	What is the minimum wage in your state? If you don't know, please make your best estimation. *

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249	Please rate your level of agreement or disagreement with this statement: "Employers and their employees should not try to get along--work is just an economic exchange without trust or loyalty." *
250	Please rate your level of agreement or disagreement with this statement: "Most corporations take advantage of their CUSTOMERS more than the law permits."
251	Please rate your level of agreement or disagreement with this statement: "Most companies take advantage of their EMPLOYEES more than the law permits." *
252	Please rate your level of agreement or disagreement with this statement: "I would go out of my way for my employer because I trust that my employer will reward me in the end." *
253	Please rate your level of agreement or disagreement with this statement: "It's OK to take office supplies (without permission to do so) if it's highly unlikely that I'll get caught." *
254	What words best capture your feelings with respect to employees who intentionally sabotage or steal in their workplaces? *
255	What is the LOWEST dollar amount that would justify firing an employee for theft? (Please enter a number below-- if you think that stealing anything, regardless of it's dollar-value justifies termination, please write the number zero below.) *
256	Do you consider it "theft" when employees copy employer-owned software (like Microsoft office, for example) for their own personal use on their personal computers? Why or why not?
257	How much do you agree or disagree with this statement: "Irish, Italian, Jewish and many other minorities overcame prejudice and worked their way up. African-Americans should do the same without special favors."
258	Are you trying to find a new job right now? *
259	Please select the number three in response to this question. *
260	Do you think you are fairly paid for your work at your current job? *
261	How many people you know have applied to your company for a job because you told them about the opening with your company? *
262	How important is it to you that then next president of the United States protect workers' rights? *
263	How important is it to you that the next president of the United States make it tougher on employers who hire illegal immigrants? *
264	Please share with us your opinion generally on illegal immigrants in the United States? *

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265	Should U.S. employers have the right to give genetic tests to people who are applying for a job, or shouldn't they have that right? Why or why not? *
266	Should employers have the right to REFUSE to hire workers if tests show they have an inherited tendency to develop certain forms of cancer or heart disease? Why or why not? *
267	Should employers have to pay for their workers' medical insurance? *
268	How important is the issue of genetic screening of employees to you? *
269	Should U.S. employers be allowed to fire employees who refuse to submit to genetic screening? Why or why not?
270	In the past five years, how frequently have you taken a break from work to smoke cigarettes?
271	Please share with us your opinion on smokers' rights in the workplace in the space provided below: *
272	Please rate your agreement or disagreement with this statement: "It should be ILLEGAL for employers to screen people out of jobs for health-related reasons." *
273	How do you feel about this statement: "In the United States, traditional divisions between owners and workers still remain." *
274	How do you feel about this statement: "A person's social standing depends on whether he/she belongs to the upper or lower class in the U.S." *
275	How do you feel about this statement: "In the U.S., there are still great differences between social levels."
276	How do you feel about this statement: "What one can achieve in life depends mainly upon one's family background." *
277	How much do you think about quitting your current job? *
278	Approximately what percentage of your income do you turn over to the government? (If you prefer not to answer this question, please write "n/a" below.) *
279	Do you think that the income tax you pay now is too much, too little or just about the right amount? *
280	If you could, would you pay 5% HIGHER income tax if you were guaranteed that 100% of the money went to funding public-school education? *
281	How do you feel about this statement: "The way most companies work, the only thing management cares about is profits, regardless of what workers want or need." *
282	How do you feel about this statement: "Corporations should pay more of their profits to workers and less to shareholders."

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283	How do you feel about this statement: "Unions in this country have TOO LITTLE power." *
284	How do you feel about this statement: "For the most part, unions just stand in the way of economic progress in this country." *
285	How do you feel about this statement: "I would support a law that made it HARDER for employees to join unions." *
286	How important is it to you that the next president of the United States supports the North American Free Trade Agreement ("NAFTA")? *
287	Which presidential candidate do you think supports NAFTA the most? (If you don't know of prefer not to answer, please so indicate in the space provided below.) *
288	Over the past five years, how much would you say that NAFTA has benefited the United States? *
289	In the last five years, did an organization where you worked go out of business or close down? *
290	In the last five years, did the business where you worked merge with another company? *
291	In the last five years, at any business where you worked, was there a major lawsuit filed by employees against the organization? *
292	In the last five years, where you worked, was there was a major lawsuit filed by shareholders against the organization?
293	In the last five years, at the place where you worked, were there many layoffs (more than 30% of the workforce)? *
294	In the last five years, where you worked, was the business ever taken over or changed ownership? *
295	In the last five years where you worked, has the company outsourced many U.S. jobs overseas? *
296	In the last five years where you worked, was there ever a major strike by a union? *
297	How did you FIRST learn about your current job? (If you are not working now, please tell us about your last job.) *
298	Would you like to join a union at your current job? *
299	In response to this question, please ignore the other choices and select "Other". *
300	Do you think that there is "dignity" in your current employment? Please explain your answer with as much detail as possible.
301	In general, do you think that HR ("Human Resources") departments that many

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	employers have are only interested in protecting the employers? *
302	Please share with us your opinion of HR departments in the U.S. in general: *
303	In the past two years, how frequently have you used web-sites like "Monster.com" or similar sites to search for jobs? *
304	To what extent do you consider it "disloyal" for someone who is currently employed to search for other jobs? *
305	Please share with us your opinion of the place of religion in the workplace: *
306	Please rate how strongly you agree or disagree with this statement: "I feel like I make a useful contribution at work." *
307	Please rate how strongly you agree or disagree with this statement: "I can tell that my coworkers respect me."
308	Please rate how strongly you agree or disagree with this statement: "My job is mostly boring." *
309	Please rate how strongly you agree or disagree with this statement: "I put my heart into my work." *
310	Please rate how strongly you agree or disagree with this statement: "If I could retire today and never work again, I would do it." *
311	Are you comfortable talking about your religious beliefs with your coworkers? *
312	How important is it to you that your workplace be free of discrimination based on religion? *
313	Have you ever been fired from a job? *
314	Have you ever quit a job? *
315	Have you personally been involved in an employment dispute? *
316	Have you personally been involved in an employment lawsuit?
317	In the U.S., are employers legally allowed to fire employees without any reason at all? *
318	Have you ever negotiated your pay with an employer? *
319	How likely are you to initiate a negotiation with your employer about your pay? *
320	Imagine that at work tomorrow, your employer told you that she would give you a raise if you could justify it in one sentence. What would you say? *
321	Would you say that most of the time people try to be helpful, or that they are mostly looking out for themselves? *
322	Do you think that most people would try to take advantage of you if they got a

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	chance, or would they try to be fair? *
323	Generally speaking, would you say that most people can be trusted or that you can't be too careful in life? *
324	Generally speaking, would you trust an attorney to assist you if your employment were terminated and you suspected it was for illegal reasons?
325	Generally speaking, do you think that the way that employment disputes are handled in this country is fair? *
326	What is your opinion on affirmative-action in employment? (If you prefer not to do so or are unsure about this subject, please so indicate in the space provided below.) *
327	Please rate your agreement or disagreement with the following statement: "Affirmative-action doesn't benefit anyone because people tend to second-guess the abilities of minorities in workplaces known to have adopted affirmative-action hiring policies." *
328	Do you agree or disagree with this statement: "Employers are wrong to ever take race into account when hiring people." *
329	Have you ever heard of "employment arbitration" or "mandatory arbitration"? *
330	Do you think employers should be allowed to require employees to waive their right to a jury trial? Why or why not? *
331	Are employers in the U.S. legally allowed to make their employees waive their right to a jury trial? *
332	Have you ever heard of "mediation"? *
333	Which one of the listed types of employment claim do you think is the MOST COMMON in the U.S.? *
334	Do you think that mediation is a fair process for resolving disputes between employers and employees? Why or why not?
335	To what extent are U.S. employment laws MORE employee-friendly than European employment laws? *
336	Is it LEGAL for an employer in the U.S. to require employees to sign a contract saying that they won't joint a union? *
337	How easy/difficult is it for you to leave your job for a short period to attend to personal matters? *
338	How easy/difficult is it for you to make a personal phone call from work? *
339	In the last two years, how easy/difficult was it for you to get time off to attend to personal matters such as a doctor's appointment or to attend a wedding?
340	How easy/difficult is it for you to take time off when you are sick? *

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341	How easy/difficult is it for you to understand the benefits you receive for your work (if any)? *
342	What percentage of time at work would you estimate you spend attending to personal non-work-related matters? *
343	How frequently do you have to travel for work?
344	How likely are you to do extra work assignments off work-time if your employer asked you to? *
345	Are the people who work where you work all white, mostly white, about half and half, mostly black, or all black? *
346	In general, how much discrimination is there that makes it hard for African-Americans to obtain jobs in the U.S.? *
347	Please rank how much your current job is like a "relationship" where you feel there is mutual trust, loyalty and respect between you and your employer. *
348	Have you ever been the victim of sexual harassment at work?
349	How important is it to you that your employer treat everyone fairly at work? *
350	In general, do you think your employer treats you well? *
351	How important is it to you that your workplace reward hard work? *
352	If you could identify ONE THING that your employer does that you could change, what would it be? *
353	Please rate how strongly you agree or disagree with this statement: "The people running the U.S. don't really care what happens to individuals like me."
354	Please rate how strongly you agree or disagree with this statement: "There's no point trying to negotiate with companies (like employers or banks) because they are too powerful." *
355	Please rate how strongly you agree or disagree with this statement: "My employer does not care about my opinion about how to make my job better or otherwise improve working conditions." *
356	Please rate how strongly you agree or disagree with this statement: "In general, I feel left out of things going on around me."
357	Please rate how strongly you agree or disagree with this statement: "Most people with power try to take advantage of people like me." *
358	Please rate how strongly you agree or disagree with this statement: "If someone returned a wallet you lost, you should try to do something in order to repay him/her." *
359	Please rate how strongly you agree or disagree with this statement: "The most realistic policy is to take more from others than you give."

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360	Please rate how strongly you agree or disagree with this statement: "It generally pays to let others do more for you than you do for them." *
361	Do you think it should be legal for employers to secretly listen-in on employees when they talk on the telephone? *
362	Do you think it should be legal for employers to secretly monitor employees' e-mail at work? *
363	Do you think it should be legal for employers to secretly monitor employees' instant messaging at work? *
364	Do you think it should be legal for employers to video-record employees in break areas (without telling them about it)?
365	Do you think it should be legal for an employer to fire an employee for writing an e-mail to a friend saying that the company isn't paying them fairly? *
366	What is your opinion generally about wire-tapping and eavesdropping? *
367	How important is the issue of clandestine monitoring of the workplace to you? *
368	Do you think that EMPLOYEES should be allowed to secretly record their conversations with their employers? *
369	Do you feel that a person of color who has the same education and qualifications can get as good a job as a white person? *
370	If a person of color has the same qualifications as a white person, do you feel that he or she can make as much money? *
371	Generally speaking, do you think the opportunities for people of color to get ahead have improved in the last five years, remained about the same, or gotten worse? *
372	Do you think that the EMPLOYMENT opportunities for people of color have improved in the last five years, remained about the same, or gotten worse? *
373	Do you think that people of color should have as good a chance as white people to get any kind of job, or do you think that white people should have the first chance at any kind of job?
374	Do you feel that you were ever passed over for being hired or promoted because of your race? *
375	How frequently do you think employers in the U.S. hire minorities SOLELY because they don't want to appear racist or discriminatory? *
376	Do you feel that you were ever passed over for being hired or promoted for ANY REASON AT ALL? (If so, what do you think the reason really was?) *
377	Please rate how strongly you agree or disagree with this statement: "I receive

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	the respect I deserve from my coworkers."
378	Please rate how strongly you agree or disagree with this statement: "I receive the respect I deserve from my supervisor(s)." *
379	Please rate how strongly you agree or disagree with this statement: "I experience adequate support in difficult situations at work." *
380	Please select "Not sure" in response to this question. *
381	Please rate how strongly you agree or disagree with this statement: "When something goes wrong at work, I can talk it over with my friends or family."
382	Approximately how many people do you work with at your current job? (This includes people with whom you come in contact on a regular basis.) *
383	Of those people with whom you work, how many do you consider a "close friend"? *
384	Of the people with whom you work, how many do you consider a "friend"? *
385	If someone is pregnant, is she considered "disabled" for purposes of U.S. employment law? *
386	If someone has a broken leg, is he considered "disabled" for purposes of U.S. employment law?
387	Do U.S. employers have to make reasonable accommodations for disabled employees? *
388	How frequently do you think employers in the U.S. hire disabled individuals SOLELY because they don't want to appear discriminatory? *
389	Is it true that in the U.S., employers are not allowed to fire employees who claim to be recovering alcoholics?
390	To what extent do you feel one would be better off living in Europe rather than the U.S. if one were permanently wheel-chair-bound? *
391	Do you think that MOST employers play by the rules when it comes to hiring disabled people? *
392	How important is it to you that the law protect disabled individuals from discrimination in the workplace? *
393	Please rate how strongly you agree or disagree with this statement: "What one achieves in life no longer depends on one's family background, but on the abilities one has and the education one acquires."
394	Please rate how strongly you agree or disagree with this statement: "What one gets in life hardly depends at all on one's own efforts, but rather on other things beyond our control." *
395	In response to this question, please select the option, "Not Sure". *

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396	Please rate how strongly you agree or disagree with this statement: "One's income should not be determined by one's work."
397	Please rate how strongly you agree or disagree with this statement: "Everybody should get what they needs to provide a decent life for their family." *
398	Please rate how strongly you agree or disagree with this statement: "In the long run, it's better to accept favors than to do favors for others." *
399	Please rate how strongly you agree or disagree with this statement: "You SHOULDN'T offer to help someone if they don't ask for your help." *
400	What would you do if you were fired from your job, and you were sure that the reason you were fired was because of your political beliefs? *
401	Please rate how strongly you agree or disagree with this statement: "I am sure that I can handle my job without constant assistance."
402	Please rate how strongly you agree or disagree with this statement: "When I feel uncomfortable at work, I know how to handle it." *
403	Please rate how strongly you agree or disagree with this statement: "I know I'll be able to cope with work for as long as I want." *
404	Please rate how strongly you agree or disagree with this statement: "I can tell that other people at work are glad to have me there." *
405	Please rate how strongly you agree or disagree with this statement: "I'm proud of my relationship with my supervisor at work." *
406	Approximately how many different individuals have you directly supervised over the entire course of your career? (If you've never supervised anyone, simply write "zero" in the space provided below.) *
407	Approximately what percentage of your time at your current job do you spend doing tasks that you think could be considered "supervisory"? *
408	How many times in the past two years have coworkers come to you for advice on how to handle work-related situations? *
409	Should marijuana use be made legal or not? Why? *
410	Should employers be allowed to fire employees caught smoking marijuana off-work-property and off-working hours? *
411	Should everyone who starts a job at workplace that already has a union have to join that union? *
412	Should employers be allowed to fire employees if they fail a drug test? *
413	Should employers be allowed to fire employees for no reason at all?
414	In general, how important is the issue of the legal status of drugs to you? *

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415	Which presidential candidate do you think most supports your views with respect to drugs in the workplace? *
416	To what extent do you think that MOST unions agree with your views about drugs in the workplace? *
417	What is your opinion on how much we're spending on the following: Improving and protecting the environment. *
418	What is your opinion on how much we're spending on the following: Improving and protecting the nation's health.
419	What is your opinion on how much we're spending on the following: Solving the problems of the big cities.
420	What is your opinion on how much we're spending on the following: Halting the rising crime rate. *
421	What is your opinion on how much we're spending on the following: Dealing with drug addiction. *
422	Which presidential candidate do you think is MOST aligned with your views on SPENDING on the areas identified in the preceding questions? (If you are not sure, please so-indicate in the space provided below.) *
423	How important to you is it that the next president of the United States be aligned with your views on spending on the areas identified in the preceding questions? *
424	Which of the five spending areas identified in the preceding questions is the MOST important to you? *
425	Please rate your level of agreement or disagreement with the following statement: "Unions help their members." *
426	Please rate your level of agreement or disagreement with the following statement: "MOST employees lie to their employers." *
427	Please rate your level of agreement or disagreement with the following statement: "America has an open society."
428	In response to this question, please select number three. *
429	Please rate your level of agreement or disagreement with the following statement: "Most jobs are merely economic exchanges of money for time and labor. There's no place for loyalty and justice at work." *
430	How do you feel about this statement: "You should help others so that later they'll help you." *
431	How do you feel about this statement: "You should not bend over backwards to help another person." *
432	How do you feel about this statement: "I feel used when people ask favors of

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	me." *
433	Generally speaking, which best describes how you would think of yourself? *
434	In 2000, you may remember that Al Gore ran for president on the Democratic ticket against Bush for the Republicans. Do you remember for sure whether or not you voted in that election? *
435	If you did vote in the 2000 presidential election, for whom did you vote?
436	In 2004, you may remember that Kerry ran for president on the Democratic ticket against Bush for the Republicans. Do you remember for sure whether you voted or not in that election? *
437	If you did vote in the 2004 presidential election, for whom did you vote?
438	Are you planning to vote in the 2008 election? *
439	What is your primary source of news about the upcoming election? For instance, CNN, Fox, ABC, NY Times, etc. (If it's several sources, please so-indicate in the space provided below. If you do not pay attention to the news coverage at all, please so-indicate below.) *
440	How much do you trust the primary source of news that you identified above? *
441	In the U.S., Is it legal for an employer to refuse to hire someone who has a MENTAL disability? *
442	Does depression qualifies as a "mental disability" under U.S. law? *
443	Are employers in the U.S. legally allowed to ask job-applicants whether they have a disability?
444	Are employers in the U.S. legally allowed to ask wheelchair-bound job-applicants whether they need special accommodations?
445	Are employers legally allowed to fire disabled employees who cannot perform their jobs as well as they are supposed to? *
446	Please rate your agreement or disagreement with this statement: "There is more discrimination against people who are recovering from drug or alcohol addiction than is publicly recognized." *
447	Please rate your agreement or disagreement with this statement: "There is more discrimination against people with mental disabilities than is publicly recognized." *
448	Do you think that it is illegal for an employer to refuse to hire someone because he or she served in the U.S. military? *
449	Please rate your level of agreement or disagreement with this statement: "In our society, everyone must look out for himself." *

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450	Please rate your level of agreement or disagreement with this statement: "It is of little use to unite with others and fight for one's goals in politics or in unions." *
451	In response to this question, please select number four. *
452	Please rate your level of agreement or disagreement with these statements: "The economy can run only if businessmen make good profits. That helps everyone in the end."
453	Please rate your level of agreement or disagreement with this statement: "Sexual harassment happens in the work place more often than most people think." *
454	There has been a lot of press coverage of the "sub-prime mortgage crisis." For the most part, would you say that you have been following this news coverage closely? *
455	Do you think that the next generation of Americans will be negatively affected by this crisis? *
456	Do you own your own home? *
457	To what extent do you help coworkers at work? *
458	To what extent would you estimate that you waste time when you are at work taking care of personal matters? *
459	If you were passed over for a promotion you thought you deserved, and you were sure that the reason you were passed over was because of your use of company-provided health benefits, what would you do? *
460	Do you think that your employer's motives and intentions are generally good? *
461	Is your current employer ALWAYS honest and truthful with you?
462	Do you agree or disagree that taking "sick days" even when not really sick, is a perfectly acceptable response to unfair treatment at work? *
463	Do you agree or disagree that employment is not about having a "relationship," but rather just a way to earn a living? *
464	To what extent do you think that many big companies do everything in their power to provide an opportunity for employees to voice their concerns in the workplace? *
465	To what extent do you feel that you are fairly compensated considering your responsibilities at work? *
466	To what extent do you feel that you are fairly compensated in view of the amount of experience you have? *
467	To what extent do you feel that you are fairly compensated for the amount of

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	effort you put forth at work?
468	Do you agree or disagree that at work, you are rewarded justly for the work you have done well? *
469	To what extent do you feel that you are am fairly compensated for the stresses and strains of your work? *
470	If you felt that you were not compensated lawfully what would you do, if anything? *
471	Have you ever done anything like what you described above? *
472	Which would you rather have on your side in the event that you noticed that your employer was not compensating you legally-- a union or a lawyer? *
473	What would you do (if anything) if your employer asked you to spy on your coworkers and report back to him?
474	Please rate how much you agree or disagree with this statement: "My current job is part of my career." *
475	How important is it to you that your employer increase your pay every year? *
476	How important is it to you that your employer pays you at least what you could get if you went to work for a competitor? *
477	How important is it to you that your employer pay you based entirely on your performance, without any regard to your seniority? *
478	How important is it to you that your employer trust you with company resources? *
479	How important is it to you that your employer provide you with reassurances that you could work there for as long as you wanted? *
480	Have you ever been drug-tested at work? *

* *signifies that a response is required to continue with the survey.*