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COMMERCIAL LAW

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Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other.[1]

A Survey article is hardly the traditional medium for moral exhortation. I want to speak, however, less with the academics than with the practicing lawyers and judges who argue and decide our society's day-to-day business disputes. My intention is to develop a perspective for thinking about those disputes that can change dramatically the way in which we draft contracts today and resolve difficulties under them tomorrow—a change which is radical only because our official view of the law of commerce departs so radically from how we believe human beings ought to treat each other.

My plea is this: we *must,* individually and as a profession, take responsibility for the kind of society we create. Now I realize that law is not the only way in which we shape our existence together. But it is the vineyard in which we toil and where, given our expertise, our efforts at putting plow to earth ought to yield the most productive results. What we have cultivated, however, should give us pause. Nowhere is the suffocating alienation of modern existence more apparent than in our commercial dealings. The amorality of the marketplace as a sphere of untrammeled personal aggrandizement, the harvest of a thoroughly self-interested individualism, has become the symbol of twentieth century life. Transported into the political arena the image has led us, paradoxically, within a powerful central state in which we are at every turn confronted with rules to guide our behavior, to recreate Hobbes' state of nature—an anarchy of the war of all against all.[2]

Our societal problems seem to us too complex, beyond human ken. We see no solutions, we find no leaders, we derive no guidance out of the summation of individual and institutional greeds that the model of the marketplace takes as the only navigation for our collective course. There is, however, surprising agreement across the political spectrum

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1. D. Hume, Treatise of Human Nature, Book III, Part II, § II (1739-40).

2. T. Hobbes, Leviathan, *reprinted in,* III The English Works of Thomas Hobbes 113-115 (W. Molesworth 1839-45).

about where we must look for answers. From the Reagan-rightist nostalgia for the days when our word was as good as our bond and our handshake as good as our word to the socialist-leftist yearning for fraternity, community, and solidarity, the quest is the same: for a recognition of our need and right to rely upon each other and of our mutual vulnerability and dependence. This view of human relationships—that our fellow participants in life deserve to be treated not as victims but as human beings, with respect and concern—is central to our moral philosophy, from Christ (and before) to Kant (and after). But what then can we make of the reflection of ourselves in the law of commerce, in whose mirror we are free to use and destroy others in the pursuit of our private ends, if only we have annointed ourselves with the magic of "contract?"

In last year's Survey article,[3] I tried to expose the conceptual blinders of the picture of "Freedom of Contract" that prevent us from seeing beyond this degraded and ignoble perception of ourselves. The picture, I argued, is an historical anachronism whose only connection with "freedom" is to deny it by supplying a justification for the enforcement of personal and institutional domination. The law makes a value choice when it elects to enforce the unbargained-for fine print of the written "contract" and it is only the mythology of free contract that masks this ugly fact. For the exercise of official power is no less offensive when it is enlisted to legitimate private domination than when it is employed directly for public oppression.

If we commercial lawyers are really interested in making a contribution through our legal work to the solution of our horrendous social problems, I suggest that wrecking the edifice of "Freedom of Contract" is a good place to start. This unworthy construct is at odds not only with our most basic legal precepts, even in commercial law, but also with commendable motivations of the actual participants in the marketplace. My experience has been, and there is empirical evidence for generalization,[4] that business people are more prone than the lawyers who advise them to recognize the importance of seeing the other's point of view and to treat even the purely business relationship as one marked by a degree of mutual concern and awareness. Worse, this pull of the law toward a baser view of human interaction undermines any movement in the commercial community toward a fuller conception of social responsibility, as the law's whisper nags in the merchant's ear, "Go on. It's legal. Screw him."

We must begin by pondering the richness of our culture's view of human relationships and the destructive superficiality of the notion of the economic actor. As a result, we ought to gain a deeper perception of our

3. Johnson, *Commercial Law,* 13 N.M.L. Rev. 293 (1983).

4. McCaulay, *Non-Contractual Relations in Business: A Preliminary Study,* 28 Am. Soc. Rev. 55 (1963), *reprinted in,* D. Black, The Social Organization of Law 75 (1973).

clients' interests and correspondingly of what we mean by representing our clients zealously. For that ethical obligation need not require that we treat business transactions and disputes as occasions for taking advantage, as opportunities to victimize. Rather, our zeal can be contoured by the realization that there *is* a minimum of humane behavior we all have a right to expect from each other—a minimum which the law has recognized in such time-hallowed concepts as good faith, reasonableness, fairness, and conscience, but which we have allowed the picture of "Freedom of Contract" to obscure. We can pull down the edifice with a continual assault on the lie that we don't have a right to expect each other to act as moral human beings, that we are not obligated to recognize the legitimate demands of others that they be treated with respect.

There's my plea. Now, as good lawyers should, we ought to turn to the cases; so let me tell you a story.

I. FREEDOM OF CONTRACT

Phil and Lena Smith had tired of delivering milk *for* a distributor; they wanted to *become* a distributor. They paid a former wholesaler for Price's Creameries $72,000 to purchase the distributorship and equipment; borrowed another $26,000 for working capital; and signed a distributorship agreement with the Creamery. Their version of the American dream crumbled, however, a bare six months later when Price's terminated the agreement. Practically, the Smiths faced financial ruin; legally their trouble was a clause in the distributorship agreement which permitted either party to terminate for any reason. Their response became *Smith v. Price's Creameries*.[5] Because of the clause, they didn't get past summary judgment.

The focus of the Smiths' unsuccessful argument, and the occasion for a ringing judicial defense of freedom of contract, was the unconscionability of the termination clause and Price's lack of good faith in acting under it. The Smiths contended that the termination clause was unconscionable and therefore void under Article Two of the Uniform Commercial Code[6] because during the negotiation of the agreement, Price's representative assured them that the distributorship was theirs indefinitely so long as they performed satisfactorily. Even without the assurance, they added, the clause was still unconscionable because it disproportionately allocated risks between the parties.

5. 98 N.M. 541, 650 P.2d 825 (1982).

6. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."
N.M. Stat. Ann. § 55-2-302(1) (1978).

The court was unsympathetic: absent fraud, mistake, or illegality, a contract "negotiated at arm's length" is conscionable even though it results in a "hard bargain or subject[s] a party to exposure of substantial risk."[7] The dairy's alleged misrepresentation during negotiation wasn't fraud because it was plainly contradicted by the written termination clause, the court averred; and the negotiation was at arm's length because the Smiths were able to take care of themselves. The clause was plainly worded, observed the court, and the Smiths had plenty of time to review the contract or hire a lawyer to do it for them. Nevertheless, they didn't try to bargain about *any* of Price's standard terms. Interestingly, the Smiths' concession that they had noticed the termination clause before signing the contract (although they asserted "surprise in ascertaining [its] specific language and far reaching consequences")[8] wasn't crucial for the court. The Smiths had a duty to read the contract, whether they had or not, and were thus "presumed to know the terms of the agreement, and to have agreed to each of its provisions" anyway.[9]

In the court's view then, the obligation of conscience turns out to be nothing more than a chimera. The party who drafts the contract not only gets the benefit of the fictionalized assent of the other to all that the writing contains; that "assent" also is binding and unassailable if it has not been rushed. Merely by allowing the other the opportunity to hire an attorney, the drafter is empowered both to include any terms *whatsoever* in the writing and to make contradictory oral promises with impunity. That, to say the least, is a bizarre notion of conscience.

A similar fate awaited the Smiths' second contention: that summary judgment was inappropriate because Article Two imposes an obligation of good faith in every contract,[10] raising a factual issue of the good faith of Price's termination. Effectively reading the good faith provision out of the Code, the court held that Price's motivation and justification for terminating the agreement were "immaterial" because the contract allowed termination "for any reason."[11] To demand that defendant act in good faith, the court reasoned, would require construction of the clause contrary to the plain wording of the agreement in violation of the principle of freedom of contract.[12]

The court's opinion is elliptical enough to leave plenty of hiding places for legal snipers. How could the court have decided that the agreement was at arm's length, and thus necessarily conscionable, without any

7. 98 N.M. at 545, 650 P.2d at 829.

8. *Id.* at 544, 650 P.2d at 828.

9. *Id.* at 545, 650 P.2d at 829.

10. N.M. Stat. Ann. § 55-1-203 (1978): "Every contract or duty within this act . . . imposes an obligation of good faith in its performance or enforcement."

11. 98 N.M. at 546, 650 P.2d at 830.

12. *Id.*

attention to the relative bargaining strength of the parties or to the availability of distributorships from other dairies without the harsh termination provision required by Price's (thus giving the Smiths a true option to "take it or leave it")?[13] How could the court have concluded solely from an examination of the procedural regularity of the transaction that the termination clause was conscionable, without an inquiry into whether the term was nevertheless so "one-sided" and "oppressive" as to be fatally objectionable?[14] How could the court have ignored that the Code explicitly prohibits a waiver of the good faith obligation attached to every Article Two contract?[15] How could the court consequently have ignored that contract terms implied by law, like the obligation of good faith, often supercede the parties' agreed terms, and that such obligations normally are implied precisely because the law chooses to *limit* the freedom of contract? Alternatively, if the court's premise was that the obligation of good faith applies only to the "performance or enforcement" of contracts,[16] why is there no argument for the dubious proposition that exercise of a termination right is neither?[17] Even if the good faith obligation of the Code were insufficient to carry the day for the Smiths, either because it does not extend to termination of contracts or because it is limited to mere honesty and reasonable commercial standards,[18] why is there no discussion of common law principles of fairness and good faith available to supplement the Code's provisions?[19] Indeed, why is Article Two even applicable to a dispute that doesn't concern a transaction in goods?[20]

The pervasive vulnerability of the court's argument, however, merely confirms the pointlessness of doctrinal sniping, and suggests that only a frontal assault has any hope of dispelling the myth of "Freedom of Contract." For so long as the court feels that it is protecting liberty by enforcing the sanctity of the written document, even the most agile legal maneuvers within the theater that the court has chosen will fail to inject the values of fairness and community into the contractual setting.

Once the myth is exposed as an utter falsification of reality, which

13. *See Lynch v. Santa Fe Nat'l Bank*, 97 N.M. 554, 627 P.2d 1247 (Ct. App.), *cert. denied*, June 30, 1981 (No. 4900), discussed in Johnson, *supra* note 3, at 294-301.

14. N.M. Stat. Ann. § 55-2-302, official comment 1 (1978).

15. *Id.* § 55-1-102 (1978).

16. *See supra* note 10.

17. *Compare* Restatement (Second) of Contracts § 205 comment e (1981) (good faith in the "performance and enforcement" of contracts prohibits abuse of the power to terminate) *with* Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Virginia L. Rev. 195, 252 (1968) (such a reading of the statutory language is questionable).

18. N.M. Stat. Ann. §§ 55-1-201(19) ("'Good faith' means honesty in fact in the conduct or transaction concerned.") and 55-2-103(1)(b) (1978) ("'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.")

19. *Id.* § 55-1-103 (1978): "Unless displaced by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions."

20. *Id.* § 55-2-102 (1978): "this article applies to transactions in goods. . . ."

bestows its mantle of protection not upon liberty and justice but upon domination and the regressive redistribution of wealth and resources to the more powerful,[21] our imagination loses its shackles. We have before us the opportunity for a fresh start, to think anew how the law can best protect our liberty and our humanity. In last year's Survey article, I suggested that our court of appeals had begun to chart the new direction in its disregard of the fine print of an insurance contract.[22] Unbargained-for form clauses are a product of mutual assent and are thus enforceable, the court of appeals reasoned, only if they satisfy the reasonable expectations of the non-drafting party. That perspective, which I argued cannot logically or practically be confined to the realm of insurance contracts,[23] clearly stakes out for the judiciary a much broader role than the minimalist function of the court as mere parser of the written word. The role is thoroughly traditional, however, in its insistence that mutual assent is the heart of contract law. It only beckons the deviationist away from a fixation upon the importance of a signature on a piece of paper, and back to the original insight that the writing is *not* the agreement but merely some evidence of the agreement.[24]

Phil and Lena Smith's situation, however, now becomes potentially troubling, for they conceded that they read the termination clause. Didn't they *decide* after reading it to take the risk of an arbitrary termination? And because they freely elected to accept the peril, how can the law respect their dignity and autonomy except by holding them responsible for their foolishness? The answers to those last questions appear deceptively clear because they arise within, and take their meaning from, the myth of "Freedom of Contract"—a myth whose stage is peopled by self-interested economic atoms, devoid of social duty to each other. These actors, who like Wild Bill Hickok must sit forever with their backs to the wall to avoid surprise from behind, have only themselves to blame if their assassins find them seated elsewhere. But is there really no richer conception of "freedom" to which we can aspire?

Phil and Lena Smith may have had a different notion. Ponder this: how could they possibly assert that they read the perfectly understandable termination clause but were surprised by its "far reaching consequences?" One explanation of why the Smiths might have understood but yet not understood is that they may not have realized that they were really empowering the dairy to terminate "for any reason" because, they claimed, Price's had assured them that it wouldn't. Here the court's admonition

21. *See* Johnson, *supra* note 3, at 301.

22. *Id.* at 304-08, discussing Stock v. ADCO General Corp., 96 N.M. 544, 632 P.2d 1182 (Ct. App.), *cert. denied*, 96 N.M. 543, 632 P.2d 1181 (1981).

23. *See* Johnson, *supra* note 3, at 306-07.

24. The insight is repeatedly proclaimed in the Code itself. *See, e.g.*, N.M. Stat. Ann. §§ 55-2-204, 55-2-207, 55-2-316, 55-2-719 (1978).

amounts not only to "Pay attention to unforeseen eventualities that you had no call to think about;" but also "Pay attention to those that you had good reason *not* to think about!" "[I]n the face of the clear wording of . . . the termination clause," the court says, "the oral statement of Price's made prior to execution of the agreement cannot be deemed to constitute fraud or misrepresentation."[25] The court doesn't say why, but its implicit suggestion is that the Smiths' reliance on the oral representation couldn't have been reasonable in light of the written clause. The utterly unfounded assumption of this position is that people read and understand and take the writing as the "agreement," wholly apart from the words and behavior of the other party. The practical and doctrinal effect of the position is to supply an unfettered license for pre-contractual deception, if only the lies are contradicted by language embedded somewhere in the written document.

Second, and I think most significantly, even had the Smiths both paid attention to what they read and ignored what they were told, perhaps they didn't "understand" because it just never entered their heads that the clause really *meant* what the dairy claimed, and the court held, it said: that they could be ruined at Price's absolute whim. We might imagine the Smiths saying in retrospect: "But we didn't dream that 'for any reason' meant 'for *any* reason'—that Price's could be so ruthless as to terminate us unless we *did* something to deserve it." Of course the Smiths *may* have done something to deserve it; they may have been lousy distributors whom Price's had very good reason to terminate. So Price's may not have been ruthless at all. The point is that we don't learn whether they were or not because that is, in the court's view, irrelevant. It upheld the summary judgment because as a matter of law, they had a *right* to be ruthless.

Here we arrive at the heart of the issue: our court and the Smiths have radically conflicting pictures of the nature of human relationships in the business world. In the court's view, people who step into the sphere of commerce become gamblers,[26] motivated solely by their own self-interest and burdened by no social duty to take into account the interests of others. For the Smiths, however, human beings are not, simply by virtue of participation in commerce, stripped of their humanity. Because the pursuit of our economic interests occurs within a larger framework of basic decency and fairness, we expect that those with whom we deal will not act in flagrant disregard of our concerns. Not only can we trust others to do what they say; we *understand* what they have said only within this context of mutual vulnerability and respect. The written clause can thus

25. 98 N.M. at 544, 650 P.2d at 828.

26. The analogy is Roberto Unger's, and I am indebted to him for far more. His thoughts were the inspiration for many of mine in this article. *See* Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 563, 616-49 (1983).

supply "agreement" only if the court has already assumed a particular model of human relationships, for what has been assented to depends on the social context and cannot define it.

The Smiths have truly assented to the tyranny of the term only *if*, and not *because*, they are gamblers. Whether they are—the normative choice of the social context—is an unavoidable assumption that the *court* must make. Consequently the law, and not the parties, must take full responsibility for the stark vision of human nature with which the Smiths find themselves imbued; in the court's view, they took the risk, gambling that Price's would act decently—reasonably, in good faith and good conscience—and they lost. The law, therefore, adopts the unseemly role of exercising the power of the state to protect the party who defeats these thoroughly laudable *human* expectations.

Once we recognize that there is a choice to be made, however, the law is no longer *forced* to demean us. It *can* take good faith, fairness, reasonability and conscience as *the* model of human relationships in the marketplace as in all other contexts of our lives (for the major part of our moral discourse involves assessing blame and responsibility for the failure to take the concerns of others into account). And it *can* simply assert that this model cannot be waived: that the ethics of commerce are, quite simply, those of human relations generally.

This assumption on moral grounds is certainly no less respectable than the assumption of the ethics of cutthroat self-interest, which is in fact the choice that the court has made. But even on doctrinal grounds, it reflects far better the wisdom of our legal heritage. The judiciary's abdication of its role as the voice of fairness in the market place, and the corresponding disappearance of notions of social duty from this sphere of human intercourse, is a relatively recent phenomenon.[27] A response to nineteenth century *laissez-faire* liberalism, constriction of the law's function to mere implementation of the will of individuals was a dramatic schism with the then-traditional view that contractual liability was based on community-rooted values of fairness. Earlier jurisprudence could not escape the imperative of normative choice because it saw the binding nature of contract as a creation of law rather than of individual will. Courts were forced, consciously and explicitly, to define the underlying social background against which agreements were to be understood and enforced.

The history of the "new" role of law in contract has been the progressive diminution of the enclave that nineteenth century courts attempted to stake out for the untrammeled exercise of individual will. That radical picture of the moral emptiness of human nature and social relations

27. The following historical and doctrinal synopsis draws heavily upon the work of P. Atiyah, The Rise and Fall of Freedom of Contract (1979); G. Gilmore, The Death of Contract (1974); L. Friedman, Contract Law in America (1965); M. Horowitz, the Transformation of American Law, 1780-1860 (1977); and Unger, *supra* note 26.

always clashed with the criterion of reasonableness that formed the heart of tort law and from which contractual liability (in the form of assumpsit) grew. Nor was "Freedom of Contract" ever able to bring within its domain whole classes of agreements—familial and other non-economic arrangements, money lending, insurance, trusts—which kept at their core the older visions of community-based sources of social duty. Neither could it prevent the successive flight, in the face of the realities of the industrial revolution, of most of its remaining subject matter back into the realm from which it had come. One by one, legislatures and courts themselves carved out huge chunks of contract law—the law of corporations, business regulation, antitrust, labor relations, consumer protection, social welfare redistributions—and reintroduced into them the world of social responsibility. Finally, even the now-eviscerated corpus of private unregulated economic transactions that contract law could still call its own caved to continual assaults in the name of constructive and implied contracts, of restitution and reliance: compulsory obligations all, fashioned out of the law's sense of fairness with utter disregard for the will of the parties.

All that remained to close the circle around the aberration of "Freedom of Contract" was the official proclamation of what Grant Gilmore unofficially had announced as the *The Death of Contract*.[28] It came, for those who would hear, in the Uniform Commercial Code, a document whose fundamental insight is that the commercial world does in fact, and *ought* to, see its participants as human beings and not as a procession of victims and victimizers. The moral background against which all contracting is conducted, the Code announces, is one of good faith, conscience and reason; and because it is *the background* and thus the *unstated* context against which all commercial agreements must be read and understood, it may not be waived.[29]

Because the Code was a product of compromise, its call to social responsibility is not uniformly as unmuted as it is, for instance, in the open and unrestricted invitation of the unconscionability provision,[30] or in the emasculation of liquidated damages clauses in the interest of fairness.[31] The Code's duty of good faith, by contrast, requires mere honesty

28. *See* Gilmore, *supra* note 27.

29. N.M. Stat. Ann. § 55-1-102 (1978).

30. See *supra* note 6 for the text of the unconscionability provision.

31. Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

N.M. Stat. Ann. § 55-2-718(1) (1978); Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 Duke L.J. 465, 511-13, has correctly suggested that this provision supplies a suitable analogy for dealing with the fairness of termination clauses: they ought to be enforceable only if the conditions creating a right to terminate bear a reasonable relationship to the risks and benefits of the agreement.

(but, for the merchant, also reasonable and fair commercial practices).[32] But courts which have perceived that the moral background ought to incorporate more than mere honesty,[33] and the drafters of the new contracts Restatement who have imposed the duty of "good faith *and* fair dealing"[34] to prohibit all conduct that violates "community standards of decency, fairness or reasonableness,"[35] have had no trouble mining the common law to take the Code's insight to its conclusion. What we expect of human relationships in all other spheres of life, they have said, does not suddenly disappear when money is involved; here too we must take into account the interests of others and the effects of our actions upon them. Our supreme court, too, has at times shared that insight. Barely a year ago, it refused to allow a lessor to withhold consent to a sublease arbitrarily because the lease was "governed by general contract principles of good faith and commercial reasonableness. . . . New Mexico law has consistently required fairness, justice and right dealing in all commercial practices and transactions."[36]

So what I have said amounts to this. The court's search for consistency in its quest for justice is doomed—and worse, the court is made the standard bearer of *in*justice—by the seductiveness of a conceptual framework whose most remarkable feature is its testimony to the awesome power of myth over the human imagination. How *can* it continue to hold us so tightly within the orbit of its empty shell—its substance gone, its justification in tatters, its plausibility discredited and rejected by the very body of doctrine in which its ghost plays so prominent a role? And yet it pesters us: "The law *cannot* be an arbiter of morals. We must be free to *choose* our moral standards, to define for ourselves what is 'fair.'"

The Code and the Restatement and our own court at times—and in fact *all* of our law before and since this perverse nineteenth century aberration—reply: the law cannot *avoid* it. The problem of normative choice only arises when what the parties have chosen is itself called into question by competing visions of the moral and social background of their relationship. Then the court has no alternative but to act as moral arbiter. For if what we do and say has meaning only in context (an insight that is *the* conceptual revolution of the twentieth century, sweeping before it classical formalism in whatever guise—science, music, art, philosophy and, of course, law) then an agreement makes no sense torn from its place within our larger and unstated understandings about our "forms of

32. *See supra* note 18.

33. See Summers, *supra* note 17, for a thorough survey of the great depth courts have found in the common law obligation of good faith.

34. Restatement (Second) of Contracts § 205 (1981) (emphasis added).

35. *Id.* comment a.

36. Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 241, 638 P.2d 1084, 1086 (1982).

life."[37] This moral and social background of human relationships informs what we conceive of ourselves as doing, allowing us to decide *some* things without having to decide *all* things anew each time we act or speak. More concretely, the parties to a contract don't *define* "fairness" by their words, but rather their words are intelligible only within a context of moral and social values about human behavior.

If this is so, we lawyers and judges are, with our clients and litigants, engaged in the continual process of defining and refining, of creating, the world in which we wish to live. We *do* choose the ways in which we view ourselves and others, *not* through our "choice" of contract language, but through our communal struggle for a deeper awareness of how we ought to live together. The continuing pretense that our enforcement of moral standards (or the lack of them) is justified by individual acts of will merely provides us with an excuse for evading the responsibility for what we, collectively as a profession and an institution, have wrought. It is only this pretense that rationalizes the law's ignoble role as protector of the tyrant, enforcing the crime because the victim unwittingly trusted her fellow human being with the weapon.

II. THE QUEST FOR COMMUNITY

"I feel the air of other planets,"[38] sings Schoenberg's soprano as she opens the last movement of the Second Quartet, heralding music's liberation from the constraints of classical tonality. We, too, breathe new air when we step from the oppressive domain of "Freedom of Contract" into realms animated by a radically different vision of social existence. Intriguingly, we can make our interplanetary voyage without leaving home, for both within the area of law we call "commercial," and within our courts' decisions in that area during this Survey year, the alternative vision is thriving—in the law of insurance and of business associations, both of which have roots in concepts of agency that pre-existed the reign of "Freedom of Contract" and never fell victim to its power.

A. Insurance

The coexistence of opposite pictures of the world—defying logic to become the mother of history, as Hegel taught us—is always a difficult predicament: in its presence we are snared by ambivalence and beyond each exit lies contradiction. Across the threshold between two worlds stands the decision in *Omni Aviation Managers, Inc. v. Buckley.*[39] Buckley

37. The phrase belongs to L. Wittingenstein, Philosophical Investigations, *e.g.*, ¶23 (3d ed. 1967).

38. S. George in A. Schoenberg, Second Quartet, Opus 10, Fourth Movement (1907-8).

39. 97 N.M. 477, 641 P.2d 508 (1982).

rented an airplane from Avcor, wrecked it, and paid the deductible to Avcor on its insurance. Omni, Avcor's insurer, paid Avcor the remainder of the loss. As Avcor's subrogee, it then sued Buckley for reimbursement, relying on a general indemnification clause in Avcor's standard form rental agreement, which Buckley had signed. Buckley, however, took refuge in the immediately preceding clause, discovering that he had only agreed to pay for any loss "not covered by insurance." That was not enough, decided the trial court, to overcome the more general provision by which Buckley had agreed to indemnify Avcor against "all loss . . . in connection with the foregoing contract," and so gave judgment for Omni.

The supreme court reversed, but it had to maneuver through a minefield to get there. First, the court observed, this transaction was a bailment, and clauses exculpating a bailee from liability for her own negligence are strictly construed; they will not be enforced if there is *any* other possible interpretation. Given two contradictory clauses here, however, the exculpation didn't seem so clear at all. But, said the court, that rule is meant to protect the bailor from the *bailee's* overreaching, and doesn't serve any purpose where, as here, the *bailor* (Avcor) prepared the contract. Accordingly, the court concluded, "a relaxation of the strict construction rule here would advance the goals of freedom of contract."[40]

Once the court had declared the traditional bailment rule inapplicable, however, it had left its own analogous rule governing exculpatory clauses in realty leases: the clauses will be enforced, but only if they are express and specific.[41] The trouble, of course, is that there is nothing very express and specific about a clause that can be interpreted as exculpatory only by implication from Buckley's promise to pay the deductible amount, an implication that is contradicted by the all-inclusive indemnity of the very next paragraph of the contract! Undismayed, the court dug deeper. The contradiction makes the contract ambiguous, so extrinsic evidence is admissible to explain it. After all this effort, unfortunately, there was no extrinsic evidence, but the court had saved its ace: ambiguities are construed against the drafter who, without evidence to support its interpretation, loses. And this apparently is so even though the rule of construction must perform the alchemy of transforming ambiguous clauses, unsupported by extrinsic evidence, into express and specific announcements of exculpation.

You know me well enough by now to deduce that I am satisfied with the *result* of the construction-against-drafter canon because it is one formalistic way the court can come to the aid of the victim of the standard contract. In the court's justification of that result, however, all that really

40. *Id.* at 480-81, 641 P.2d at 511-12.

41. Acquisto v. Joe R. Hahn Enter., Inc., 95 N.M. 193, 619 P.2d 1237 (1980).

happened in several pages of attenuated discussion is that one canon of construction (for bailments) was replaced with another (for contracts at large). The opinion is absolutely silent on the only matter of any consequence in the case, and that is *why* Omni, rather than Buckley, ought to suffer from poorly drafted clauses to which neither party to the contract paid any attention until the dispute arose.

The reason is certainly *not* "Freedom of Contract." Here the court is snared by ambivalence, relaxing the strict construction rule of bailments to promote that freedom, and then blithely embracing merely another form of that rule which just as surely limits the "freedom" the court sought to protect. Further, whatever purpose the rule is supposed to serve, if it can extract an "express and specific" agreement out of these two clauses, "strict construction" has become so malleable that it collapses as a reliable guide for decision. The court in *Price's,* for instance, could just as easily have construed the termination clause against the dairy that drafted it because the clause ambiguously said *nothing* about whether the duty of good faith was waived. Why then did the court call the rule into service to limit "Freedom of Contract" here, but not there?

Because the rule of construction masks, rather than reveals, the ground of decision, the court gives us no answer. If, however, we shift our gaze from the writing to what Buckley and Avcor might reasonably have understood in the *absence* of any discussion or actual agreement about insurance arrangements—to the relationship of the parties—an answer emerges. For if Avcor neither asked Buckley about his insurance nor required that he have any, it is incomprehensible that they could have assumed anything *other than* that Avcor's insurance would cover any loss. Their reasonable expectations could only have been that Avcor offered *insured* airplanes for rent and that the rental fee bought not only the use of the plane but insurance to go along with it. The radical departure from the model of "Freedom of Contract," and its inability to explain the decision here, is remarkable. It is simply impossible to understand *Omni* from the viewpoint of the court in *Price's,* for if Buckley were presumed to have read and understood the document, he at least should have been put on guard by the general indemnity clause. Perhaps he could be further presumed to have been only confused, but that hardly explains either why he had no presumed duty to get clear on the matter nor how an "express and specific" agreement can materialize out of the presumed confusion. And even if these ragged edges could be tidied up (by more presumptions?) it is difficult to see the value in it. The formal explanation derived from the writing has become so fictionalized that it illuminates nothing; the court has either blinded itself to reality or has declined to tell us what it sees there.

A more forthright disclosure, however, appears in the Survey year's

other two important insurance decisions, in which the court's focus is explicitly upon the fairness of the transaction rather than upon the "freedom" of the insured to be bound by unbargained standard terms. In *Lopez v. Foundation Reserve Insurance Co., Inc.*,[42] Lopez and a passenger in his car were killed in an accident with an uninsured motorist. Although his uninsured motorist coverage with Foundation was expressly limited by the policy to the $15,000 legal minimum required by state law,[43] Lopez' wife claimed twice that amount. She argued that: (1) Lopez had insured two cars under the policy, paying uninsured motorist premiums on each; (2) unlike other automobile coverage, uninsured motorist insurance protects the insured from uninsured motorists under any circumstances—even while a pedestrian or a passenger in another's car—and is not conditioned upon the involvement of an insured vehicle; (3) Lopez consequently would have obtained exactly the same protection by purchasing uninsured motorist coverage on only one of their cars; and therefore (4) because he had paid twice for the same protection, his beneficiary ought to be able to collect up to the limit under *each* policy. The trial court didn't buy it, giving summary judgment for Foundation, but the supreme court did; they reversed.

The opinion begins just where *Omni* ended: the limitations provision was ambiguous, because it didn't mention the effect of multiple premiums, and thus should be "construed against the insurance company which drafted the clause."[44] The existence of an ambiguity meant that summary judgment was inappropriate, because extrinsic evidence would be necessary to interpret what the clause meant. The court discovered, however, that the parties had stipulated all the facts necessary to construe the clause. Further, not only did the court have plenty of facts; it also had plenty of reason to decide what the parties had agreed to without *ever* mentioning the language of the policy again!

Because the written document dropped out of view, so did the "ambiguity" and the rule of strict construction: both appear in the opening section of the opinion, solely to justify the reversal of summary judgment, and are not heard from again. Instead of trying to decipher the writing as it had in *Omni*, the court here dramatically shifted its perspective to (1) how Lopez and Foundation reasonably could have understood their relationship; and (2) the "fairness" of the relationship itself. Lopez ought to be able to "stack" the two coverages for a doubled limitation, the court first said, because "it fulfills the reasonable expectations of the insured."[45] The nature of those expectations are suggested by the court's second

42. 98 N.M. 166, 646 P.2d 1230 (1982).
43. N.M. Stat. Ann. § 66-5-222 (1978).
44. 98 N.M. at 168, 646 P.2d at 1232.
45. *Id.* at 170, 646 P.2d at 1234.

rationale: "payment of two premiums entitles the insured to two recoveries . . . *[I]t is only fair* that the insured be permitted to stack the coverages for which he has paid."[46] Can you feel the air? We have escaped the powerful gravity of "Freedom of Contract." The court has conquered the compulsion it felt in *Omni* to use fictions to ignore the writing without appearing to do so, to reach a fair decision by pretending it was the handiwork of the parties. We have entered a different world where not only do reasonable expectations count more than documents, but fairness counts for all.

Keep breathing, now with the court of appeals in *Landin v. Yates*,[47] a case strikingly like *Omni* in the presence of both a legal rule and a policy clause that the insured had to overcome. The legal rule is that a release from liability operates as accord and satisfaction: one who secures a release in settlement of a claim is estopped from then suing the person who released.[48] The policy clause was that the insurer could "settle any claim or suit as it deems appropriate." Landin's insurer, unbeknownst to Landin, had obtained a release from Yates in settlement of a claim arising from a car accident. In Landin's subsequent suit against Yates for damages, the trial court gave Yates summary judgment because the clause authorized the insurer to settle, and when Yates released Landin and her insurer, he also was released. The court of appeals disagreed, reversed, and held that despite the broad language of the policy provision, the insurer did not have authority to procure a release without the insured's consent.

No one, of course, argued for "Freedom of Contract" here, for the battle was over *which* abridgment of that "freedom" should prevail: whether, in the interest of fairness, the court ought to protect Yates from being sandbagged by imposing upon Landin a compulsory requirement of estoppel, or whether it ought to protect Landin from her insurer by imposing an equally compulsory requirement of consent. The court chose the second alternative. Because the insurance relationship encompasses the extra-contractual duty that the insurer obtain the insured's consent, the court held, any settlement and release "is not effective unless the insured expressly consented."[49] Were Landin's consent to settlement not required, the court reasoned, the insurer could serve "its own interest to the detriment of the insured," in violation of its "fiduciary duty" arising from the insurance relationship.[50]

The rationale reveals first how far we have come from the world of

46. *Id.* at 171, 646 P.2d at 1235 (emphasis added).
47. 98 N.M. 591, 651 P.2d 1026 (Ct. App.), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982).
48. Harrison v. Lucero, 86 N.M. 581, 525 P.2d 941 (Ct. App. 1974).
49. 98 N.M. at 592, 651 P.2d at 1027.
50. *Id.*

"Freedom of Contract." There is no pretense that the insurer voluntarily assumes the duty through an exercise of will; it is, rather, an attribute imposed by law of participation in a certain social context. Second, the rationale presents us with a blended model of social obligation, for the duty is not in the strictest sense wholly "fiduciary." The insurer, in the court's view, is *not* a trustee, required to act only in undivided loyalty to and for the exclusive interest of the beneficiary,[51] but instead is expected to accommodate both its own and the insured's interests. The extent of the insurer's social duty is that it "must in good faith *be responsive to* the insured's interest. . . . The insurer must make a full, fair and prompt disclosure to the insured of all facts which might affect the right and interest of the insured in the settlement," and then await the insured's informed decision about whether to consent.[52] The court, however, does not intimate that the insurer has any duty in all circumstances to *favor* the insured's interests over its own. Given that each has interests in the relationship potentially inconsistent with those of the other, what is required is not sacrifice of one's own but recognition of the other's; in decisions which affect both, they must proceed in concert.

B. Business Associations[53]

The vision of extra-contractual social duty that underlies the law of business associations is remarkably similar in both concept and consequences to the dynamic at work in the law of insurance. In each area, the court discovers a source of legal obligation derived not from the wills of the participants but from the bare fact that they have undertaken a certain relationship with each other. And in each, the court perceives emanating from that social context, the duties of fairness, reasonableness, and good faith. The resemblance is apparent in two opinions of the court of appeals this year: *Dilaconi v. New Cal Corp.*,[54] and *C.B. & T. Co. v. Hefner*.[55] The former concerned the duties of corporate directors and controlling shareholders, the latter the duties of partners.

The court in *Dilaconi* affirmed a judgment against the minority shareholders in a closely held corporation who had challenged as improper self-dealing a number of transactions between the corporation and its controlling family whose members were the corporation's officers, directors, and majority shareholders. The trial court found that all the

51. Restatement (Second) of Trusts § 170(1) (1959).

52. 98 N.M. at 593, 651 P.2d at 1028 (emphasis added).

53. The New Mexico Legislature this Survey year overhauled the state corporation statutes to conform with the 1980 version of the Model Business Corporation Act. Because those changes will be the subject of a subsequent article, this article will not discuss them.

54. 97 N.M. 782, 643 P.2d 1234 (Ct. App. 1982).

55. 98 N.M. 594, 651 P.2d 1029 (Ct. App.), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982).

disputed transactions were "within the bounds of discretion, and sufficiently in the interests of the corporation that they should not be disturbed by the Court."[56] On appeal the minority shareholders argued that the transactions weren't in the best interests of the corporation and that even if they were, the additional benefit to the majority breached the *non*-discretionary fiduciary duty of directors and majority shareholders to the corporation.

That duty exists, the court agreed, but its "essence" is "good faith" and "fairness."[57] A director (or majority shareholder) consequently does have some "discretion" in dealing with the corporation: she too may profit if she in good faith acted for what she "honestly believed to be the best interests of the corporation" and if the transaction was in fact "reasonable and advantageous to the corporation."[58] Both of those issues, the court of appeals concluded, are factual matters that were resolved against the minority on the basis of sufficient evidence. A *potential* conflict of interest, then, is insufficient to invalidate a deal between a corporation and those who control it if it is in fact marked by both good faith *and* fairness. That rule is consistent with the prevailing view in other jurisdictions[59] and, interestingly, with the court of appeals' description in *Landin* of the "fiduciary" relationship of the insurer and insured. Directors, like insurers, may not seek private gain *at the expense* of their fellow participants in the enterprise; but both possess recognized and legitimate individual interests which they, unlike true trustees,[60] may pursue in concert with their "partners."

Of course neither a corporation and its directors nor an insurer and its insured are *legal* partners, but the analogy illuminates the sense of joint endeavor characterizing each of the relationships. Real partners *were* involved, however, in the second of these cases, *C.B. & T. Co. v. Hefner*. The plaintiff, trustee for the estate of a deceased partner in a liquor store, sold its decedent's interest to Hefner, a surviving partner. When the trustee later discovered that the partnership also owned an interest in an oil well, which had apparently been conveyed in the sale through failure to exclude it, the trust successfully sued for rescission of the contract. The court of appeals affirmed.

Although the trustee, prior to the sale, was clearly unaware of the partnership's interest in the well, a unilateral mistake just as clearly supplies no grounds for rescission of a contract.[61] Instead, the trial court

56. 97 N.M. at 784, 643 P.2d at 1236.
57. *Id.* at 788, 632 P.2d at 1240.
58. *Id.* (quoting Pepper v. Litton, 308 U.S. 295, 306 (1939)).
59. *See, e.g.*, H. Henn and J. Alexander, Laws of Corporations §§ 235-38 (3d ed. 1983).
60. Restatement (Second) of Trusts § 170 (1959).
61. 98 N.M. at 597, 651 P.2d at 1032.

concluded that Hefner's failure to inform the trust about the well breached his "fiduciary duty" as a partner of "full disclosure . . . good faith and fairness."[62] This extra-contractual obligation, however, is insufficient to justify rescission unless the trustee's ignorance was excusable: if the trustee *should* have known of the existence of the well, then the mistake was caused by its own failure to investigate, and the breach of duty became irrelevant.[63] Hefner thus argued that C.B. & T's failure to find out precisely what properties it had offered to sell was in itself gross negligence and, even worse, that the trustee would have discovered the oil interest if only it had made a detailed examination of its *own* files!

The trustee did have the property appraised, but the appraiser unfortunately missed the well too. In addition, the court observed, there were no other circumstances of the sale to alert the trustee to the partnership's interest. But if the seller had an affirmative duty to discover all that she reasonably could, as Hefner's precedent required,[64] the absence of a red flag hardly excuses ignorance of one's own files. Consequently, the court was forced to conclude that C.B. & T. simply had no duty to investigate because, the trial court had found the plaintiff "'did not view this transaction as . . . adversarial.'"[65] The court of appeals then took one last step: if that's how the plaintiff viewed it, that's how it was—this was "a *nonadversarial* transaction. . . ."[66]

The court did not claim that the law permits C.B. & T. to trust in Hefner's sense of fairness *because* Hefner was a fiduciary and thus had to protect his partner's interests, or *because* Hefner had superior bargaining power or had been guilty of fraud, or *because* of any other special exception that is normally called forth to justify a departure from the rule of "Freedom of Contract." No, the break is clean, direct, and unrationalized: the court has found a new way of seeing. The transaction is neither "at arm's length" *nor* "fiduciary," for the dichotomy has been conquered. The synthesis allows each party in a contractual relationship to pursue self-interest but demands that each take the other's interests into account. And *that* is the recognition of the value of community, of the *human* context.

We have now returned to the place of our beginning, for this is precisely the model of commercial relationships that explains why Phil and Lena Smith didn't comprehend that Price's termination clause meant what it said. They saw neither themselves nor the dairy as gamblers; like C.B. & T., they instead understood their transaction as a mutual enterprise, thoroughly grounded in a social context of good faith and fair dealing.

62. *Id.* at 600, 651 P.2d at 1035.
63. *Id.* at 599, 651 P.2d at 1034.
64. Sawyer v. Barton, 55 N.M. 479, 236 P.2d 77 (1951).
65. 98 N.M. at 599, 651 P.2d at 1034.
66. *Id.* (emphasis added).

Although the contracting parties each had their own distinct interests in *Price's* and *C.B. & T.*, those interests are "adversarial" not of necessity but only if a certain social background already has been presumed. Our journey, then, has acquainted us with a *range* of economic situations in which the law, and not the will of the parties, imposes social duties. The trustee's role demands submission of her interests to those of the beneficiary, but the joint nature of the undertaking in insurance, corporations, and partnerships permits the "fiduciary" there to pursue with her "partners" mutual (but not antagonistic) interests. Different still is the "non-adversarial" relationship in which the parties may act in conflicting self-interest, but only within the context of good faith and fairness that recognizes their mutual vulnerability and dependency. Common to all, however, is the realization that obligations arise from relationships: "out of the *common action*, that is, out of what is *done* . . . [and not] out of what is *said*, that is, out of the expressed intentions, or promises, of the parties."[67]

III. A NEW VISION

I propose now to put this alternative conception of commercial relationships to work. During the Survey year, our courts grappled with a number of recurrent, troublesome problems of contract law. The resulting opinions are often conclusory, the rationales formal and fictional, and the reasoning elliptical. As a doctrinal whole, the cases are loosely tied together by the underlying picture of "Freedom of Contract," but the court's inchoate discomfort with the arbitrariness and moral agnosticism of that view made impossible the articulation of a coherent sense of direction. This body of law, then, provides an ideal laboratory in which to experiment with the effects of a radical transformation in our analytical point of departure. Suppose we reject the asocial atomism of the nineteenth century marketplace as our fundamental assumption about social reality. Instead, we accept the vision of community and mutuality whose synthesis we traced in Section II: that contractual obligations arise from relationships in which promises play a part, and that those exercises of will can only be understood within the context of social duty ("fairness, justice, and right dealing," in the words of our court[68]), which the relationships impose. What then?

A. Contract Formation

The problem of contract modification has long bedeviled the common law. The difficulty typically arises like this: I agree to build your house

67. Atiyah, *supra* note 27, at 56.

68. Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 241, 638 P.2d 1084, 1086 (1982).

for a certain price but, subsequently, I encounter unforeseen difficulties and you agree to cover the additional expense. When I finish the job, you don't pay the increment as you had promised. The rule says you don't have to—because I didn't promise to do anything more than what I was already obligated to do (build your house). I have given no consideration for your additional promise, which is therefore unenforceable. A court that is sufficiently moved by my plight may, however, be persuaded to scramble for *some* semblance of an additional promise on my part so that it can hold you to your word.

This drama was played out, on just these facts, in the court of appeals decision in *Burt v. Horn,*[69] but with a twist: there was simply *no* evidence from which the court could find an additional promise by the builder to support the modification. What we need here, the court decided, is a presumption, and it found one imbedded in a statute which said written contracts "shall import a consideration in the same manner . . . as sealed instruments."[70] That takes the burden of proof off the builder, and because there was no evidence that he *hadn't* made an additional promise, the court enforced the modification.

The nineteenth century invention of the doctrine of consideration has fallen on hard times, both in the initial and modification stages of a transaction, from the judicial rediscovery of reliance and restitution as grounds for contract recovery. Predating the regime of "Freedom of Contract" and only temporarily eclipsed by it,[71] both theories of recovery are rooted in social duty. The obligations arise not from a mutual exercise of wills but from the unfairness of permitting one party to avoid any responsibility for encouraging trust and dependence in another (reliance) or to avoid paying for a benefit retained (restitution). Thus, no great leap is required to simply dispense with the necessity of consideration (and with the presumptions and other formal devices for finding it when it isn't there) when fairness demands. That is precisely how both the Uniform Commercial Code[72] and the new Restatement of Contracts[73] have solved the modification problem: fair modifications are enforceable without consideration, and unfair ones are unenforceable even with it.

The advantage of injecting the new vision into a case like *Burt* is enormous. The court's attention is consciously redirected to the equitable concerns which, I suggested, prompt its decision to apply an exemption rather than the rule in the first place, and upon which both the Code and Restatement formulations focus. As a result, the parties and the court

69. 97 N.M. 515, 641 P.2d 546 (Ct. App. 1982).
70. N.M. Stat. Ann. § 38-7-2 (1978).
71. *See generally* Atiyah, *supra* note 27.
72. N.M. Stat. Ann. § 55-2-209 and official comment 2 (1978).
73. Restatement (Second) of Contracts § 89 (1981).

will be forced to deliberate openly the *real* issue, rather than be encouraged to dissipate their energies in aimless quibbling about fundamentally irresolvable matters. For, like the interpretation of the language of a contract, the decision about *which* opaque fiction or other formalism (or *which* meaning of the fiction selected) ought to determine the outcome of the case requires a prior determination of the canon's purpose and its consequent applicability in *this* context. That unstated judgment, however, incorporates the very normative choice that the fiction was designed to avoid. Exposing it ought to enhance the quality of decision-making and, in the court's articulation of its underlying assumptions, the value of the decision as guiding precedent in later cases.

B. Contract Interpretation

A second perennial difficulty of contract law lies in the attempt to resolve variances between what parties have said and what they've signed. That, of course, was also *the* problem of *Smith v. Price's Creameries,* but the disarray of a conceptual system laden with contradictions is Hydra-headed. Its visage in *Clark v. Sideris*[74] is the parol evidence rule: "a source of considerable confusion,"[75] the court ruefully admits, but which on reflection bears an uncanny resemblance in *Clark* to the "no-fraud-when-a-writing-says-otherwise" rule of *Price's.*

The contract at issue in *Clark* was a concession arrangement between the State of New Mexico and Mr. Clark for the operation of a marina, lodge, and cabins at Elephant Butte Lake State Park. The resort was dilapidated, but the State Park and Recreation Division had grand plans. They had told the prior concessionaire, and promised Clark during negotiation for the agreement, that they would seek a $300,000 appropriation from the state to improve the run-down facilities. Although the Division didn't include that promise in its lengthy form contract, it afterwards repeatedly reaffirmed ("on numerous occasions")[76] its obligation to restore the resort. When the money was appropriated, however, the Division spent only half of what it had promised on Clark's facilities, using the rest for other unrelated improvements at the park. With much of the resort thus left unusable, Clark sued the state for breach of contract. Finding that the promised $300,000 expenditure was "the very inducement and basis for the signing of the concession agreement,"[77] the trial court concluded that the obligation was part of the contract and that the state had therefore breached. The supreme court reversed, holding that

74. 99 N.M. 209, 656 P.2d 872 (1982).
75. *Id.* at 212, 656 P.2d at 875.
76. *Id.*
77. *Id.*

the trial court shouldn't even have admitted into evidence testimony of the state's oral promises: the printed document's silence about the additional obligation was (1) unambiguous, requiring that the parties' agreement be derived *solely* from the writing; (2) contradicted by any other promise that spoke where the document didn't; and (3) sanctified by the document's merger clause, providing that the writing contained the parties' entire agreement.

The court's third rationale is a straightforward application of the doctrine of *Price's:* a contracting party may promise and misrepresent with wild abandon if only a contrary clause has been imbedded within the document. We of course have already thought at length about the deficiencies and alternatives to that point of view, and I might only add here two observations. First, the parol evidence rule, which originally was meant to better ascertain the intentions of the parties by excluding evidence of tentative agreements that were discarded and replaced by a final statement of obligations, has become a formalist device for ignoring those intentions. The document is now not *evidence* of the agreement, but the agreement itself. Second, the revisionism of that doctrinal transformation is explicitly recognized by the new contracts Restatement: a merger clause shouldn't be enforced merely because it appears in a document, but is effective only if the parties have truly assented to it.[78] And that is a matter that cannot be presumed from a signature but can only be inferred from a close examination of the parties' relationship, whether they have in fact, explicitly and together, decided to gamble on the four corners of the writing rather than to rely upon the entire context of their undertaking.

The court's other two renditions of the parol evidence rule, however, are even more disturbing. If a writing's silence about part of an agreement is in itself enough to vaporize the omitted obligation, the court has altogether given up its quest to discern the understanding of the parties. In its place appears the *conclusive* presumption that the document alone, even absent a formal merger clause, has said all there is to say. That result, however, is untenable even within the picture of "Freedom of Contract," for the court has not merely implemented the will of the parties; it has fashioned out of their silence a compulsory, implied-in-law merger clause where none existed. But the conversion of the parol evidence rule into a *source* of legal rights is not only doctrinally inconsistent; its creation of an impregnable fortress for the contract drafter is a systematic and morally indefensible preference for the powerful.

The rule appears in a different light, however, if we think of a contract relationship as meaningful only in the context of the more general social understandings that pervade it. From this angle, it is clear that the court

78. Restatement (Second) of Contracts § 210, comment b; § 216, illustration 3 (1981).

needs *all* the evidence it can gather about how the parties treated each other in order to understand their utterances and their writings, their words and their silences. It is equally clear that a document ought to be sacred only if *the parties* annointed it in fact rather than in form, as a way of telling a future court to ignore what it would otherwise appropriately consider. Here the parol evidence rule has a role to play, but in the limiting, not the typical, case—when *both* parties have clearly decided to cast their lots solely on the paper rather than also upon their relationship with a fellow human being.

The reservation of the rule for the case of the self-chosen gamblers underlies its formulation in both the Uniform Commercial Code[79] and the new contracts Restatement.[80] In each, a writing appears as just another piece of evidence of how the parties saw their transaction: proof of extraneous oral agreements is barred neither by the document's freedom from ambiguity;[81] nor by its silence;[82] nor even by its merger clause, unless the parties actually intended that the document be the last word on all matters between them.[83] In each, the commercial context of the relationship is specifically made part of the contract.[84] And the Restatement even makes explicit what the Code's focus on the parties' intentions implies: non-standard terms are "naturally omitted" by all standard form contracts, whose apparent finality consequently can *never* be used to gag the non-drafter's testimony about the additional promises.[85]

"I was dealing with fair people in a fair way,"[86] Clark had described his vision of the contractual relationship, failing to comprehend that the law could find those expectations so outrageous that they should be replaced with a thoroughly antithetical conception of human responsibilities. But Clark's vision is *not* outrageous. Its historical and social roots run far deeper than do those of its nineteenth century counterpoint,[87] and it has found here a modern voice in the Code and the Restatement. The humble parol evidence rule, casting into bright relief both the doctrinal inconsistency and the substantive injustice of its formalist profile, thus points the way out of the cave. The answer lies, it suggests, in a richer

79. N.M. Stat. Ann. § 55-2-202 (1978).

80. Restatement (Second) of Contracts §§ 209-18 (1981).

81. N.M. Stat. Ann. § 55-2-202 and official comment 1(c) (1978); Restatement (Second) of Contracts § 212, comment b (1981).

82. N.M. Stat. Ann. § 55-2-202, official comment 1(a) (1978); Restatement (Second) of Contracts § 210, comment a (1981).

83. N.M. Stat. Ann. § 55-2-202 (1978); Restatement (Second) of Contracts § 210, comment b; § 216, comment e (1981).

84. N.M. Stat. Ann. § 55-2-202(a) (1978); Restatement (Second) of Contracts §§ 220-23 (1981).

85. Restatement (Second) of Contracts § 216, comment d (1981).

86. 99 N.M. at 215, 656 P.2d at 878.

87. *See supra* text accompanying notes 27-29.

conception of the depth of social understandings that give the act of promising its meaning.

C. Contract Duties

The decay of the myth is even more striking in the anti-contractarian creation of implied warranties, whose duties *explicitly* arise not from individual wills but from social valuations. The decision to impose a compulsory obligation upon a contract implements a normative judgment about who *ought* to bear the risk of things going awry in a given transactional setting. That, of course, is precisely the choice that I have argued underlies *every* adjudication of a contract, and which is merely masked by the illusory neutrality of "Freedom of Contract." How then does it look when the problem is tackled directly?

In *State ex rel. Risk Management Division of Department of Finance & Administration v. Gathman-Matotan Architects and Planners, Inc.*,[88] New Mexico sought to shift the loss from the disastrous 1980 state penitentiary riot onto the architect who had designed the prison's remodeling plans. One of the improvements was the installation of a bay window in the prison's central control area. The rioting prisoners easily shattered the new glass and captured the control area, giving them the run of the prison. When the state sued, among its claims for negligence and breach of contract was a cause of action for breach of an implied warranty that the architect's plans were sufficient "to provide a control center adequate to serve as a central stronghold in the event of an inmate uprising."[89] The trial court dismissed the warranty action for failure to state a claim, and the state took an interlocutory appeal. The court of appeals affirmed, holding that an architect's plans do not carry an implied warranty that they are adequate for a specified purpose.

New Mexico had long recognized an implied contract warranty to use reasonable skill of the trade, but that standard required proof of negligence which the state hoped to avoid. The court argued, however, that the considerations that led to the development of implied warranties in the sale of goods (lack of privity between manufacturer and buyer, difficulty of proving negligence against a distant manufacturer using mass production techniques, and the better ability of the mass manufacturer to spread risks among its customers)[90] are not present in a contract for professional services, where the protection against negligence alone consequently is sufficient. Those considerations did indeed generate the implied warranty of merchantability against defects,[91] the contractual cousin of strict lia-

88. 98 N.M. 790, 653 P.2d 166 (Ct. App.), *cert. quashed*, 99 N.M. 47, 653 P.2d 878 (1982).
89. 98 N.M. at 792, 653 P.2d at 168.
90. *Id.* at 794, 653 P.2d at 170.
91. N.M. Stat. Ann. § 55-2-314 (1978).

bility in tort. But the analogy the state sought here was to the different warranty of fitness of goods for a particular purpose.[92] This obligation was born neither of the difficulty of recovery nor of the perceived fairness of redistribution of the loss from an aberrational defect, but of the need to protect the buyer who relies on the seller's skill and judgment to supply the right product for a particular job. The court thus distinguished the wrong warranty and left unrebutted the clear parallel of the fitness warranty with the state's reliance upon the architect to specify the appropriate kind of glass for the control center.

Although the court provided no additional rationale, it thrice cited as support but without explanation a Minnesota decision[93] that offers a different reason why the sale of goods is unlike a contract for professional services. Professionals deal in sciences rife with random, unmeasurable factors and pervaded with the inescapable possibility of error, the Minnesota court observed; we consequently may justifiably expect of professionals diligent "state-of-the-art design techniques," but we may not fairly expect the "perfect results" required by a warranty of fitness.[94] Thus, the Minnesota opinion concluded, "we do not think it just that architects should be forced to bear the same burden of liability for their products"[95] as are sellers and manufacturers of goods.

The "inexact science" rationale appears at first to provide little succor to the prison architect who had no "random factors" to struggle with, but merely needed to supply unbreakable glass. In the longer view, however, the Minnesota court (and the New Mexico court too, I suspect) was haunted by the specter of holding all professionals—doctors and lawyers, as well as architects—to a guarantee of overall results. Here the professional *is* quite different from the seller of goods in her ability to predict outcomes. A doctor prescribing medicine or a lawyer drafting a document is necessarily forced to guess about variables (an individual patient's reaction, a later court judgment) beyond her control. The seller who knows her product and the buyer's purpose, however, encounters a much narrower range of unknowns and accordingly has a more ministerial decision to make. Thus, although the "buyer" of goods *or* professional services may rely upon the skill and judgment of the "seller" to supply the appropriate "product," the two sorts of transactions are really quite different in what the buyer ought to be able to expect from them. The disparity in the ability to predict and control the future suggests that it is fair to see the extra-contractual duties in the two contexts differently. And *I* suggest, of course, that this kind of conscious elaboration of social un-

92. *Id.* at § 55-2-315.
93. City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978).
94. *Id.* at 424.
95. *Id.* at 425.

derstandings—the investigation of how we ought to relate to each other *here*, in this sphere—is merely the vivid display of the normative choices that more typically are submerged in the rhetoric of the myth.

It was rhetoric rather than reality, however, which dictated the supreme court's approach in *Deaton, Inc. v. Aeroglide Corp.*[96] to another sort of implied warranty problem. First, some background: once the decision has been made to create the social obligation through warranty, there remains the difficulty of whether, and how, that duty may be overridden by the parties' agreement. The Uniform Commercial Code's solution to this classic confrontation of the two value schemes whose outlines we've traced is a compromise. A seller may disclaim the implied warranties of merchantability and fitness for a particular purpose, but only if the disclaimer clause in a written contract is "conspicuous":[97] if a reasonable person "ought to have noticed it" or if it is in larger or contrasting type.[98] That answer is not a thoroughly happy one, although it does provide some protection against the surprise of the hidden disclaimer. The Code's blanket approval of the clauses, however, apparently leaves no room to examine, in a given context, the substantive fairness of allowing one party to require as a condition of doing business the abrogation of expectations that the law has recognized as justifiable. Without that opportunity, the recognition is hollow, the duty an illusion. The impregnability of the bold-face disclaimer becomes an unexplicable inconsistency within the Code's larger vision that contract is a matter of context, whose fundamental characteristics are always good faith and reasonableness.

The contradiction disappears, however, if we can escape the vestiges of "Freedom of Contract" that create it, and immerse ourselves instead in the Code's vision that a license to dominate is *not* the meaning of liberty. Then the requirement of conspicuousness becomes the beginning, not the end, of the inquiry, for even a conspicuous disclaimer ought to be unenforceable unless it actually comports with the parties' intentions—how they understood what they have "promised" against the entire socially-created background of their relationship. Here the Code is unequivocal: part of that background, as we've observed, is *conscience*, and this justifiable expectation creates a duty that may *not* be disclaimed.[99] The overriding social obligation thus resolves the contradiction that the purely procedural limitation on disclaimers had seemed to create. It supplies a means to isolate those circumstances in which the disclaimer ought to be enforced because the parties have explicitly decided, together, to eviscerate their normal expectations with a considered gamble. So when

96. 99 N.M. 253, 657 P.2d 109 (1982).
97. N.M. Stat. Ann. § 55-2-316(2) (1978).
98. *Id.* at § 55-1-201(10).
99. *See id.* §§ 55-2-302, 55-1-102 (1978) (emphasis added).

the Massachusetts Legislature decided that warranty disclaimers are never enforceable in consumer contracts,[100] where bargaining over warranties simply never occurs; and when the California judiciary added that neither are they enforceable even in commercial contracts unless the disclaimers have really and fairly been bargained;[101] both have truly seen through the lens of the new vision the Code supplies.

In *Deaton,* however, neither the lawyers nor the court, reached that level of analysis. Instead, their attention was focused on whether a boldface notice, on the frontside of a commercial standard form sales agreement, that the sale was subject to the conditions printed on the reverse side made the fine print implied warranty disclaimer imbedded in the back "conspicuous." The court held that it did. Because the frontside reference was "conspicuous," the court asserted, *all* the fine print on the reverse was also "conspicuous," and "should have been noticed by a reasonable buyer."[102] The disclaimer was therefore valid.

Equally conspicuous in its absence, however, is any attempt in the opinion to explain *why* a reasonable person ought to be required to notice all the fine print under these circumstances. Given the myth's image of proper contracting behavior, however, no explanation is necessary. As in *Clark* and *Price's,* the determinative framework here is that parties to a contract have a duty to read and understand, and thus are presumed to have read and understood, the entire contract (including termination clauses, merger clauses and now, warranty disclaimers). Because the most basic precept of civil law is that reasonable people do their duty, the court's hypothesis consequently mandates that the reasonable buyer would notice *anything* in a written contract. And if that's true, then *any* disclaimer embodied in a written document is "conspicuous," and therefore effective, because a reasonable person would have dutifully read and understood it. The "reasonable person" test of conspicuousness thus turns out to be no test at all, and once again the conventional construct has landed us squarely in the midst of contradiction.

What has gone awry here is the court's picture of how "reasonable" people behave—they don't read the *front* side of a standard form contract (except perhaps to confirm the accuracy of the nonstandard bargained-

100. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties shall, be unenforceable.

. . .

The provisions of this section may not be disclaimed or waived by agreement. Mass. Gen. Laws Ann. ch. 106, § 2-316A (West Supp. 1983-84).

101. A&M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (Ct. App. 1982).

102. 99 N.M. at 256, 657 P.2d at 112.

for terms) much less the back side. But the Code can hardly be expected to achieve its purpose of modernizing the law of commercial transactions[103] if it is burdened with a rigid nineteenth century mythology of contractual interaction. Far from responding flexibly to commercial reality,[104] the Code so burdened contorts that reality out of all recognition to force it into the rigid confines of a pre-determined conceptual system. Were the court to recognize the reality, it would become clear that a warranty disclaimer ought to be presented with little less than a brass band accompaniment to be noticeable, and therefore "conspicuous," in the great majority of contractual situations.

D. Breach of Contract

A fourth problem area that traditionally has tied the common law courts into knots is the technical breach: whether the law ought to sanction a minor failure to perform which, although literally a default under the contract, has caused no harm to the other party. The received doctrine of course answers in the affirmative, a straightforward deduction from the conception of contractual obligation as a creation of will to be passively enforced by the courts. In testimony to the power of the concept, the doctrine even receives an airing in Article Two of the Code: a party whose performance fails "in any respect to conform to the contract" is in breach.[105] As we might suspect from the Code's overall vision, however, that rule turns out to be devoid of much substance. It is laden with so many exceptions, qualifications, and conditions (not the least of which are the duties of good faith, reasonability, and conscience) that a breach is in fact penalized only when it *substantially* impairs the value of the performance.[106]

The difficulty also arises in contracts involving secured transactions under Article Nine of the Code. In *Brummund v. First National Bank of Clovis,*[107] the bank held a mortgage on the Brummunds' motel property and a security interest in its furnishings. When the Brummunds sold the property, the bank pointed to clauses in the mortgage and security agreement prohibiting sale of the collateral without the bank's consent, and declared default. Although the Brummunds continued to make the mortgage payments, the bank relied upon the agreement's acceleration clause

106. *See, e.g., id.* at § 55-2-608 (1978) (revocation of acceptance permitted only if the "nonconformity substantially impairs" the value of the performance); § 55-2-612 (1978) (rejection of an installment under a contract for several deliveries permitted only if "the non-conformity substantially impairs the value of that installment and cannot be cured"); § 55-2-508 (1978) (seller has right to cure defective tender); § 55-2-504 (1978) (rejection for delay in delivery permitted only if delay is "material"). *See also* Whaley, *Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby,* 24 Drake L. Rev. 52 (1974).

107. 99 N.M. 221, 656 P.2d 884 (1983).

to demand immediate payment of the entire debt. The Brummunds sued for a declaratory judgment to stop the foreclosure; the bank won.

Where *Price's* had excised the duty of good faith from Article Two, *Brummund* performs the surgery for Article Nine. Before operating, however the court had to deal with the Brummunds' argument that they hadn't defaulted at all because the Code specifically permits a debtor to transfer her interest in collateral, notwithstanding a prohibition in the security agreement.[108] That provision, the court properly reasoned, merely protects the debtor's transferee, who thus may keep the property, but subject to the security interest if the secured party has not consented to the sale.[109] The parties may nevertheless agree, the court concluded, that despite the debtor's *power* to transfer the collateral, the exercise of that power constitutes a default.

After the unconsented sale, then, the bank still had a security interest in the collateral in the transferee's possession, allowing it to repossess in the event of default. The Brummunds still owed, and were performing, all their duties under the security agreement. But the bank also had, in the unconsented transfer, an incident of default that, under the agreement, apparently gave it the additional right to call due the entire debt. That right, however, can only be exercised in good faith, claimed the Brummunds, and here the bank's interest wasn't jeopardized in any way to provoke the acceleration of payments.

The court's response was terse: "[w]e need not discuss . . . whether the acceleration of the balance due on the note was predicated on 'good faith,'" because that statutory obligation applies only to acceleration "at will" clauses, and *not* acceleration for default.[110] It is true that the Code specifically prohibits the enforcement of clauses permitting the secured party to accelerate "at will" or "when he deems himself insecure" unless the creditor "in good faith believes that the prospect of payment or performance is impaired."[111] Even here, however, some courts have found little difficulty in extending the protection of the principle to any invocation of the powerful acceleration right.[112] Moreover, the court ignored the more general obligation of good faith that the Code imposes upon *every* contract.[113] Indeed, that general duty requires the court to discuss

103. N.M. Stat. Ann. § 55-1-102 (1978).
104. *Id.* official comment 1.
105. N.M. Stat. Ann. § 55-2-601 (1978).
108. N.M. Stat. Ann. § 55-9-311 (1978).
109. *Id.* § 55-9-306(2).
110. 99 N.M. at 224, 656 P.2d at 887.
111. N.M. Stat. Ann. § 55-1-208 (1978).
112. *See, e.g.*, Brown v. Avemco Inv. Corp., 603 F.2d 1367 (9th Cir. 1979); Sparkman v. Peoples Nat'l Bank, 580 S.W.2d 868 (Tex. Civ. App. 1979). *But see* Crockett v. First Fed. Sav. & Loan Ass'n., 289 N.C. 620, 224 S.E.2d 580 (1976).
113. N.M. Stat. Ann. § 55-1-203 (1978).

good faith, *Brummund* and *Price's* notwithstanding, *whenever* it is raised in a dispute that the Code governs.

The court's reluctance to examine the fairness of acceleration where the secured party apparently has suffered no harm stands in stark contrast to its treatment of the nearly identical problem in real property mortgages. There "due-on-sale" clauses, the realty version of acceleration, have been struck down as unreasonable restraints on alienation absent a showing of substantial impairment to the lender's security interest.[114] The court in *Brummund* recognized the inconsistency, and attempted to explain it by reiterating that the Code specifically allows both (1) the debtor to transfer the collateral and (2) the parties to denominate the transfer a default. That must mean, the court concluded, that the Code has approved the contractual restraint on sale and has displaced the common law. But the restraint in the "due-on-sale" clause is created not by any contractual prohibition of sale, but by the threat of acceleration that severely penalizes the sale. This threat is exactly the same when personal property is involved, and it has in no wise been blessed with the Code's blanket approval. The Code requires that the acceleration must *at least* be exercised in good faith,[115] but that obligation leaves ample room for the application of additional supplementary common law principles.[116] Those principles here, drawn from the "due-on-sale" cases, suggest that the appropriate standard for Article Nine acceleration requires that the secured party's belief in the impairment of her interest must be not only in good faith but also, in fact, reasonable.

That suggestion is reinforced if we now rethink whether there had been a default at all in *Brummund*. The justification for acceleration was the debtor's failure to obtain the bank's consent to sale of the collateral; but if the bank could not legally have withheld consent, the Brummunds' omission becomes irrelevant. The bank apparently could not have refused consent for *any* reason, because a contract clause giving one party the power of consent over the other's actions may not be wielded arbitrarily. Rather, the consent may be withheld only if the refusal is in good faith, fair, and commercially reasonable.[117] Thus, if the transfer did not actually impair the security interest, the bank could not have justified, regardless of its good faith, even the declaration of a default, and much less the consequent acceleration.

The prohibition of "due-on-sale" and "arbitrary consent" clauses clashes so stridently with *Brummund*'s free acceleration doctrine precisely because they emanate from fundamentally irreconcilable world views. The

114. State *ex rel.* Bingaman v. Valley Sav. & Loan Ass'n, 97 N.M. 8, 636 P.2d 279 (1981).
115. N.M. Stat. Ann. § 55-1-208 (1978).
116. *Id.* § 55-1-103; *see generally* Summers, *supra* note 17.
117. Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 241, 638 P.2d 1084, 1086 (1982).

former, like the Code itself, represents a normative choice, derived from social values rather than from individual power, to restrain the unlimited ability of one party to use contractual rights to dominate the affairs and property of another. The latter is just as surely a normative choice, but the failure to recognize it, the refusal even to discuss whether the contract power exerted bore a fair relationship to the needs and interests affected, has its cost in contradiction: in the name of freedom, the law denies it.

IV. CONCLUSION

We humans don't have everything, but neither have we nothing; for we have each other. We care and we sympathize. We excuse and we justify. We condemn and we praise. Our lives are thus defined in the unceasing pursuit of our *place:* how, now and in these circumstances, do we fit together with our fellows? The creation of self, just as surely as the creation of our world, is a social activity, which means that I can't know who "I" am without also knowing who "you" are and what "we" are together. To pretend otherwise—to pretend that we are alone in a sea of four billion other human beings—is simply an impossible feat of imagination.

It is just that pretense, however, that the myth of "Freedom of Contract" represents, which explains why every attempt to draw out the myth's implications have ended in contradiction. The utter futility of trying to comprehend the meaning of an isolated human encounter, wrenched out of the context of social understandings in which it occurred, has necessarily demanded in each case the creation of some *other* context to make sense of the situation. But because "values" are just as inextricably interwoven into our common life as are "facts," this purportedly neutral selection of a conceptual framework cannot escape passing judgment, not only on what we are, but also on what we ought to be. The law's flight from normative choice in pursuit of objectivity consequently comes to rest in the necessity of commitment which it had sought to evade. Captured by the myth's illusion that the escape has succeeded, however, the law deteriorates into commitment by default: an automatic and unthinking affirmation of the very structures of power and domination that our pursuit of justice was meant to subvert. Under the banner of liberty, the law has demeaned our nature, dismissed our aspirations, and made us servile.

Once we see that this pattern of legitimation is not ordained in logic but is adopted by choice, we have liberated our imaginations to conceive of other ways of structuring our lives together. As the veil of the myth falls from our eyes, those divergent possibilities that had before seemed as shadows begin to take on form and substance, and soon we come to see them everywhere. We learn to recognize the face of community—of

fairness, of conscience, of social obligation—which is so familiar to us in the setting of our moral tradition, when it also appears within the fabric of the law. And once we recognize it there, the visage won't go away. We find it interwoven throughout legal doctrine, animating its history, explaining its inconsistencies, illuminating its basic texts. Finally, we are fully struck by the wild implausibility of the atomistic myth, the absurd notion that an isolated human activity (like promising—or like signing a document) can be interpreted and assessed in a moral vacuum, stripped of all the richness of our normative understandings that give the act its meaning.

So the choice is ours. The legal materials we need to better construct our lives together lie before us. The cases, the Restatement, the Code—all can come alive within our hands to fashion the world of commerce in the image of human concern and decency, if only we have the vision to use them. But use them we must, in *some* way, of necessity. If not with vision, then blindly; and if not to create a better world, then to create a worse one.