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Lawrence Cunningham's Contracts in the Real World, Stories of  
Popular Contracts and Why They Matter**

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## Review Essay

### Learning Contracts through Current Events: Lawrence Cunningham's *Contracts in the Real World: Stories of Popular Contracts and Why They Matter*

Miriam A. Cherry\*

In his recent book published by Cambridge University Press, Professor Lawrence Cunningham explores the nuances of contract law through current events.<sup>1</sup> His decision to use the contracts of modern-day singers, actors, and entertainers to illustrate contract law principles is an inspired choice that will appeal to today's law students. The book guides the reader down the well-trodden path of classic contract doctrines and applies those classics in modern, celebrity-laden contexts. In this regard, the book reads like an updated version of Marvin Chirelstein's classic contracts primer<sup>2</sup>—an easy-to-read and clearly written commentary. Cunningham's version adds rollicking celebrity stories to the mix, simultaneously educating and entertaining the reader. Both students and contract law experts will find much here to enjoy, and find new stories that appeal as much as the old common law chestnuts. But, perhaps because of the broad appeal and audience to which the book is aimed, there may be too optimistic a view about the received wisdom of contract law, inasmuch as existing doctrines have not addressed many of the new consumer law issues raised by modern technology.

In this review essay, I first start with a brief summary of Professor Cunningham's book and how I believe it will appeal to a wide audience. In the second portion of the review, I focus on Cunningham's thesis about contract law, to wit, his view that contract law doctrine as it is currently constituted has struck an appropriate balance between the formalists and

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\* Professor of Law, Saint Louis University; B.A., 1996, Dartmouth College; J.D., 1999, Harvard Law School. Thanks to Matthew Bodie, Leah Chan Grinvald, Anders Walker, and Jarrod Wong for their helpful comments, and to Jacob Hollars for his excellent help as my research assistant.

<sup>1</sup> LAWRENCE A. CUNNINGHAM, *CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER* (2012).

<sup>2</sup> MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* (6th ed. 2010).

realists. In other words, Cunningham argues that modern contract law allows for the advancement of individual autonomy, but at the same time that current doctrine allows for appropriate court intervention to police overreaching or other problems with the bargain. In the third portion, I explain why, despite all the best intentions of the author, I find myself only partially persuaded by the optimistic view of existing contract doctrine.

In my view, modern technology has exacerbated many of the existing tensions within contract law, stretching the concept of mutual assent to its outer limits to cover methods of transacting like clickwraps and browserwraps. Further, these tensions are not necessarily reducible to the formalist-realist dichotomy on which Cunningham focuses. Despite this divergence, I conclude that Professor Cunningham has taken on a subject of surprising scope and breadth and made his obvious joy and excitement in writing about contract law fully accessible to a wide audience. Along the way, he holds the reader's attention and illuminates the overarching doctrinal themes of contract law.

#### I. SUMMARY OF CONTRACTS IN THE REAL WORLD

After a general introduction to the field of contract law, as well as a list of celebrities that the reader will meet throughout the book, the table of contents lists contract formation, defenses, remedies, interpretation, performance, conditions, and ends with third parties. The appropriate organization of a contracts treatise or textbook is a matter of longstanding debate amongst contracts scholars. Some professors begin a class by teaching remedies, others with consideration, and others still with offer and acceptance.<sup>3</sup> Despite this ongoing pedagogical debate, the organizational structure that Professor Cunningham has selected is logical and works well even if some might prefer a different order of topics. Only on a rare occasion was there any reason to question the book's placement of a story or an issue.

In the first chapter, concerning formation, the stories immediately grabbed the reader's attention, turning ancient questions over consideration

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<sup>3</sup> Professor Lon Fuller suggested that students begin their study of contract law with damages, so that they would understand the consequences of what it meant to breach a contract. See Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook That Never Was*, 72 *FORDHAM L. REV.* 595 (2003). Other professors (myself included), begin with contract formation, because students find it easier to understand breach and damages if they first understand how a contract comes into existence, and what types of promises will be legally enforced. I have often said that in some sense it does not make much difference at what point one begins one's study of contracts, because it all wraps around again, like the mythical serpent eating its own tail.

and the necessity of a bargain into a lively discussion of the ownership of the archives of civil rights leader Martin Luther King, Jr.<sup>4</sup> Reading the chapter provides an insight into the ambiguous language surrounding those papers left with Boston University, which had awarded him the degree that made him “Dr. King.”<sup>5</sup> From there, Cunningham turns his attention to issues of offer and acceptance, mostly the question of mutual assent and offers made in jest, based on *Leonard v. Pepsico*, the recent “Pepsi Points” for a harrier jet case.<sup>6</sup> The chapter finishes with a discussion of mutual assent, by reviewing the Peerless ship case, *Raffles v. Wichelhaus*,<sup>7</sup> and then applying the concept of objective intent to several internet contracting cases, including *Specht v. Netscape*<sup>8</sup> and *ProCD v. Zeidenberg*.<sup>9</sup>

Chapters Two and Three focus on contract defenses, including unconscionability, public policy, mistake, impossibility, and infancy. While Chapter Two starts off with an ordinary case by way of example, the chapter quickly moves back to more celebrity-friendly terrain. Raising issues of the bounds of the law and unconscionability, the book discusses the attempted blackmail of entertainer David Letterman and a palimony lawsuit against rapper 50-Cent.<sup>10</sup> The chapter continues with the story of a contract to split gambling winnings—made between two octogenarian sisters.<sup>11</sup> Finally, the Baby M case, with its multi-dimensional discussion of contracts against public policy, rounds out the chapter.<sup>12</sup> Chapter Three begins with a discussion of mistake, in the context of a divorce in which a portion of the divided joint assets disappeared in Bernard Madoff’s notorious recent Ponzi scheme.<sup>13</sup> Other stories in this section use celebrity contracts to great

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<sup>4</sup> CUNNINGHAM, *supra* note 1, at 11-14; *King v. Trustees of Boston Univ.*, 647 N.E.2d 1196 (Mass. 1995).

<sup>5</sup> CUNNINGHAM, *supra* note 1, at 12; *King*, 647 N.E.2d 1196.

<sup>6</sup> CUNNINGHAM, *supra* note 1, at 16-18; *Leonard v. Pepsico, Inc.*, 88 F.Supp. 2d 116, *aff’d*, 210 F.3d 88 (2d Cir. 2000).

<sup>7</sup> CUNNINGHAM, *supra* note 1, at 26; *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Ct. of Exchequer); 2 Hurl. & C. 906.

<sup>8</sup> CUNNINGHAM, *supra* note 1, at 27-28; *Specht v. Netscape Communications, Corp.*, 306 F.3d 17 (2d Cir. 2002).

<sup>9</sup> CUNNINGHAM, *supra* note 1, at 28-29; *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>10</sup> CUNNINGHAM, *supra* note 1, at 42, 44-47; Bill Carter & Brian Steltier, *Letterman Extortion Raises Questions for CBS*, N.Y. TIMES, Oct. 2, 2009, [http://www.nytimes.com/2009/10/03/business/media/03extort.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2009/10/03/business/media/03extort.html?_r=1&pagewanted=all); *Tompkins v. Jackson*, No. 104745/2008, 2009 WL513858 (N.Y. Sup. Ct. Feb. 3, 2009).

<sup>11</sup> CUNNINGHAM, *supra* note 1, at 49-52; *Sokaitis v. Bakaysa*, 293 Conn. 17 (Conn. 2009).

<sup>12</sup> CUNNINGHAM, *supra* note 1, at 52-58; *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

<sup>13</sup> CUNNINGHAM, *supra* note 1, at 59-66; *Simkin v. Blank*, 80 A.D.3d 401 (N.Y. App. Div. 2011).

effect. For example, Cunningham's discussion of impossibility includes Donald Trump's attempts to cancel a contract via a force majeure clause,<sup>14</sup> while Craig Traylor of "Malcolm in the Middle" television fame takes center stage in illustrating the defense of infancy.<sup>15</sup> The chapter ends with a discussion of the contracts and defenses in the AIG bonus scandal<sup>16</sup> and sports sponsorship contracts made by Citigroup and Enron.<sup>17</sup>

Chapters Four and Five turn to remedial issues, including expectation damages, reliance damages, and restitution. Celebutante Paris Hilton plays a major role in this discussion, as she was alleged to be in breach for contracts for a movie promotional appearance as well as hair extension promotions.<sup>18</sup> Cunningham uses these examples to walk through a general discussion of damages, which are enlivened through a recounting of some of Hilton's antics. The doctrine of mitigation and the lost volume seller both receive a thorough and interesting treatment in the discussion of the Redskins football team's decision to pursue breaching season ticket holders, despite the fact that some of those tickets could presumably be resold.<sup>19</sup> The discussion of restitution revolves around the development of the hit television show *The Sopranos*, and whether one of the contributors of ideas had a right to share in the profits.<sup>20</sup> The chapter ends with a discussion of the off-contract remedies awarded when rock singer Rod Stewart was unable to perform in Las Vegas due to vocal chord problems.<sup>21</sup>

Chapters Six, Seven, and Eight deal with interpretation of the contract, the implied duty of good faith, and the effect of conditions. Rapper

<sup>14</sup> CUNNINGHAM, *supra* note 1, at 66; *Trump v. Deutsche Bank Trust Co. Americas*, 65 A.D.3d 1329 (N.Y. App. Div. 2009).

<sup>15</sup> CUNNINGHAM, *supra* note 1, at 70; *Berg v. Traylor*, 56 Cal. Rptr. 3d 140 (Cal. Ct. App. 2007).

<sup>16</sup> CUNNINGHAM, *supra* note 1, at 73-78; Lawrence A. Cunningham, *A.I.G.'s Bonus Blackmail*, N.Y. TIMES, March 17, 2009, <http://www.nytimes.com/2009/03/18/opinion/18cunningham.html>.

<sup>17</sup> CUNNINGHAM, *supra* note 1, at 78-83; Richard Sandomir, *Citigroup Puts Its Money Where Its Name Will Be*, N.Y. TIMES, July 20, 2008, <http://www.nytimes.com/2008/07/20/sports/baseball/20sandomir.html>.

<sup>18</sup> CUNNINGHAM, *supra* note 1, at 84-94; *Goldberg v. Paris Hilton Entm't, Inc.*, No. 08-22261-CIV, 2009 WL 2525482 (S.D. Fla. Aug. 17, 2009); *Hairtech Int'l, Inc. v. Hilton*, No. BC443465, 2010 WL 3300058 (Cal. Superior) (Trial Pleading) (Aug. 11, 2010).

<sup>19</sup> CUNNINGHAM, *supra* note 1, at 94-99; James V. Grimaldi, *Washington Redskins React to Fans' Tough Luck With Tough Love*, WASHINGTON POST, Sept. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/02/AR2009090203887.html>.

<sup>20</sup> CUNNINGHAM, *supra* note 1, at 118-22; *Baer v. Chase*, No. 02-2334, 2007 WL 1237850 (D.N.J. Apr. 27, 2007).

<sup>21</sup> CUNNINGHAM, *supra* note 1, at 122-25; *Rio Properties v. Armstrong Hirsch*, 94 Fed.App'x. 519 (9th Cir. 2004); *Rio Properties v. Armstrong Hirsch*, 254 Fed.App'x. 600 (9th Cir. 2007).

Eminem's recording contract provides an excellent illustration of what happens when a new technology—in this situation, ringtones and iTunes downloads—is invented after the contract is signed.<sup>22</sup> How to sort out payment for these new technologies was the subject of a heated debate—with Eminem's legal fight winning him millions of dollars.<sup>23</sup> Best efforts clauses are illustrated in poet Maya Angelou's disagreement with promoter Butch Lewis over her agreement to license her poetry to Hallmark greeting cards.<sup>24</sup> Comedian Conan O'Brien's dispute over the change in time of his show is an issue that many watched closely as it unfolded, and it is used to discuss the concept of material breach and adjustment.<sup>25</sup> The discussion of conditions benefits from the example of troubled actor Charlie Sheen, as it raises questions about whether particular conditions were either waived or estopped since the network had previously chosen to ignore his drug-fueled antics.<sup>26</sup> Finally, the book ends—as most contracts books do—with the obligatory chapter about third-party beneficiaries. This portion of the book is timely and important, thanks to its use of Wal-Mart's ongoing labor disputes and discussion of how third-party beneficiary doctrine might be helpful in thinking through those issues.<sup>27</sup> Overall, the book covers a vast scope of issues and doctrine, inviting its readers along for an exciting intellectual journey through the field of contract law.

## II. DIFFERING VIEWS OF CONTRACT LAW, AND PROFESSOR CUNNINGHAM'S ARGUMENT

Some would claim that contract law is revolutionary; others would argue that it is reactionary. Compared to the status relationships of the Middle Ages, in which economic power was primarily determined through feudal or family relationships, contract and market relations promised a more egalitarian alternative. In the classic text *Ancient Law*, Sir Henry Maine described the radical transformation from a feudal society governed by custom and hierarchy to one transformed by the industrial revolution, in

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<sup>22</sup> CUNNINGHAM, *supra* note 1, at 126-30; *F.B.T. Productions v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010).

<sup>23</sup> CUNNINGHAM, *supra* note 1, at 126-30.

<sup>24</sup> *Id.* at 148-52; *B. Lewis Productions, Inc. v. Angelou*, No. 06 Civ. 6390 (DLC), 2008 WL 1826486 (S.D.N.Y. Apr. 22, 2008).

<sup>25</sup> CUNNINGHAM, *supra* note 1, at 167-71; Bill Carter, *Fingers Still Pointing, NBC and O'Brien Reach a Deal*, N.Y. TIMES, Jan. 21, 2010, <http://www.nytimes.com/2010/01/22/business/media/22conan.html>.

<sup>26</sup> CUNNINGHAM, *supra* note 1, at 176-86; *Sheen v. Lorre*, No. SC111794, 2011 WL 817781 (Cal. Superior) (Trial Pleading) (Mar. 10, 2011).

<sup>27</sup> CUNNINGHAM, *supra* note 1, at 194-98; *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

which socio-economic mobility was not only possible, but which was expected.<sup>28</sup> On the other hand, there are those who would argue that contract law acts as a reactionary force insofar as enforcing bargains strictly as written could result in reinforcing power imbalances that already exist in society.<sup>29</sup>

Professor Cunningham's work notes these various arguments, and strikes a middle ground between them. He characterizes the schism in contract law as a dispute between formalists and the realists. This schism applies even to foundational matters, such as the question of whether a contract has been formed. Cunningham notes that extreme formalists would champion a return to the days of the seal and enforce only those deals that meet the strict definitions of offer, acceptance, and consideration.<sup>30</sup> Realists, on the other hand, favor scrutinizing the context of every bargain, accepting the most informal of deals and even enforcing promises to make gifts as contracts.<sup>31</sup> This divide becomes both more interesting and perhaps controversial in examining the outer limits of acceptable contracts. Formalists, Cunningham notes, would like to see the ability of judges to scrutinize adequacy of consideration, even purely nominal consideration, severely circumscribed so as to expand the freedom of contract.<sup>32</sup> Conversely, Cunningham asserts that realists would want to empower judges fully to scrutinize not only the adequacy of consideration, but also to police contracts that may violate a social norm, value, or policy.<sup>33</sup> Thus the dichotomy between formalists and realists turns into a debate over the extent of government or court involvement in private ordering.

Cunningham walks a tightrope between these positions, often making reference to contract law's "sensible center," and noting that with many common problems, the rules that have evolved over the years make a good deal of sense. In essence, he makes a case for the status quo, eschewing reform in either the direction of more government interference in contract, or government withdrawal from contract. Cunningham suggests that current law strikes the proper balance between two rather extreme positions.

Reading Professor Cunningham's discussion will likely be a comforting experience for many readers, especially law students. While formalists and

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<sup>28</sup> SIR HENRY MAINE, ANCIENT LAW (1886).

<sup>29</sup> See, e.g., Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925 (2006).

<sup>30</sup> CUNNINGHAM, *supra* note 1, at 34.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 57.

<sup>33</sup> *Id.* at 57-58, 82-83, 146-47, 212.

realists may debate and bicker and try to push the law too far in one direction or another regarding government intervention, the old wisdom of the common law knows best. The book extols the earthy pragmatism of old precedents and wise judges, and suggests that these doctrines will ultimately win out and reach a balance. This soothing vision, however, smoothes over ongoing debates among modern contract law scholars. Modern technology, in particular, proves to be a particular challenge for the soothing discussion.

### III. MODERN TECHNOLOGY AS A CHALLENGE TO EXISTING CONTRACT DOCTRINE

Modern technology has exacerbated the doctrinal tensions within contract law. Currently, clickwraps and browserwraps stretch the notion of mutual assent to its extreme, perhaps warping it in the process. The recent literature on form contracting online has been substantial.<sup>34</sup> While some of this literature sees online contracting as a natural inheritance to traditional contract law doctrine,<sup>35</sup> other commentators have argued that contracting online has distorted the doctrine.<sup>36</sup>

Professor Cunningham discusses the recent cases *Specht v. Netscape*<sup>37</sup> and *Pro-CD v. Zeidenberg*<sup>38</sup> as part of his treatment of the theme of contract formation and mutual assent. *Netscape* involved an instance where Internet users were invited to download a program without first seeing a license agreement or any mention of one, as it was contained on a lower part of the screen that could not be seen.<sup>39</sup> When users alleged that the download contained spyware and filed a lawsuit, Netscape countered by pointing to the arbitration provision in the license.<sup>40</sup> The Second Circuit, per Judge Sonia Sotomayor, held that these terms were not binding, since users did not have an opportunity to read the license and thus could not have assented to the terms.<sup>41</sup>

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<sup>34</sup> See, e.g., Nancy Kim, *Internet Challenges to Business Innovation*, 12 J. INTERNET L. 3 (2008); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

<sup>35</sup> See, e.g., Robert A. Hillman & Jeffrey J. Rachlinsky, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

<sup>36</sup> See, e.g., Richard Warner, *Turned on its Head?: Norms, Freedom, and Acceptable Terms in Internet Contracting*, 11 TUL. J. TECH. & INTELL. PROP. 1 (2008).

<sup>37</sup> *Specht v. Netscape Communications, Corp.*, 306 F.3d 17 (2d Cir. 2002).

<sup>38</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>39</sup> *Netscape*, 306 F.3d at 21-25.

<sup>40</sup> *Id.* at 25.

<sup>41</sup> *Id.* at 31-32.



In *Pro-CD v. Zeidenberg* the Seventh Circuit, per Judge Frank Easterbrook, held that the terms of use inside a software package—commonly known as a shrink-wrap license—would be binding on the purchaser, Zeidenberg.<sup>42</sup> The court reasoned that the purchaser was on notice that the software came with terms, even though the terms were not revealed at the time of purchase.<sup>43</sup> The book reconciles these conflicting precedents in the following way:

Zeidenberg's acceptance is analogous to download offers on the Internet, where users are invited to click *Yes* to signal they accept the terms. Cases like ProCD seemed to favor Netscape's stance, but they actually support Netscape users' case. After all, in ProCD's case, the box of software noted it was subject to the terms listed inside. . . . These details made ProCD an easy case on which to conclude that a contract was formed. In contrast, the Netscape users never saw—and they could not reasonably have seen—the clause at all. There was no chance to click *No*.<sup>44</sup>

This explanation is not entirely satisfactory, as *Netscape* and *Pro-CD* are fundamentally in tension. Further, given the realpolitik of adhesion contracts, it is difficult to say that an opportunity to “click no” would be anything but a distinction without a difference. The fact is, these cases conflict, and do so on a pro-business versus pro-consumer axis. In fact, two well-known additional cases that dealt with late-arriving terms inside a computer box, *Hill v. Gateway*<sup>45</sup> and *Klocek v. Gateway*,<sup>46</sup> blatantly contradict each other, with contrary holdings on virtually identical facts. These disputes, which are governed by the Uniform Commercial Code, should lead to a uniform result. When instead they result in inconsistent holdings, it only intensifies the debate about how to deal with online contracting and adhesion contracts online.

Of course, not all commentators view online contracts of adhesion unfavorably.<sup>47</sup> Some authors take an explicit pro-business stance, and thus support contracts of adhesion as assisting businesses in becoming more efficient. Others advocate that contracts of adhesion are by nature efficient and that cost savings will be passed along to consumers—a type of “trickle

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<sup>42</sup> *ProCD*, 86 F.3d at 1449.

<sup>43</sup> *Id.* at 1452.

<sup>44</sup> CUNNINGHAM, *supra* note 1, at 29.

<sup>45</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

<sup>46</sup> *Klocek v. Gateway 2000 Inc.*, 104 F.Supp. 2d 1332 (D. Kan. 2000).

<sup>47</sup> Randy E. Barnett, *Consenting to Form Contracts*, *Symposium: A Tribute to Professor Joseph M. Perillo*, 71 *FORDHAM L. REV.* 627 (2002).

down” justification for the existence of the adhesion contract.<sup>48</sup> From a libertarian perspective, contracts of adhesion may be viewed as simply the private ordering of the market, to be left to a laissez-faire determination.<sup>49</sup> Still others view adhesion contracts as bad, but perhaps a necessary evil. Some commentators point to the presence of the free market as all the protection that consumers need. If the terms that one firm provides on its form contract are too harsh, the consumer, after all, can choose to contract elsewhere, at a firm offering better terms. Perhaps, if the terms are harsh enough and demand is elastic enough, the consumer will choose to forgo contracting altogether. To retain a competitive advantage, firms will of necessity have to offer terms that are more-consumer friendly.

Professor Todd Rakoff’s germinal article on adhesion contracts, however, pointed to the converse trend—the tendency of form terms to become more entrenched, rigid, and harsh over time, despite, or perhaps because of, the other players in an industry.<sup>50</sup> The harsher a drafter makes the terms, the more likely it is that other drafters in the same industry will “borrow” the same harsh terms.<sup>51</sup> The tendency of firms to adopt a set of ever-harsher terms turns on its head the notion that competition will protect the consumer’s interests.<sup>52</sup> Unfortunately, online terms only exacerbate the existing situation. The doctrine appears rigid, almost frozen in time.

In contrast, tort law doctrine has been capacious enough to cover related new developments. When mass-market goods failed or caused serious injury, plaintiffs at first attempted to bring cases via the contractual doctrine of breach of warranty.<sup>53</sup> These claims, however, were often stymied because of either lack of privity or the low damages awarded in a warranty action.<sup>54</sup> Due to this inflexibility in contract law, plaintiffs instead looked to tort law for redress for their injuries. Tort law was seen as less formalistic (in the area of consumer affairs, at least),<sup>55</sup> and plaintiffs were

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<sup>48</sup> Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255-58 (2006); see also *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>49</sup> Ware, *supra* note 48, at 259.

<sup>50</sup> Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1228 (1983).

<sup>51</sup> *Id.* at 1226-27.

<sup>52</sup> *Id.*

<sup>53</sup> William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099-1101 (1960).

<sup>54</sup> *Id.* at 1128-34.

<sup>55</sup> However, that is not the case when it comes to employment-related torts, or torts that an employee would bring against an employer. The fellow-servant rule, as well as other rules, served as methods that effectively prevented an employee from bringing a claim against his or her employer. See generally MORTON J. HOROWITZ, *THE TRANSFORMATION OF*

able to bring lawsuits to seek recompense not only for the cost of their defective goods, but also for compensation for their injuries. In the 1960s Justice Roger Traynor pioneered the field of products liability, with its subdivisions of design and manufacturing defect and its standard of strict liability.<sup>56</sup> Under this rubric, the plaintiff need only cover the proof of the existence of the defect, not that the defendant knew about the concern or that the defendant acted without a reasonable standard of care.<sup>57</sup> In this way tort law seems to have been more flexible in dealing with new claims than contract law has been.

As we continue to click our way through countless EULAs and are told that we are subject to “terms and conditions” that no reasonable consumer has had the time to read, I maintain that we are obligated to make changes—perhaps akin to those made in the field of torts—in order to continue to build on the wisdom of contract law. While there is much to celebrate in the received wisdom of ancient doctrines, we must also recognize that it is the common law’s dynamism and adaptability that have led to its genius.

#### IV. CONCLUSION

Overall, *Contracts in the Real World* is worthwhile reading for anyone interested in gaining a more complete understanding of contract law doctrine. First year law students will find insights in the book’s inspired treatment of classic cases, and they will also learn how those classic cases can be applied to modern disputes. The book manages to be entertaining without simplifying the issues being discussed. The only aspect of debate is whether the book’s positive treatment of the state of current contract doctrine is warranted in light of recent developments in online contracting. While I might advocate for more change in the doctrine, Professor Cunningham’s view is certainly reasonable and understandable. Overall the book is an excellent resource for anyone who wants to learn about contract law and leads the reader on an exciting intellectual journey.

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AMERICAN LAW, 1780-1860 (1979). In fact, they did so in such an effective way that an alternate path for bringing forward a claim, i.e. the no-fault system of worker’s compensation, had to be developed. See Samuel Estreicher, *Predispute Agreements To Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997).

<sup>56</sup> Fleming James, Jr., *A Tribute to the Imaginative Creativity of Roger Traynor*, 2 HOFSTRA L. REV. 445 (1974).

<sup>57</sup> RESTATEMENT (SECOND) OF TORTS, § 402A (1965).