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The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts

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Research on standard form contracts tends to focus on five areas: (1) analyzing the contents of common form contracts; (2) determining why competition mostly does not exist among firms drafting these contracts; (3) modeling consumer responses to boilerplate; (4) exploring judicial interpretation of these forms; and (5) discussing normatively how courts and laws should handle these contracts. This Study explores empirically how individuals experience and interpret form-adhesive agreements, in the hope of further understanding how they affect exchange relationships between organizations and individuals. This Article uses a measure of perceived enforceability to analyze actors' interpretations of these ubiquitous agreements and explore the elusive yet historically important concepts of citizenship and trust in the rule of law. To do this, this Article develops a construct, called "malleable consent," as a measure of actors' perceptions of unenforceability of form agreements to which they have consented without duress, fraud or coercion.

Based on interviews with sales associates of a large national retailer and survey responses of MBA students of an elite university, this Article offers preliminary evidence that actors who regard form-adhesive agreements as binding upon them are more likely to regard their employment relationships as "relational" (imbued with trust, loyalty and a set of ethical commitments). Conversely, actors who regard such agreements as non-binding are more likely to view their employment relationships as "transactional" (merely a market exchange). Further, the construct, malleable consent, is used to reveal differences in actors' use of law as a form of coercive power across socio-economic groups. Preliminary evidence suggests that less educated, lower skilled and lower paid subjects with greater employment dependency are more likely to feel bound by the terms of form-adhesive agreements that restrict their resort to law than more educated, higher skilled, and higher paid subjects with less employment dependency.

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The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts

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I. INTRODUCTION

Imagine this argument made to a judge:

Your Honor, it is true that my client signed the contract at issue in this case. It is true that there was no fraud in the inducement, procedural unconscionability or coercion. We further concede that the contract contains terms to which both parties consented without duress, and that no terms are substantively unconscionable. Nonetheless, we submit that the terms contained in the contract should be viewed by this court as mere *invitations to negotiate*, as suggestions on how the parties should behave, and not as binding terms, in spite of their wording to the contrary.

Would this lawyer be laughed out of court? Is it not oxymoronic to describe a “contract’s” terms as suggestive invitations to negotiate? What if instead of being made to a judge, this argument was made by one contracting party to the other? Under what circumstances would this argument actually prevail, in spite of its clear defiance of classical, objective theory of contract and intuitive unfairness? Lastly, if this way of viewing contracts were the norm and not the exception, what effects would this have, if any, on economic and social exchange, considering that by many accounts, our systems for both economic and social exchange are founded on and continue to depend on the fundamental principles of objective theory of contract, including consideration and meeting of the minds?

These questions may seem chimerical or absurd if one imagines a classical contractual setting like those commonly taught in first-year law school classes, in which parties haggle over terms and then memorialize

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them in a document called “contract.” However, the argument presented above may seem less absurd if one imagines instead, the most common type of contract governing exchanges between organizations and individuals today. These are, of course, form-adhesive contracts. Form-adhesive contracts are ubiquitous. Anyone who has received a loan, entered into a mortgage agreement, rented a car, purchased software, music, or other media, received medical care, entered into a cell phone service contract, gone on a cruise, signed up for a credit card, joined a club, or engaged in just about any other economic exchange with an organization in the last three decades has likely encountered many such agreements. In fact, relationships between organizations and individuals are rooted in these take-it-or-leave-it contracts drafted by organizations (or more often, lawyers representing the organizations’ interests), intended to be signed by numerous individuals such as customers, employees, medical-care recipients and others. And yet, in spite of their ubiquity, form-adhesive contracts are relatively understudied. When they are studied, it is rarely from a socio-legal perspective, although the need to adopt such an approach has been acknowledged.¹ Most of the attention paid to form contracts has been from an economic or legal-economic perspective, focused on theory and model building as opposed to empirical inquiry. Most existing scholarship has adopted the perspective of “society,” the legal system, the economy, or the drafters of form agreements. A focus on individuals’ experiences with and interpretations of these contracts is much less common.² Individual behavior with respect to such terms is usually assumed, theorized, or modeled. It is rarely empirically observed and reported.

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

¹ Todd D. Rakoff, Commentary, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1244–46 (2006) (discussing advantages of a judicial, rather than an administrative or legislative, approach to resolving issues with boilerplate contracts).

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

untapped area in which to explore views about citizenship in the state.

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

Existing research about form contracts has been framed by the observation that these agreements are axiomatically different from contracts as classically defined. Specifically, drafting organizations promulgating these contracts are invariably more powerful than, and less dependent on, the individuals who sign them.³ There is often no "meeting of the minds" in the classical sense of the term, as many signers do not read or understand what is in the agreements they sign. In fact, some organizations take great pains to craft and deliver their forms specifically to minimize the likelihood of such a "meeting of the minds."⁴

Scholarship has explored the nature of these differences and the important question of how such differences affect judicial enforcement of these contracts. For instance, economists have questioned the lack of competition over terms contained in such contracts.⁵ Others have pondered whether these agreements are one-sided, the extent of the one-sidedness, and the conditions under which they are more or less one-sided.⁶ Still

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

⁴ BOB SULLIVAN, GOTCHA CAPITALISM 8–10 (2007) (describing how, in 2001, AT&T intentionally drafted a contractual provision in which customers agreed to waive their right to sue the company and tailored distribution of this provision so as to minimize likelihood that it would be noticed or read).

⁵ See, e.g., Xavaer Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505 (2006) (discussing existence of information "shrouding" even in competitive markets); Russell Korobkin, *Bounded Rationality, Standard Form Contracts and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (arguing that because contract terms may not enter into buyers' decision-making processes, drafting parties may have incentive to include inefficient contract terms in standard forms).

⁶ See, e.g., Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 83, 85 (Omri Ben-Shahar ed., 2007) (arguing that online disclosure might shield vendors from unconscionability claims, rather than increase actual readership of contract terms); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (noting reasons behind unequal bargaining positions); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) (arguing that form terms contained in adhesion contracts should be presumptively unenforceable); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) (proposing an analytical

others have contemplated when such terms are enforced by courts and when they ought not to be.⁷ Some note that boilerplate is not as bad as it may seem, in part because firms selectively enforce them against signers.⁸ As discussed below, this last observation is perhaps the most interesting example of the underlying conundrum presented by form-adhesive agreements. For the most part, however, those who have approached the subject try to ascertain what the text of these agreements purports to do, when they are good or bad (where “bad” means the language is one-sided in favor of the drafting organization), just how bad they are, how courts have treated such terms, and how courts should treat such terms.

These approaches are useful and serve an important role in addressing policy discussions about form-adhesive agreements. However, they collectively fall short of the mark when trying to understand the role of such contracts in exchange relationships, or more significantly in sustaining or undermining the rule of law. Also, it would seem that more than three decades of socio-legal studies have repeatedly demonstrated the need to understand not only the formal “law on the books” aspect of a legal phenomenon such as form contracts, but the “law in action” aspect as well. The “law in action” approach is particularly salient in this area because, as noted in the literature and confirmed by the research reported herein, form agreements are often not even read or understood by the signers. It would therefore make sense to explore interpretations of and experiences with form agreements (the “law in action” component) to determine how the law should regard these contracts, and at the very least to supplement the existing research, which has addressed the “law on the books” component almost exclusively.

framework in light of courts’ failure to address unfairness of one-sided consumer contracts).

⁷ See, e.g., Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006) (arguing that standardized contract terms should not automatically be suspect); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1105–06 (2006) (“Drafters value boilerplate because the courts know what it means.”); Robert A. Hillman & Jeffrey J. Rachlinksi, *Standard-Form Contracting in the Electronic Age*, 77 NYU L. REV. 429 (2002) (concluding that current framework used by courts for dealing with form contracts will be sufficient to apply to the Internet world); Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMP. LEG. STUD. 677 (2007) (finding that licenses tend to be biased in favor of software companies, and that the larger or younger a company, the more one-sided the contract); Slawson, *supra* note 6, at 532 (“It would be equally unrealistic to confer on courts broad powers to rewrite [form-adhesive agreements].”).

⁸ See, e.g., Florencia Marotta-Wurgler, *“Unfair” Dispute Resolution Clauses: Much Ado About Nothing?*, in *BOILERPLATE THE FOUNDATION OF MARKET CONTRACTS* 45, 46–66 (Omri Ben-Shahar ed., 2007) (applying an empirical study of dispute resolution clauses to find that such clauses do not place hardships upon consumers); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006) (noting that a company’s “expectation of doing business with other consumers in the future may dissuade it from enforcing a one-sided contract to the hilt”); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006) (“[F]irms . . . have given their managerial employees the discretion to grant exceptions from the standard-form terms on a case-by-case basis.”).

It may occur to those steeped in the law and society tradition—particularly those of the legal realist persuasion and even more particularly those familiar with the seminal work of Stewart Macaulay,⁹ Grant Gilmore¹⁰ and Lawrence M. Friedman¹¹—that such a focus on the citizen is essential to fully understand these unusual forms of contract as experienced. *Contract as experienced*, as Macaulay and others would likely agree, is often more important than *contract as written*. In fact, the necessity of including empirical analysis of individuals' experiences and interpretations of contracts is evidenced by the central finding of Macaulay's important work on contracts among businessmen: individual opinions about contracts more saliently predict how breaches are perceived and resolved than the contract terms themselves.¹² This research seeks to extend the work of Macaulay and others by examining how individuals actually experience form agreements, and how individual interpretations of form agreements affect the way in which social actors exchange (contractually or otherwise) with the organizations that require their consent on such forms.

The objectives for this analysis are threefold. First, this Article argues that through an exploration of individual interpretations of and experiences with form-adhesive agreements, it is possible to gain a fuller understanding of trust in the rule of law and by extension, citizenship in the state. Second, this Article seeks to contribute to the important discussion among contract scholars about how form agreements ought to be regarded in doctrine and legislation by demonstrating empirically the connection between interpretations of form-adhesive agreements and how individuals regard their ongoing relationships with form-drafting organizations. Third, in challenging the assumption of uniformity in individual interpretation of form agreements, this Article argues that observed differences of interpretations of and experiences with boilerplate vary with socio-economic status (SES), such that higher SES actors view the enforceability of contracts they have signed as more malleable than lower SES actors. The implications of such SES-based differences of interpretation of form agreements for theories of democracy and the liberal state may be far-

⁹ See generally Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465 (1985) (reflecting on his 1963 article and updating his theory); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) [hereinafter Macaulay, *Non-Contractual Relations*] (noting that, in the business world, planning of exchange relations and use of legal sanctions to settle disputes are seen as unnecessary and undesirable).

¹⁰ See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 87 (1974) (“[W]e might say that what is happening is that ‘contract’ is being reabsorbed into the mainstream of ‘tort.’”).

¹¹ See generally LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965) (studying relations between and changes in contract law and society in Wisconsin from the Civil War through the 1950s).

¹² Macaulay, *Non-Contractual Relations*, *supra* note 9, at 55 (directly and succinctly introducing the article by asking, “What good is contract law? Who uses it? When and how?”).

reaching considering the degree to which citizens' consumer and employment relations are governed by these contracts.

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

To illustrate the importance of actor-centered empirical inquiry, consider the arguments advanced by Lucian Bebchuk and Richard Posner in one article¹³ and Jason Scott Johnston in another.¹⁴ These authors claim that firms do not intend to strictly enforce the terms contained in form agreements.¹⁵ That is, firms keep self-serving terms in form contracts to selectively “fend off consumer opportunism,” as Omri Ben-Shahar describes it, but otherwise allow honest clients off the hook.¹⁶ These authors assume a uniformity of individual interpretation of the form agreements they have signed. All actors, they argue, are assumed to behave consistently with their interests—when the terms are activated and not in their interests, individuals will speak up and demand circumnavigation from the organizations, otherwise honest clients remain silent. Firms then sort the honest from the dishonest and enforce only against the latter, resulting in a presumptively *fair* outcome. Johnston goes so far as to argue that boilerplate *encourages* negotiation, like the lawyer's hypothetical argument at the outset of this Article, suggesting that the terms contained in such agreements to which both sides have ostensibly bound themselves are merely *invitations to negotiate*.¹⁷ This may be the organizations' view, and this Article later addresses how this approach parallels the way in which powerful, ruling-class elite social actors historically transformed statutory law to conform to their interests. But this assumption conflates the notion of self-interest, on the one hand, with perceptions of one's ability to rely on the law to enforce a contract or to wield the law as a sword to escape from a contractual provision that appears unlawful on the other. This Article argues that these things are quite separate, and need to be measured separately, especially when the exchange relationship of interest is axiomatically power-imbalanced as is

¹³ Bebchuk & Posner, *supra* note 8.

¹⁴ Johnston, *supra* note 8.

¹⁵ Bebchuk & Posner, *supra* note 8, at 827–28; Johnston, *supra* note 8, at 858.

¹⁶ BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS, at xi (Omri Ben-Shahar ed., 2007).

¹⁷ See Johnston, *supra* note 8, at 864–77 (citing examples of standard-form contracts in which negotiating over terms with consumers is an accepted and expected business practice); Joel Rothstein Wolfson, *Contract and Copyright Are Not at War: A Reply to “The Metamorphosis of Contract into Expand,”* 87 CAL. L. REV. 79, 95 (1999) (“As corporate counsel for a large corporation, I can tell you that very few terms in a contract are truly ‘non-negotiable.’”).

the case with form-adhesive contracts.

What if all individual signers do not view these contracts they have signed in this unusual way—as invitations to negotiate?¹⁸ Form agreements are, after all, binding legal contracts (at least they may appear as such to some). What if some regard form contracts “myopically,” thinking that there is no post-agreement negotiation available, and others regard them, perhaps more sophisticatedly, as open and quite negotiable, like the “myopes” and “sophisticated consumers” in Xavaer Gabaix and David Laibson’s terms?¹⁹ This is exactly the type of division that prior research on law as a differentiated resource suggests. Along these lines, what if the variation in individual interpretations is such that the organizations’ opportunities for sorting are not aligned to distinguish opportunism from altruism? What if SES differences among individuals explain part of the variation, such that lower SES actors are more likely to feel bound by one-sided terms than higher SES actors? Again, this is consistent with prior scholarship on citizenship.

The purpose of this Article is to raise questions, provoke discussion and begin to empirically vet the theories developed about perceived enforceability of contract. It is also the aim of this Article to expand the scope of inquiry on the phenomenon of form contracts beyond the present range of disciplines. Hopefully, this Article illustrates the need for further empirical study of citizens’ engagement with these ubiquitous contracts. To begin, this Article examines these questions: What happens to interpretations of enforceability when actors bind themselves to contracts that they have had no opportunity to participate in negotiating or drafting? Does variation exist in interpretations of enforceability of such agreements? What effect(s), if any, does such variation have on the way individuals interpret their exchanges with the entities (mostly institutions) that draft such agreements? Do groups of socio-economic actors interpret enforceability of agreements differently and with what effect, if any?

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

¹⁸ Interestingly, there is research demonstrating gender differences in the way in which individuals perceive opportunities to initiate negotiations. *See generally* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003) (exploring gender gap in propensity to initiate negotiations).

¹⁹ Gabaix & Laibson, *supra* note 5, at 507–09.

respond to form agreements, and as a way of examining popular faith in the rule of law.

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

The main analysis is in Part V, which sets out the preliminary findings supporting the hypothesis that higher SES actors are more likely to regard form-adhesive agreements as unenforceable when compared to lower SES actors. Part VI then discusses the findings in support of the hypothesis that actors are more likely to regard form agreements as unenforceable (high malleable consent) when they view their jobs as instrumental transactions—as simply a financial exchange. Where employment is regarded as an exchange of obligations as well as rewards, as imbued with a substantive, moral relationship—what industrial relations scholars often refer to as a “social contract” or a “relational exchange”²⁰—actors are more likely to regard the form-adhesive agreements as *enforceable* (low malleable consent). Essentially, when actors view form-adhesive agreements as unenforceable, there is less expressed trust in the employment relationship. These results seem to hold across diverse populations, from low level employees of a national company to MBA students at an elite business school. MBA students, who enjoy less dependent employment constraints (for example, more job opportunities and less dependencies), voice less respect for the enforceability of the contracts they sign. They display malleable consent more frequently than sales associates with greater employment dependency and constraints. Exploring these differences across the two divergent groups, the construct is presented as a means of revealing otherwise unobserved differences among citizens’ interpretations of law in the employment context. Part VI discusses the implications of this research and Part VII the limitations. The conclusion follows.

²⁰ THOMAS KOCHAN & BETH SHULMAN, ECON. POLICY INST., A NEW SOCIAL CONTRACT: RESTORING DIGNITY AND BALANCE TO THE ECONOMY 1 (2007); Thomas Kochan, Presidential Address to the 52nd Annual Meeting of the Industrial Relations Research Association: Building a New Social Contract at Work: A Call to Action, 3 (January 7–9, 2000), available at http://www.press.uillinois.edu/journals/irra/IRRA_Proceedings_2000.pdf#page=12. See generally PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET (2001) (discussing the difficulty American industry faces in meeting social obligations to workers in a modern economy).

II. THE INTERRELATIONSHIP AMONG CITIZENSHIP, CONTRACT AND TRUST IN THE RULE OF LAW

There is a connection between interpretations of law and virtually all social and economic exchange. By understanding such interpretations, we may gain a fuller understanding of the circumstances under which individuals rely on the law, avoid the law, break the law and believe in the consequences of actions that deviate from the law.²¹ This connection is important because, in part, it defines citizenship in the state. Work by sociologists and other scholars has repeatedly and consistently demonstrated this connection.²² Trust in agreements underlies not only economic transactions but also lies at the heart of the civil justice system, the rule of law more generally, and, to a larger extent, our ability to interact socially. The notion that parties to an exchange may bind themselves presently, and often rely on their agreements in the future, is simultaneously at the root of all commerce and all social interaction. Understanding this relationship is important because deterioration of the critical mass of contract-enforceability believers yields a corresponding

²¹ See generally PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998) (examining anecdotally ways in which Americans' lives are influenced by the way they think about and use the law); Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 6 AM. J. SOC. 1328, 1329 (2003) (arguing that "resistance [to law] is enabled and collectivized . . . by the circulation of stories narrating moments when taken for granted social structure is exposed and the usual direction of constraint upended"); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 2 (1985) (examining "natural duty" to explain why people "have a moral obligation or duty to obey the law"); Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 165 (1987) ("Legal institutions cannot be understood without seeing the entire social environment.").

²² See, e.g., KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS I* (1988) ("challeng[ing] the conventional faith in the law's ability to eradicate social prejudice"); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* (1990) (concerning behavior of social systems); EWICK & SILBEY, *supra* note 21, at xi ("us[ing] stories of everyday life to discover the different ways in which people use and think about law"); IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (discussing how social changes have affected Marc Galanter's *Why the "Haves" Come Out Ahead* article and theory); JUSTICE AND POWER IN SOCIOLEGAL STUDIES I (Bryant G. Garth & Austin Sarat eds., 1998) ("connect[ing] an understanding of culture's normative ideals with examination of the complex ways that law works in the world"); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990) (addressing use of court system to settle personal disputes); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) ("[E]xplor[ing] the everyday behavior of citizens toward the law and examin[ing] why people obey or disobey it."); Robert J. Bies & Tom R. Tyler, *The "Litigation Mentality" in Organizations: A Test of Alternative Psychological Explanations*, 4 ORG. SCI. 352, 352 (1993) ("identify[ing] different psychological factors that could explain why employees consider suing their employers"); Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 941 (1999) ("extend[ing] Galanter's analysis by considering the ability of large bureaucratic organizations to 'internalize' legal rules, structures, personnel, and activities"); Marc Galanter, *Why the "Haves" Come Out Ahead*, 9 LAW & SOC'Y REV. 95 (1974) (addressing different interactions with legal system between "one-shotters" and "repeat-players"); James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC'Y REV. 631, 632 (1991) (arguing that "those who perceive the Court as more procedurally fair are no more or no less likely to acquiesce to unpopular Court decisions").

problematic deterioration of law, associated with loss of social control and increased resort to non-legal means of redress, including violence, asocial behavior and other potentially undesirable outcomes.²³

This connection between citizenship and the rule of law on one hand and beliefs about enforceability of contract on the other is discussed specifically by several notable scholars. For instance, Eugen Ehrlich wrote that the contract is the “juristic form for the distribution . . . of the goods and personal abilities (services) that are in existence in society.”²⁴ The law embodies the norms of exchange in this “contract.” Actors interpret and often reinterpret contracts they have created (or at least to which they have consented). Actors’ interpretations of their contracts are colored by their views of the law specifically, in context with respect to the relative power of the parties, and generally, often drawing on notions of justice, equity and fairness.²⁵ Thus, a self-perpetuating loop that enables both economic and social exchange to function is born. Max Weber and others after him agree that contract creates law as much as law creates contract.²⁶ This is why, for example, the Uniform Commercial Code (UCC) attempts to embody *and* defer to industry custom (the norms of exchange), and why those creating contracts governed by the UCC look to case law interpreting it and related statutes in negotiating their instruments of exchange.

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

It is true that obligations that are properly contractual can be entered into or abrogated by the mere will to agreement of the parties. Yet we must bear in mind that, if a contract has binding force, it is society which confers that force. Let us

²³ See generally DONALD BLACK, *THE BEHAVIOR OF LAW* (1976) (discussing law as one form of social control); EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1936) (discussing relationship between legal decisions and society); Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34, 34 (1983) (“examin[ing] . . . the so-called struggle between law and self-help”).

²⁴ EHRLICH, *supra* note 23, at 48.

²⁵ Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCH. REV. 323, 336–38 (1997); see, e.g., James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 474–90 (1989) (exploring connections between perceptions of procedural fairness and conceptions of just decision making); Craig A. McEwen & Richard J. Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 LAW & POL’Y 257, 257 (1986) (“conclud[ing] that institutional legitimacy is related to voluntary compliance”).

²⁶ MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 125 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954).

assume that it does not give its blessing to the obligations that have been contracted; these then become pure promises possessing only moral authority. Every contract therefore assumes behind the parties who bind each other, society is there, quite prepared to intervene and to enforce respect for any undertakings entered into. Thus it only bestows this obligatory force upon contracts that have a social value in themselves, that is, those that are in conformity with the rules of law. We shall even occasionally see that its intervention is still more positive. It is therefore present in every relationship determined by restitutory law, even in ones that appear the most completely private, and its presence, although not felt, at least under normal conditions, is no less essential.²⁷

It follows from the above proposition that belief in the enforceability of contracts is at least, in part, a reflection of belief in the state's ability to enforce law generally. Ehrlich agreed with Durkheim on this point and took the concept one step further. Ehrlich believed not only that the law and the state lurk in the shadows of all private contracts, but that informal, everyday norms of social exchange do as well.²⁸ He noted that even in commercial dealings, contracts are not entered into as with definite persons, "but as with the whole group of persons who are in a mutual relation of exchange of goods with each other."²⁹ This idea that contractual relations norms extend beyond the four corners of private parties' agreements to affect the scope of others' legal power is echoed in Weber's writings as well:

In certain situations the normative control through enabling rules necessarily extends beyond the task of the mere delimitation of the range of the parties' individual spheres of freedom. As a general rule, the permitted legal transactions include a power of the parties to the transaction to affect even third parties. In some sense and to some degree almost every legal transaction between two persons, inasmuch as it modifies the mode of the distribution of disposition over legally guaranteed powers of control, affects relations with an indeterminately large body of outsiders.³⁰

Taken together, the ideas of Ehrlich, Durkheim and Weber yield the

²⁷ EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 71 (W.D. Halls trans., The Free Press 1984) (emphasis added).

²⁸ EHRLICH, *supra* note 23, at 45–48.

²⁹ *Id.* at 46.

³⁰ WEBER, *supra* note 26, at 126.

feedback loop described above wherein law relies on norms of social exchange, which in turn rely on law to sustain the social order generally. Thus, the normative context of exchange, the social valences associated with the provisions of agreements, and perceptions of law are all part of this critical exchange relationship in which emergent contracts are the legal representation of the interaction. This notion is encapsulated in Abram Chayes's influential work, *The Modern Corporation and the Rule of Law*,³¹ in social theoretical insights of how each person makes the law when he or she writes a contract, and in the idea that the law is not about *proscriptions*, but about individually crafted *prescriptions*.³² Because the way that parties to a contract interpret their agreements has the capacity to affect the law, the "disposition over legally guaranteed powers of control,"³³ and a host of other socially relevant measures, trust or faith in the enforceability of contract is required for the feedback loop to be perpetuated.

The feedback loop—involving norms of exchange, interpretation of law, law "on the books" and contract—begs the question of which element is in control of the loop. Macaulay demonstrated that terms contained in negotiated, arms-length business contracts among sophisticated and knowledgeable actors are often eclipsed by the norms of interaction.³⁴ These actors' interpretations of how business is to be conducted dictated how they behaved more so than the written terms in contracts they had entered.³⁵ Available contractual remedies were foregone, and extra-contractual responses, including penalties for breach, were negotiated and accepted in spite of pre-existing written agreements purporting to dictate otherwise.³⁶ These observations lead to the provocative Realist assertion that "contract is dead."³⁷ However, this assertion, and the associated scholarship, do not begin to fully explain the effects of this alleged death on the contracting actors, and the conditions under which these important norms and interpretations vary systematically. This research seeks to pick up this very set of questions.

³¹ ABRAM CHAYES, *THE MODERN CORPORATION AND THE RULE OF LAW* 25, 32 (Edward S. Mason ed., 1959).

³² See LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 577–78 (2d ed. 1977) ("[T]he source of law is said to lie in the will of the people. . . . [T]he structure of the legal system itself—the way in which 'custom' or 'public opinion' is translated into 'law'—is itself an important factor . . .").

³³ See *supra* text accompanying note 30.

³⁴ Macaulay, *Non-Contractual Relations*, *supra* note 9, at 59–62.

³⁵ *Id.* at 60; see GILMORE, *supra* note 10, at 64–65, 70–71 (explaining that law of contract has evolved to accommodate expectations of parties); see generally FRIEDMAN, *supra* note 11 (noting that contract law changes along with society).

³⁶ Macaulay, *Non-Contractual Relations*, *supra* note 9, at 61–62.

³⁷ GILMORE, *supra* note 10, at 1; Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 *TEX. L. REV.* 103, 113–15 (1988).

A. *Variation in Malleable Consent*

Depending on one's theoretical assumptions, it could be either expected or quite counter-intuitive that actors vary in the way they construe the enforceability of agreements into which they have entered. It may be expected for those who posit that law is a differentiated resource.³⁸ If form-adhesive agreements are interpreted and experienced in the same way that other legal things are, it follows that variation exists here as it does in contexts like the civil and criminal justice systems.³⁹ Some could view contract, regardless of its adhesiveness or *form-ness*, as a set of moral obligations. In this instance, the morality of the agreement drives the perceived enforceability and trumps other concerns like fairness, instrumental cost-benefit calculations, or even legality. However, it is just as easy to imagine how a different configuration of priorities could lead to regarding the same form contract as unenforceable. Variation may therefore also be expected for those who subscribe to the view of contract as an embodiment of moral obligations, where one person's morality may differ greatly from her contractual counterpart's.⁴⁰ For some, a "deal's a deal" trumps "it's not fair that I was forced to sign the waiver in order to receive emergency medical treatment for my daughter." Lastly, it may be the case that variation in perceived enforceability is expected for those who believe that resource-dependency dominates the decision-making process. For instance, if one has to sign a contract in order to receive the benefit of the bargain, one should be acutely aware of one's true resource-dependence on the party requiring their signature. It would be rational and expected to assume that a party who is able to force one to sign a contract is also quite capable of enforcing its terms.

Variation in perceived enforceability is counter-intuitive for those who assert that action is consistently, and almost uniformly, rationally self-interested, as is often the case in economic models of behavior. In such models, people sign because it is in their interests. They prefer to receive

³⁸ See, e.g., EWICK & SILBEY, *supra* note 21, at 17; Kritzer & Silbey, *supra* note 22, at 8 (noting that "repeat players . . . are much more likely to win [in court] than one-shot litigants"); PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 9 (1978) ("[A] legal order has many dimensions . . .").

³⁹ See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617 (1986) ("Legal interpretation, therefore, can never be 'free;' it can never be the function of an understanding of the text or word alone."); Kritzer & Silbey, *supra* note 22, at 4 (noting that one-shot litigants are disadvantaged in other civil and criminal contexts); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719, 719 (1973) ("The complex 'law,' thus condensed into one term, is abstracted from the social context in which it exists, and is spoken of as if it were an entity capable of controlling that context."); C. Wesley Younts & Charles W. Mueller, *Justice Processes: Specifying the Mediating Role of Perceptions of Distributive Justice*, 66 AMER. SOC. REV. 125, 125 (2001) ("Justice is a rather murky concept in social psychology, perhaps because of its various uses in common discourse.").

⁴⁰ See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296-300 (1986) (articulating theories of contracts in which one's morals inform one's contractual obligations).

the benefit of the bargain and incur the costs of signing the agreement, because the benefits less the costs are assumedly preferred to incurring the opportunity cost of foregoing the benefit of the bargain. In the employment context, new hires are in a honeymoon period and could not imagine having to sue their employers for being illegally fired or harassed. They therefore view the costs of signing away their right to sue their new employers in court as either extremely low or nonexistent. Why not give away a right if the likelihood of needing it is so low? Down the road, when signers want to do something the terms of the agreement prohibit, actors are assumed to regard the contract as unenforceable, proportional with their expected utility of seeking escape from the contract less the perceived costs of seeking escape. This is most often the case in economic analyses of behavior around contract.⁴¹

Similarly, those who study law with regard to norms of exchange often laud the law as supporting shared, uniform and socially accepted institutional rules as a reflection of public opinion.⁴² For instance, Jürgen Habermas notes that the law allows actors to relate to each other as agents *predictably* because of a shared understanding of legal obligation and responsibility, thereby removing a heavy organizational burden from communicative skills.⁴³ Variability of subjective contractual enforceability yields less predictability and increased social discord. This Article offers evidence of this lack of uniformity, contending that actors vary in the degree to which they regard the enforceability of terms, even when the terms are constant *and* against their interests.

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

Form-adhesive agreements are not new. In fact, writing in 1936, Ehrlich observed that “[m]ost written contracts are drawn up according to printed forms, the content of which often is not made known to the parties, for it is determined by society quite independently of their individual wills.”⁴⁴ Form agreements were and continue to be justified byproducts of

⁴¹ See, e.g., Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 213–14 (2000) (explaining economic reasons for why parties would choose to enter waiver agreements); see also Steven E. Plaut, *Implicit Contracts in the Absence of Enforcement*, 76 AMER. ECON. REV. 257, 257–58 (1986) (explaining economics behind enforceability of implicit contracts).

⁴² See W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 6, 10, 99 (1959) (“In a democracy, the interplay between social opinion and the law-moulding activities of the State is a more obvious and articulate one.”); JÜRGEN HABERMAS, 2 *THE THEORY OF COMMUNICATIVE ACTION* 365–66 (Thomas McCarthy trans., 1987) (discussing social context in which laws are enacted).

⁴³ See HABERMAS, *supra* note 42, at 365 (“This is true of cases where the law serves as a means for organizing media-controlled subsystems that have, in any case, become autonomous in relation to the normative contexts of action oriented by mutual understanding.”).

⁴⁴ EHRLICH, *supra* note 23, at 49.

a bureaucratic, industrialized society. Many judges and scholars initially viewed such forms as innocuous conveniences—as the way to lubricate economic exchange given the unavoidable impersonal nature of daily interactions. As Weber noted, “forms are necessary only to the extent that they are prescribed for reasons of expediency, especially for the sake of the unambiguous demonstrability of rights, and thus of legal security.”⁴⁵ He believed, however, that the expanse of their use would be determined by property rights and power. In fact, he theorized that the very tenet of “contractual freedom,” and courts’ desire to avoid substantive analysis of “fair deals,” would result in institutionally legitimated and routinized power by the few over others.⁴⁶

The nascent evolution of the notion of malleable consent is traceable even in court opinions in which boilerplate was sought to be enforced. In 1960, the Supreme Court of New Jersey heard the case of *Henningsen v. Bloomfield Motors, Inc.* in which a car buyer sued the automobile manufacturer for consequential damages allegedly resulting from a defective steering mechanism.⁴⁷ The car maker argued that the buyer waived his right to sue for such damages when he signed the contract containing a waiver of damages clause in the fine print.⁴⁸ The court ruled that the waiver did not apply:

The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position.⁴⁹

The court’s implied and uncanny prediction that the rise of the form-adhesive agreement would upset the “social order as a whole” is particularly emblematic of one of this Article’s propositions about the scope and effect of this research. Specifically, this Article speculates that the more we enter into form-adhesive agreements, the more our collective notion of contract becomes watered-down. With the degradation of this bedrock on which our economic system is based, this Article forecasts major instability in industries predicated on boilerplate contracts, like the

⁴⁵ WEBER, *supra* note 26, at 125.

⁴⁶ *See id.* at 189 (“The result of contractual freedom, then, is in the first place the opening of the opportunity to use, by the clever utilization of property ownership in the market, these resources without legal restraints as a means for the achievement of power over others.”).

⁴⁷ *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 73, 75 (N.J. 1960).

⁴⁸ *Id.* at 84.

⁴⁹ *Id.* at 86.

mortgage lending industry. Form mortgages are the norm, and because people have numbed to contracts that *appear* similar and innocuous, this Article speculates that many sign these agreements with greater malleable consent than they should have for such contracts. A mortgage form may look like the same form legalese as the “Terms & Conditions” that a cell-phone service provider sends to its customers in the mail, but they are not. Greater perceived unenforceability on a mass scale can have dire economic consequences if and when the drafting organizations seek enforcement of terms that individual signers regarded incorrectly as mere *invitations to negotiate* just as individuals might with more innocuous form agreements like the cell-phone service Terms & Conditions or other commonly encountered forms. The greater the societal level of malleable consent, the less trust there is in the rule of law. Less trust in the rule of law yields increased resort to non-institutional, extra-legal forms of coercive power and other negative outcomes.⁵⁰

Lastly, it is worth noting two additional notions that may be applicable when addressing individual behavior around form adhesive agreements. The first comes from the literature on the phenomenon known as “escalation of commitment.”⁵¹ Part of this research has demonstrated that the less often or less actively actors participate in a negotiation process, the less buy-in the actors feel to the terms of the agreement.⁵² It follows that actors who do not participate *at all* in the process of creating an agreement have no control over the terms or the process by which the parties bind themselves (this is the definition of form-adhesive agreements). In most cases, these actors have no personal connection with the party that created the agreement, and are more likely not to accept the agreement as compared to actors for whom such conditions do not exist. It is possible then, that such micro-level experiences also yield greater collective belief

⁵⁰ This logical progression is somewhat analogous to arguments about other pervasive social phenomena in that it is easy to believe but hard to prove. For instance, it may be easy to believe that pervasive depictions of violence in music, television, video games and on the Internet has *some* deleterious impact on social action. This notion, however, is difficult to prove, in part because of the extent to which the phenomenon exists.

⁵¹ See, e.g., Joel Brockner, *The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress*, 17 ACAD. MGMT. REV. 39, 39–42 (1992) (reviewing development of theory); Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 ACAD. MGMT. REV. 577, 577–80 (1981) (“[M]any of the most injurious personal decisions and most glaring policy disasters can come in the shape of sequential and escalating commitments.”).

⁵² See ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 27–28 (Bruce Patton ed., 1991) (“Give them a stake in the outcome by making sure they participate in the process. If they are not involved in the process, they are hardly likely to approve the product.”); RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 149–50 (1965) (explaining the importance of alerting opposing party of your intentions before entering negotiations); D. Ramona Bobocel & John P. Meyer, *Escalating Commitment to a Failing Course of Action: Separating the Roles of Choice and Justification*, 79 J. APPLIED PSYCHOL. 360, 360–61 (1994) (noting prior scholars’ confusion of personal responsibility and public justification in escalation of commitment studies).

that such agreements are unenforceable against them.

A second notion comes from an observation frequently noted in the legal scholarship on boilerplate. People tend not to read the form-adhesive agreements they sign. As many argue, this is rational behavior for a number of reasons.⁵³ If subjects do not read the terms at the time of consent, they would have no opportunity to know (or care) whether the provisions are enforceable against them. Later, when they learn that the terms exist, they can either accept that the entity that coerced them to sign is legally entitled to use the form-adhesive agreement to the coercing entity's advantage (it is enforceable), or they can believe that the law protects them, the individual, from such unfair behavior (it is unenforceable). Thus, the fact that actors tend not to read or care what it is that they sign is likely to produce ex-post differentiation in the perception of the agreements' enforceability.

C. *Malleable Consent and Law as Coercive Power*

If law is a means of social control, as many argue it is,⁵⁴ then form-adhesive agreements offer an appealing and convenient way for institutions that draw from the well of institutionalized (legal) power to exert greater control. In this sense, malleable consent can be a useful measure of the popular response to this institutionalized form of control.

Institutions rely on form-adhesive agreements to protect their rights and interests often to the detriment, exclusion or waiver of individuals' rights and interests (examples are waivers, penalty clauses, etc.). Such contracts are a powerful and subtle form of social control through the appearance of the law. Signing a form-adhesive agreement could mean either that pre-existing individual rights and interests are canceled out or waived (the right to a jury trial, for instance), or that future benefits are promised to be given by the individual to the institution usually upon the occurrence of a described event (i.e. in credit card user agreements, agreeing to pay a penalty for late payments). Institutions too could be said to vary in their malleable consent; they selectively enforce form-adhesive agreements against individuals in much the same way that laws are made

⁵³ See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 241–42 (1995) (referring to choice of many to avoid reading form agreements as being product of “rational ignorance” and other related limits of cognition); Hillman & Rachlinski, *supra* note 7, at 446–47 (“For any single consumer, the costs of monitoring a business’s standard-form contract outweigh the benefits.”).

⁵⁴ See, e.g., BLACK, *supra* note 23, at 2 (asserting that “[l]aw is governmental social control”); ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 18–20 (1942) (asserting that “[t]he major agencies of social control are morals, religion, and law” and that “[i]n the modern world, law has become the paramount agency of social control”); Lon L. Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 BYU L. REV. 89, 92 (arguing that “the law of contracts is, after all, an instrument of social control directed towards those who may be inclined to ignore their contractual obligations”).

and enforced against individuals. Numerous historical accounts exist of powerful actors creating rules to selectively enforce them against the less powerful.⁵⁵ It should not be surprising then that this process is replicated through form-adhesive agreements. That is, institutions create forms in the first place to demonstrate uniform treatment, and then permit individuals to escape from the oppressive waivers in a demonstration of institutional leniency and good will.⁵⁶

The footnoted references cited above in support of the proposition that institutions create forms to demonstrate uniform treatment and subsequently permit variable leniency are Thompson's account of the Black Acts and Jerome Hall's account of the laws of property and theft.⁵⁷ These may be read as accounts of institutional renditions of malleable consent. Put another way, individuals replicate what institutions do when contracts (which are embodiments of state-institutional coercive authority and power) purport to bind them to action or inaction, in ways inconsistent with their interests. The essential difference is not in the process, but in the outcomes.

The frequently cited *Carrier's Case*, discussed in Jerome Hall's important work on the history of theft, offers a perfect example of the sequence by which powerful social actors (wealthy, property-rich elite) exhibit the institutional equivalent of malleable consent. In 1473, before specific laws of theft were established to protect property, influential property-owners first tried to adjust existing laws to comport with their interests as their needs and interests were not within the intention or existing interpretations of established laws.⁵⁸ In the *Carrier's Case*,

⁵⁵ See, e.g., JEROME HALL, *THEFT, LAW AND SOCIETY* 15–16 (2d ed. 1952) (noting that “subserviency of the courts to the militant power of the nobility became a commonplace” during fifteenth and sixteenth centuries and that occasionally during this time “royal letters were sent to justices or to sheriffs ordering them to show favor to a particular person”); EDWARD THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 259–69 (1975) (describing ways through which the law operated in eighteenth century England as “clearly an instrument of the de facto ruling class” to reinforce its position in society through both harsh enforcement and occasional, deliberate leniency); Black, *supra* note 23, at 37–41 (citing instances where criminal conduct was used selectively to enforce morals or exact revenge for past wrongs); William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 *SOC. PROBS.* 67, 69–70 (1964) (describing purpose of first vagrancy laws “to force laborers (whether personally free or unfree) to accept employment at a lower wage in order to insure the landowner an adequate supply of labor at the price he could afford to pay”).

⁵⁶ See THOMPSON, *supra* note 55, at 265 (noting occasions when even “the Government itself retired from the courts defeated” and that “[s]uch occasions served, paradoxically, to consolidate power, to enhance its legitimacy, and to inhibit revolutionary movements”); Douglas Hay, *Crime and Justice in Eighteenth—and Nineteenth—Century England*, 2 *CRIME & JUST.* 45, 48–54 (1980) (detailing significant increase in capital offenses during late seventeenth and early eighteenth centuries and corresponding rise in public pardons and judicially urged acquittals); Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830–1860*, 33 *LAW & SOC'Y REV.* 161, 162–66, 168–69 (1999) (explaining advent of plea bargains in the American court system and their basis in “time-honored tradition of episodic leniency—frequent but irregular pardons and grants of clemency”).

⁵⁷ HALL, *supra* note 55; THOMPSON *supra* note 55, at 260.

⁵⁸ HALL, *supra* note 55, at 32–33.

existing law suggested that goods not delivered as contracted were not “stolen” because through the act of bailment, the carrier had established temporary property rights over the goods.⁵⁹ When these conventional understandings of bailment, property and theft proved problematic in a world of increasing commercial exchange, the merchants and their lawyers strained to substantively interpret the law to comport, in this case, via the idea of “breaking bulk,” or opening the bails.⁶⁰ When that proved too difficult because the rules were insufficiently flexible to suit their needs, new laws—whose letter comported directly with the merchants’ and the King’s commercial interests, resulting in more harmonious accord for those compelled to be in compliance with the law—were concocted.⁶¹ The transformed laws were then more easily relied upon to induce social actors to comply therewith, resulting in more security for the already more powerful actors’ interests and wealth.⁶²

Following the same pattern, when individuals are faced with contracts that bind them in ways they do not wish to be bound, first, they may alter their expectations of what the contracts contain, either electing to ignore the agreements entirely, or to develop beliefs about their contents not based on careful readings but on normative expectations. This is supported by the data presented in this Article—only three out of thirty-seven subjects knew that they signed an agreement binding them to resolve all employment disputes by arbitration in lieu of adjudication.⁶³ It is also supported by existing scholarship on reactions to boilerplate.⁶⁴ Following this, actors may strain to interpret existing agreements in substantive ways that differ from their apparent intention, arguing that the way others must regard these things differs from what the contract terms (institutional actor claims) purport to do. It is in this step that we may see actors’ expectations about the norms of exchange more saliently predicting variation in action—some expect that their credit card late fees will be waived if they call and ask their lender to do so, while others do not expect that this would happen, and pay the fine. The variation in malleable consent documented in this Article supports the occurrence of this reaction.

The last step is perhaps the most interesting, for those on the receiving end of form-adhesive agreements are axiomatically not the authoritative,

⁵⁹ *Id.* at 4.

⁶⁰ *See id.* at 4 (summarizing arguments submitted by merchants and their lawyers maintaining that a felony had occurred).

⁶¹ *Id.* at 33.

⁶² *Id.*

⁶³ All data and analysis underlying these assertions are on file with the author and are available for inspection upon request.

⁶⁴ *See Eisenberg, supra* note 53, at 240–44 (describing tendencies of modern consumers to consciously and unconsciously avoid reading boilerplate agreements); Hillman & Rachlinski, *supra* note 7, at 446–54 (reviewing various reasons why individuals often choose not to read standardized agreements).

powerful authors of the contracts empowered to alter the terms of the agreements. So, how do less powerful social actors react to form-adhesive agreements? What effect does exposure (for some, *prolonged* exposure) to these agreements have on these individuals?

Individuals may respond in four non-mutually exclusive ways. First, exposure to form-adhesive agreements may have no effect. That is, some individuals may sign these agreements and not care whether their rights are affected or how. They could tolerate or accept the invasiveness of the agreements and remain otherwise loyal to the organization(s) making them sign. Indeed, a portion of the participants observed appear to fall into this category, at least in the short-run. Second, actors could express “voice” about the agreements—complaining either to the organizations themselves, or more likely, in public venues. No substantial evidence of “voice” emerged in this study, but this does not mean that it is not a plausible or viable response. In fact, evidence of voice in response to form-adhesive agreements exists in other settings.⁶⁵ Third, they could “exit”—that is, refuse to sign the relevant forms, or find creative ways of opting out, by actually refusing to sign, editing the document before signing, or otherwise avoiding such exchanges. One could regard the existence of malleable consent itself as evidence in support of this response. The act of *mentally* excusing oneself from an otherwise binding contract (that one has indisputably signed without duress or fraud) is a creative way to “exit” from the reality of an unpleasant situation.

Lastly, actors could seek retribution specifically against the organization that made them sign, or more generally, against the institution requiring signatures on form-adhesive agreements, embodied, perhaps, by large, well-known firms such as internet service providers and media conglomerates. Examples of such exercises of coercive, punitive power might include neglect of duties or other counterproductive work behavior if directed at a specific organization, or more generally, increased disrespect for institutions’ intellectual or material property rights. In the literature on sociology of law and sociology of work, such a response is referred to as “resistance.”⁶⁶

⁶⁵ See, e.g., SULLIVAN, *supra* note 4, at 8–10 (detailing efforts of AT&T customer, Darcy Ting, to fight against the company’s attempt to include waivers of rights and arbitration agreements into service contracts); Posting of Angela Canterbury to Watchdog Blog, http://citizen.typepad.com/watchdog_blog/2007/07/protect-your-ri.html (Jul. 13, 2007, 11:38 EST) (explaining rights of Comcast customers to opt out of an “unfair and stealthy” arbitration agreement); The Small Print Project, <http://smallprint.netzoo.net/reag/> (last visited Sept. 11, 2008) (encouraging awareness of form-adhesive agreements and compelling individuals to create their own boilerplate and to sneak it into correspondence with institutions that force such agreements upon individuals).

⁶⁶ See generally JUSTICE AND POWER IN SOCIOLEGAL STUDIES, *supra* note 22 (discussing resistance as a weapon against oppression); MERRY, *supra* note 22 (discussing plaintiffs’ use of resistance within the court system); Ewick & Silbey, *supra* note 21 (discussing resistance in sociology of law context); Damian Hodgson, *Putting on a Professional Performance: Performativity, Subversion and Project Management*, 12 ORG. 51 (2005) (discussing resistance in sociology of work context).

This Article does not offer evidence of the hypothesized *general* retribitional response. That is, no evidence is presented in support of the theory that those who feel bound by terms of form-adhesive agreements (or those who do not feel that circumnavigation of such terms is an option) are more likely to take negative, reciprocal action against other organizations by doing things like stealing from them or disrespecting their intellectual property rights. However, in a second study conducted of malleable consent in MBAs, preliminary evidence was uncovered in support of the connection between views about enforceability of form-adhesive agreements and respect for organizations' intellectual property rights. Specifically, MBA students⁶⁷ who said they are "not bound by [terms in form agreements they have signed] because [they] don't have a choice in signing" or who said they are "not bound by such terms because practically speaking, it's usually the case that one can negotiate his/her way out of them" were significantly⁶⁸ more likely to agree or strongly agree that "acquiring music, movies or software (sold for a fee) without paying for them is acceptable because [they] don't feel obligated to the organizations that sell these things." Conversely, MBAs who said that they are *always* bound by form-adhesive agreements or that they are bound by such terms because "practically speaking, an individual is not as powerful as an institution," were significantly⁶⁹ more likely to disagree or strongly disagree with that statement.⁷⁰

Similarly, this Article presents no direct evidence of specific retribitional action taken against the entity promulgating the form-adhesive agreements. It is unclear whether the subjects who expressed the view that the form agreements they signed were not enforceable against them (*high* malleable consent) actually exercised coercive power against their employer at a greater rate than those who expressed the view that the form agreements were enforceable against them (*low* malleable consent). However, the current study does present preliminary evidence of the connection between malleable consent and what subjects reported they *would* do. Specifically, actors who expressed the view that form-adhesive agreements they signed were not enforceable against them (*high* malleable consent) were more likely to express views consistent with the notion of the employment relationship as "transactional"—that is, as merely a market exchange, devoid of loyalty or commitment.

Therefore this Article first argues that studying interpretations of enforceability of agreements as a construct in itself is worthwhile because

⁶⁷ n = 132.

⁶⁸ p = .002.

⁶⁹ p = .04.

⁷⁰ All data and analysis underlying these assertions are on file with the author and are available for inspection upon request.

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

III. HYPOTHESES

A. *Malleable Consent and Differences Across Socio-Economic Status*

As Richard Ely remarked, “[w]hen economic forces make possible oppression and deprivation of liberty, oppression and deprivation of liberty express themselves in contract.”⁷¹ The literature on law as a differentiated resource posits that perceptions of law will be different across socio-economic status groups such that higher SES actors will feel less “oppressed” and “deprived of liberty” than lower SES actors. If this is the case, interpretations of enforceability of form-adhesive agreements should reflect this distinction, revealing how unlevel the playing field is, regardless of its appearance to the contrary. Put differently, everyone has to sign these forms, but higher SES actors likely feel less bound by them than lower SES actors. This leads to the first hypothesis:

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

In other words, higher SES actors should exhibit *more* malleable consent and lower SES subjects should exhibit *less* malleable consent. If supported, this hypothesis would strengthen the notion that different social groups hold different views about law relative to their ability to circumnavigate a contract purporting to bind them to terms contra their interests. Previous research on legal consciousness has demonstrated that those who regard law as more accessible—as a sword wieldable on their behalf—are often better-educated, with higher paying jobs, and greater

⁷¹ Bruce E. Kaufman, *John R. Commons and the Wisconsin School on Industrial Relations Strategy and Policy*, 57 INDUS. & LAB. REL. REV. 3, 8 (2003) (quoting Richard Ely, President, Am. Ass'n for Labor Legislation).

socio-economic status generally.⁷² Such individuals are represented by the MBA subjects in the second study reported in this Article. Those who regard law as a shield, protecting organizations from the ineffective slings and arrows wielded by individuals, are often less educated, with lower paying jobs, and lower socio-economic status generally. This group is represented by the employees in the first study reported below. If malleable consent is a useful concept for understanding legal consciousness (derivative of institutional-legal faith or fear), it should reflect this dichotomy.

B. *Transactional–Relational Scaled Responses to Conflict*

The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence on this process.⁷³

The next step is to explore the relationship between interpretations of enforceability (malleable consent) and the way in which individuals exchange with the organizations requiring them to sign these agreements. This was accomplished by developing a transactional-relational scale based on Ian Macneil's influential work.⁷⁴ Existing research shows important differences between employees who view exchanges as *relational* and those who view exchanges as *transactional*. Employees who view their relationship as "transactional" tend to regard the employment exchange as primarily one of specific monetizable exchanges (pay for attendance) over a specific time period.⁷⁵ Such a transactional perspective focuses on the essential exchange of pay (high pay, merit pay and advancement, for instance) for work, to the exclusion of other typically longer-term

⁷² See generally BLACK, *supra* note 23, at 1–10 (discussing variations in application of law across social, economic, and educational settings); Roscoe Pound, *Introduction* to EHRlich, *supra* note 23, at xxxi–xxxvi (discussing trends of legal behavior at group level rather than individual level); Black, *supra* note 23, at 34, 41–42 (noting that those of lower socio-economic status receive less legal protection).

⁷³ WEBER, *supra* note 26, at 188.

⁷⁴ See generally Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (discussing effect of relational thinking on contract formation).

⁷⁵ See Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORGANIZATIONAL BEHAV. 323, 323–26 (1999) (noting that transactional contracts involve "specific, short-term, monetary obligations that require limited involvement"); Denise M. Rousseau, *New Hire Perceptions of Their Own and Their Employer's Obligations: A Study of Psychological Contracts*, 11 J. ORGANIZATIONAL BEHAV. 389, 391 (1990) (noting that transactional contracts typically involve "the absence of long-term commitments").

elements.⁷⁶ In contrast, those who view their employment as a “relational” exchange have open-ended agreements to establish and maintain a relationship involving non-monetizable elements like trust, loyalty, job security, career development, and support with personal problems.⁷⁷ In “relationally-governed exchanges . . . enforcement of obligations, promises and expectations occur[s] through . . . norms of flexibility, solidarity, and information exchange.”⁷⁸ This is not the case for transactionally-governed exchanges.⁷⁹

One way to observe whether employees view their employment exchanges as transactional or relational is to observe their responses to workplace conflicts of varying severity. Relational-view employees tend to respond to conflicts at work with more loyalty, and less exit and neglect.⁸⁰ They are more likely to resort to “voice”⁸¹ and to afford their employers the opportunity to restore order when problems arise, resorting to internal organizational outlets such as human resources departments, instead of external ones like lawyers or governmental agencies. On the other hand, transactional-view employees are more likely to go outside of the organization, either exiting more quickly in response to conflicts, or resorting to external means of redress. Similarly, research has found that psychological contract breach has a greater negative impact in terms of decreased job satisfaction, role performance and organizational citizenship behavior on relational-minded employees.⁸²

⁷⁶ See Sandra L. Robinson et al., *Changing Obligations and the Psychological Contract: A Longitudinal Study*, 37 ACAD. MGMT. J. 137, 138–41 (1994) (discussing the effect of perceived changes in employment obligations).

⁷⁷ *Id.*; see also Denise M. Rousseau & Judi McLean Parks, *The Contracts of Individuals and Organizations*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR 1, 1 (L.L. Cummings & Barry M. Staw eds., 1993) (presenting transactional and relational exchanges as points along a contractual continuum); Elizabeth Wolfe Morrison & Sandra L. Robinson, *When Employees Feel Betrayed: A Model of How Psychological Contract Violation Develops*, 22 ACAD. MGMT. REV. 226, 227 (1997) (“[V]iolation decreases employees’ trust toward their employers, satisfaction with their jobs and organizations, perceived obligation to their organizations, and intentions to remain.”).

⁷⁸ Laura Poppo & Todd Zenger, *Do Formal Contracts and Relational Governance Function as Substitutes or Complements?*, 23 STRATEGIC MGMT. J. 707, 710 (2002).

⁷⁹ See Rousseau, *supra* note 75, at 391 (“[T]ransactional contracts involve acquisition of people with specific skills to meet present needs . . . [in] the absence of long-term commitments.”).

⁸⁰ See William H. Turnley & Daniel C. Feldman, *The Impact of Psychological Contract Violations on Exit, Voice, Loyalty, and Neglect*, 52 HUM. REL. 895, 896–99, 902–03 (1999) (studying managers in this context); Jacqueline A.M. Coyle-Shapiro, *A Psychological Contract Perspective on Organizational Citizenship Behavior*, 23 J. ORGANIZATIONAL BEHAV. 927 (2002) (studying public sector employees).

⁸¹ Dan Farrell, *Exit, Voice, Loyalty, and Neglect as Responses to Job Satisfaction: A Multidimensional Scaling Study*, 26 ACAD. MGMT. J. 596, 597–98 (1983); see also ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* 30 (1970) (“To resort to voice . . . is for the customer or member to make an attempt at changing the practices, policies, and outputs of the firm . . .”).

⁸² Sandra L. Robinson, *Trust and Breach of the Psychological Contract*, 41 ADMIN. SCI. Q. 574, 576–80 (1996); Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception but the Norm*, 15 J. ORG. BEHAV. 245, 245–49 (1994); William H. Turnley & Daniel C. Feldman, *Re-Examining the Effects of Psychological Contract Violations: Unmet Expectations and Job Dissatisfaction as Mediators*, 21 J. ORG. BEHAV. 25, 25–29 (2000).

Table 1 depicts four types of common employment disputes and their associated predicted transactional and relational views. The disputes range from mild to severe forms of breach of psychological expectations—the first one involves the breach of the obligation to provide a workplace free of co-worker to co-worker disputes; the second, the breach of the obligation to comply with internal company rules about fairness of treatment; the third, a breach of the obligation of the organization to comply with external legal constraints; and the fourth, a breach of the obligation to provide fair treatment and to comply with external legal constraints with the ultimate negative consequence of unilateral termination of the employment relationship.

Table 1: Transactional-Relational Comparative Responses to Employment Conflicts

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

Previous literature has mostly, if not all, but ignored interpretations of the law and, specifically, the written contracts employees have signed in assessing how employees view this exchange relationship and in predicting how transactionally or relationally they view their employment relationships. In fact, at least one paper claimed that “*formal stipulations* employers . . . contribute only *slightly* to general perceptions of contractual

obligations.”⁸³ This Article tests the relationship between interpretations of enforceability of contract and the transactional-relational scaled view of work. The concept of malleable consent in the employment context is a function of how much perceived (*not* actual) flexibility there is in a binding agreement one has signed that purportedly limits legal remedial power against an employer. Subjects who view work transactionally are more likely to care whether there is such flexibility, and are therefore more likely to report the belief that such elasticity exists, because they are the ones most likely to resort to non-relational responses described in Table 1. Conversely, subjects who regard the employment relationship as more relationally oriented are less likely to express concern about their ability to escape a clause limiting their rights to sue their employers because (1) relationally-minded employees prefer to exchange relationally instead of litigiously, (2) they do not believe that the formal, written contract dominates their employment exchange anyway, and (3) to the extent that such subjects believe that the formal written contract controls their employment relationship, they are more likely to trust their employers to treat them fairly in the long run.

Thus, the second hypothesis emerges:

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

This means that the more one regards his employment relationship as “relational,” (and is thus willing to trade loyalty and commitment for a promise of some future benefit such as fair treatment, job security, etc.), the more likely one is to express the belief that the form-adhesive agreement he signed as a condition of employment is enforceable against him. Conversely, the more one regards his employment relationship as “transactional,” the more likely one is to express the belief that the form-adhesive agreement he signed is *unenforceable* against him. Put differently, the current study presents preliminary evidence of the connection between malleable consent and what subjects reported they would do in these conflict scenarios. Specifically, actors who expressed the view that the form-adhesive agreement they signed were not enforceable against them (*high* malleable consent) were more likely to express views consistent with the notion of the employment relationship as “transactional”—that is, as merely a market exchange, devoid of loyalty or commitment.

For instance, Subject 14, a forty-five-year-old African-American woman who had been working for her current employer for over three years, reported that the form-adhesive agreement she signed was “*just a*

⁸³ Rousseau, *supra* note 75, at 397 (emphasis added).

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

IV. RESEARCH METHODS

A. *Study I: “InnoTech” (Low Socio-Economic Status Sample)*

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

Informants were 84% men, with a mean age of 27 years⁸⁴ and an

⁸⁴ Standard deviation = 5.12 years.

average organizational tenure of 21 months.⁸⁵ The median duration of employment was 14 months. Subjects were 51% white, 19% black, 19% Hispanic and 11% other. Based on observation of sales personnel in each location, this sample closely approximated the population of sales associates employed in the geographical region sampled.

Subjects were asked about their alternative job opportunities, work experience, education, training on and off the job, what they signed when they started their jobs, how fairly they thought their employer treated them overall, and whether they considered their current employment situation a “job” or a “career.” Only 19% (seven respondents) reported that this work was a career.⁸⁶ Fifty-four percent of the participants reported having access to lawyers. The mean rating of InnoTech’s “overall fairness” of treatment on a 5-point Likert scale was 3.7.⁸⁷ Based on the researcher’s observation of sales personnel in each location, this sample closely approximated the population of sales associates employed in the geographical region sampled. Table 2 is a correlation matrix of the salient descriptive demographic attributes of the sample.

Table 2: Correlation Table of InnoTech Respondents’ Demographic Attributes

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

Note: ***Significant at 1% level; **Significant at 5% level; *Significant at 10% level.

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

¹ This variable is an indicator variable coded “1” if subjects said that their current employment was “career” as opposed to a “job.”

² This variable is coded “1” if subjects reported knowing a lawyer, and “0” otherwise.

³ This variable is a 5-point Likert-style rating of the overall fairness of treatment.

According to the subjects, they are highly substitutable; their jobs require little if any training. Several subjects complained about the high rate of turn-over among associates. Additionally, InnoTech subjects

⁸⁵ Standard deviation = 21 months.

⁸⁶ Not surprisingly, this view correlates positively and significantly with job tenure (.338; $p = .04$).

⁸⁷ Standard deviation = .91. The correlation between reported fair treatment by the organization and subjects being black is, somewhat shockingly, highly negative and highly significant (-.596; $p = .0001$), as was the correlation between subjects’ age and fairness ratings (-.408; $p = .001$), indicating that older and/or black workers reported significantly worse overall fair treatment.

generally expressed the notion that their jobs are the “best they can get” and that alternative work is not readily available. Almost all subjects completed one or two years of college, having mostly attended local community college and dropped out either to join the workforce or to have children. Other subjects were still attending college at the time of the interviews. For these reasons, this sample was considered to have uniformly lower SES actors than the MBA sample discussed in greater detail below.

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

Table 3: Descriptions of Vignettes

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

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

Table 4: Comparison of Relational Scale Components Across Studies

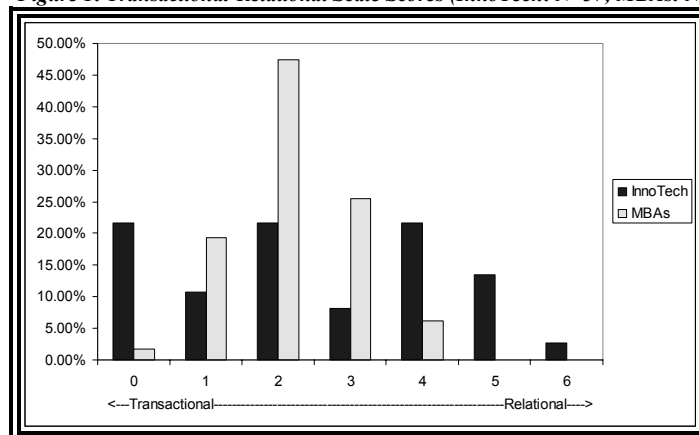
<u>Variable Name</u>	<u>InnoTech</u>	<u>MBAs</u>	<u>Welch Diff of Means Test</u>
Hyp1_manager_only	60%	3.51%	p < .001
Hyp1_self_help (rev. coded)	17.14%	4.39%	p < .06
Hyp2_show_up	30.56%	60.23%	p < .05
Hyp2_sub/alt	8.33%	25.69%	p < .05
Hyp3_citizen	48.65%	33.04%	p < .10
Hyp4_HR	39.39%	11.93%	p < .05

Figure 1 below depicts the distribution of transactional-relational scores across the two studies. Polychoric principle component analysis (PCA) and factor analysis each sufficiently confirms the internal validity of the scale when the variables “Hyp1_self_help” and “Hyp2_sub/alt” are excluded.⁸⁸ Including these two variables renders the internal validation methodologically problematic.⁸⁹ However, the two variables are included in the model because of their strong facial validity and the fact that the results reported herein remain robust whether the two variables are included or not.

⁸⁸ Polychoric PCA of the 4-elements scale demonstrates ample support for scalar convergence on a single element. The eigenvalue of the primary element is 1.85. The difference between this eigenvalue and the next closest is 1.05. This result was replicated with factor analysis (principle eigenvalue = .56, with difference between that and next closest as .62) for those uncomfortable with PCA, although it is the author’s opinion that PCA is the more appropriate tool for this analysis.

⁸⁹ This is because the two variables excluded from the full model (“Hyp1_self_help” and “Hyp2_sub/alt”) are each mostly or entirely orthogonal to the included measures of responses to the respective vignettes (“Hyp1_manager_only” from first vignette and “Hyp2_showup” from second). For instance, 98% of subjects who said they would show up in response to the second vignette (“Hyp2_showup” = 1) did not suggest that they would also try to find a substitute or alternative (“Hyp2_sub/alt” = 0). This makes logical sense in the same way that it makes sense that those who said that they would take matters into their own hands in response to the first vignette (“Hyp1_self_help” = 1) did not say that they would exclusively report the matter to their manager (“Hyp1_manager_only” = 0).

Figure 1: Transactional-Relational Scale Scores (InnoTech: N=37; MBAs: N=114)



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

The second variable, “Hyp1_self_help,” is coded 1 (and otherwise 0) if subjects responded to the first vignette by taking matters into their own hands, often literally threatening to resolve the situation with violence or other means of self-help. It could also be considered “revenge” as it is in other research.⁹⁰ This response is inconsistent with the relational view because it demonstrates subjects’ belief that they cannot rely on the organization to resolve an interpersonal dispute. This variable is reverse-coded for the relational scale.

Similarly, subjects were considered more relational if they said that they would show up to work in response to the second vignette (for example, they are scheduled for a day off, they have plans with family or

⁹⁰ Karl Aquino et al., *How Employees Respond to Personal Offense: The Effects of Blame Attribution, Victim Status, and Offender Status on Revenge and Reconciliation in the Workplace*, 86 J. APPLIED PSYCH. 52, 52 (2001).

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

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

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

The sixth and final variable included in the full scale is “Hyp4_HR,” which is coded 1 (and otherwise 0) when subjects reported giving the organization a second chance *even after their employment was terminated for unlawful reasons* described in the fourth vignette (“your employment is terminated because of your gender, race, national origin or religion”). Subjects who sought to appeal their termination within the firm were coded as incrementally more relational than those who did not.

1. *What Subjects Thought They Signed*

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

whether InnoTech could in fact compel them to divert their claims to arbitration instead of court as the document purports. Responses to this question formed the basis for the measure of subjects' malleable consent.

Thirty-six of the thirty-seven subjects remembered signing *something* when they started their jobs at InnoTech. Thirty-one of the thirty-six (86%) articulated what they remembered signing.⁹¹ Sixty-nine percent mentioned signing something innocuous like tax forms or generic paperwork. For instance, Subject 2 reported, ". . . just a lot of documents, you know, making sure that I'm telling the truth about who I am and my person and everything. W-2 forms, that's about all I can remember." Subject 7 reported, "All the tax forms, I think it was just the tax forms, yeah, they made you fill out a whole bunch of stuff, like name and address, we watched a bunch of videos, like learning on the computers, we call it 'e-learning,' that's pretty much it." Another typical response was Subject 28's: "Just the general initial employment forms, like uh . . . oh boy, I don't even remember what they were specifically anymore."

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

"I skimmed through them . . . so . . . [Do you have any recollection of what they said?] I know there's a sexual harassment one . . ." (Subj. 2).

". . . drug test, and no competition clause, you know, you can't work for any other [descriptive term deleted] company . . ." (Subj. 3).

"There was a non-competition agreement stating that I would not work at the same time on any project that [InnoTech] currently offers, there were a couple of other agreements, mainly, the contract saying that I would work for [InnoTech] and get paid, but the non-competition agreement is the most important of the multiple restrictions. [Anything else that you recall?] Basically, like what my duties would be and stuff like that." (Subj. 10).

"It's like a contract between store and employee. We have to do certain things, and we have our certain rights, but they can fire us whenever." (Subj. 16).

⁹¹ Tenure on the job had no statistically significant relation to the ability to recall or the willingness to report what the subjects signed ($p = .7142$), although everyone who had been on the job for less than seven months ($n = 6$) was able to describe something about what they signed. The least time on the job of someone unable to recall what they signed was seven months. Six individuals with the most tenure in the study (35, 36(x3), 48 and 120 months) were able to recall and describe what they remembered signing when they were hired.

“Employment, . . . what do you call it, you know, the whole, they can fire you for whatever reason . . . the employment sheet. [What’s your understanding of that?] They can fire you for almost whatever reason, pretty much, as long as they have a valid reason. [They get to fire you? That’s what it says?] That’s pretty much what it is.” (Subj. 17).

“. . . a paper that said that they're an open employer, which means that they can fire you at any time for any reason, that it was ok to drug test me.” (Subj. 21).

“A whole bunch of release papers basically saying that [InnoTech] is not held liable for a whole bunch of stuff. [Anything else?] Not to my knowledge.” (Subj. 33).

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

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

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

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

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

2. Subjects' Malleability of Consent

Participants were asked to identify the arbitration agreement that, according to the organization, all employees are required to sign.⁹² Sixty-seven percent of subjects positively identified the document. This percentage is interesting considering the low number of participants who knew they had signed an agreement waiving their right to a jury trial, requiring them instead to resolve all disputes by final and binding arbitration. Thus, most subjects recognized the form they signed when shown the actual piece of paper, but did not know to what it was they had agreed. Consistent with the Legal Realist scholarship exploring the relationship between law as experienced and law as written, this makes the participants' interpretations of this document an even more salient predictor of future behavior than the document's terms themselves.

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

⁹² After being asked if they recognized InnoTech's arbitration agreement, three provisions of the agreement were pointed out to them in the text of the document. First, the provision that specifies that InnoTech and the signer agree to "settle any and all" disputes or controversies arising out of the employment relationship by "final and binding arbitration before a neutral arbitrator;" with the examples as specified in the form of claims covered, including ones like sexual harassment (vignette three) and terminations because of race, religion or national origin (vignette four). Second, the provision that states that the signer understands that if he does file a lawsuit, InnoTech "may use this Agreement in support of its request to the court to dismiss the lawsuit and require me instead to use arbitration." Third, the provision that states that signers have three days from the date of signature to notify InnoTech's Human Resources Department that they have withdrawn their consent to the agreement, but doing so will render them ineligible for employment with InnoTech.

on their decisions in regard to disputes and grievances.”⁹³ Two exemplary high malleable consent views are as follows:

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

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

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

The second study consisted of 115 students from a prestigious East Coast business school. Primarily second-year MBA students were asked to complete a larger online survey as part of a class.⁹⁴ Completing the survey was a requirement in the class, so the response rate was approximately 100%. Subjects were 62% male; approximately 65% of the subjects were native English-speakers, and 65% were also partially or fully U.S. nationals. Sixty-one percent reported having direct access to a lawyer. The mean self-reported score of knowledge and experience with American law was 2.8⁹⁵ on a 7-point Likert scale where “0” is no knowledge or experience and “7” is extensive knowledge or experience. The inter-correlations of the demographic variables are reported in Table 5.

⁹³ EWICK & SILBEY, *supra* note 21, at 152–55. See generally Patricia Ewick & Susan S. Silbey, *Common Knowledge and Ideological Critique: The Significance of Knowing that the “Haves” Come Out Ahead*, 33 LAW & SOCIETY REV. 1025 (1999) (examining expectations and beliefs held by ordinary Americans about the American legal system).

⁹⁴ It is unfortunate that the MBAs were not surveyed on their first jobs—they were all *current* students, on the job market and mostly negotiating with employers for their first post-MBA jobs, but not currently employed. It is uncertain what would change in these data if the MBAs were on their first jobs, but this limitation is recognized nonetheless.

⁹⁵ Standard deviation = 1.2.

Table 5: Correlation Table of MBAs' Descriptive Variables

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

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

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

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

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

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

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

Most of these subjects were highly sought after by prestigious firms and were considering multiple competing job offers. Without exception, the MBA subjects have greater educational attainment than the InnoTech subjects, making them less replaceable in their future jobs. The mean starting salary of the class in which the majority of MBA subjects surveyed was approximately \$84,000 per year.⁹⁶ Sixty-seven percent of the MBA class of 2007 went into service industries, of which consulting (25.3%) and investment banking (17.5%) composed the greatest shares. Not surprisingly, the most prestigious, high-status employers recruit these students every year and the students who composed this sample were no exception. For these reasons, this sample was considered uniformly higher SES actors than the InnoTech sample.

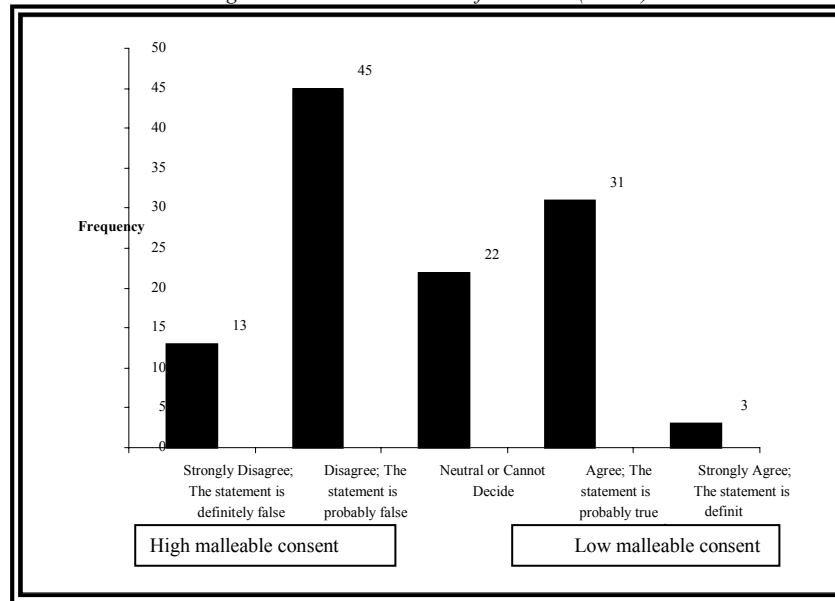
As part of the online survey, the MBA students were asked to respond to the same four vignettes as the InnoTech employees by writing their responses in open-ended text boxes. They were also asked to rate their agreement or disagreement with the following statement, on a 5-point Likert-style scale:

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

⁹⁶ This figure is based on the MBA graduates from the class of 2007. Eighty-three percent of this class obtained jobs in the United States. The mean starting salary of students who worked outside of the United States was \$81,800. These figures are based on information obtained by the author from the school's career services office.

The results are displayed in Figure 2. Thirty percent of the MBA subjects exhibited low malleable consent because they either agreed or strongly agreed with the statement. Fifty-one percent exhibited high malleable consent—that is, they either disagreed or strongly disagreed with the statement.⁹⁷ This distribution was replicated in a second study involving 138 MBA students in which 35% exhibited low malleable consent and 50% exhibited high malleable consent.⁹⁸

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



V. RESEARCH FINDINGS

A. Malleable Consent and Socio-Economic Status

Hypothesis 1 states that actors with greater educational attainment and more job alternatives that possess relatively lower dependence on their employers are more likely to regard the form-adhesive agreements they sign as unenforceable when compared to actors with lower educational attainment, fewer job alternatives, and greater dependence on their

⁹⁷ Roughly nineteen percent selected option three, “Neutral or Unable to Decide.” These participants were considered as exhibiting neither high nor low malleable consent.

⁹⁸ It is also worth noting that the MBA data is used to evaluate the convergent, discriminant and predictive validity of the construct of malleable consent. As part of the much larger survey that subjects completed, many psychometric tests were administered measuring such things as emotional intelligence (“EQ”), Machiavellianism, positive/negative affect, self-esteem, distributive self-interest and the NEO-5 factor inventory.

employers. In other words, InnoTech subjects are more likely to exhibit *lower* malleable consent than the MBAs. To test this hypothesis, the mean malleability of consent of the InnoTech subjects is compared with that of the MBAs. Table 6, depicting the statistically different mean malleable consent scores of the two samples, demonstrates support for this hypothesis. It appears that the MBA subjects are more likely than the InnoTech subjects to report that an agreement they signed purporting to prevent them from suing their employers (resorting instead to arbitration) is unenforceable. The mean MBA malleable consent score (MC) was .63 (SD = .485) as compared with .31 (SD = .467) for the InnoTech sample (where MC of one is equal to the view that the agreement is unenforceable and MC of zero is equal to the view that it is enforceable).

Table 6: Comparison of Malleable Consent Levels Across Samples

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

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

The second hypothesis is that viewing the form agreement as enforceable (low malleable consent) is associated with an increased likelihood of viewing the employment relationship as relational. Conversely, expressing the view that the agreement is unenforceable (high malleable consent) is associated with an increased likelihood of viewing the employment relationship as transactional. To test this hypothesis, a proportional odds model for ordinal logistic regression was applied. This appeared to be the most appropriately fitting model. The *p* value for the Brant test of the proportionality assumption was .53 for the MBA sample and .01 for the InnoTech sample. This means that the proportionality assumption is valid for the MBAs but not necessarily so for the InnoTech subjects. The most likely reason for this is the relatively small InnoTech sample size.⁹⁹ It is unlikely to be cause for concern given the construction of the transactional-relational scale. Additionally, the results are robust

⁹⁹ Rollin Brant, *Assessing Proportionality in the Proportional Odds Model for Ordinal Logistic Regression*, 46 *BIOMETRICS* 1171, 1173–74 (1990).

when ordinary least squares regression is applied.

Tables 7 and 8 present the ordinal logistic regression results of the role of malleable consent in explaining subjects' transactional-relational scale scores for InnoTech and MBA subjects respectively.¹⁰⁰ The results demonstrate consistent support for the second hypothesis across both samples. In both cases, high malleable consent corresponds negatively and significantly with subjects' relational view of employment. As an example, holding other variables constant at their means, there is a 26.5% probability that a white, male InnoTech participant of average sample age (twenty-three) who expressed the belief that the agreement was unenforceable would score a zero on the relational scale (scored as "transactional"). This probability drops to 0.06% that the same individual would score a six on the relational scale.¹⁰¹

¹⁰⁰ The full 6-element scale is used in these analyses. The salient results remain significant when the 4-element relational scale is used as well—dropping the two coded variables that were excluded from the principle component analysis and factor analysis as discussed above.

¹⁰¹ Interestingly, being a minority employee at InnoTech corresponds negatively with viewing the employment exchange relationally. It appears that minorities are more likely to view their employment relationships as transactional. This was borne out in analyzing the qualitative responses of subjects. Indeed, several of the minority subjects spoke "off the record," insisting on shutting off the recorder, about their belief that InnoTech discriminated against them based on their race. It is not surprising that such conditions, or at least the perception of such conditions, stymies relational exchange. Also unsurprisingly, employees who viewed their work as a career as opposed to a job were significantly more likely to view the exchange relationally. The gender of subjects did not seem to have any significant role in explaining transactional-relational scores of InnoTech subjects, but it was significantly positively correlated with expression of a relational view for MBAs. Women in the InnoTech sample were no more or less likely to view their employment as more relational, but women in the MBA sample were significantly more likely than men to view the employment relationship as more relational.

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

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

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

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

^bThe top entries are ordered logit coefficients.

P values are in parenthesis.

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

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

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

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

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

^bThe top entries are ordered logit coefficients.

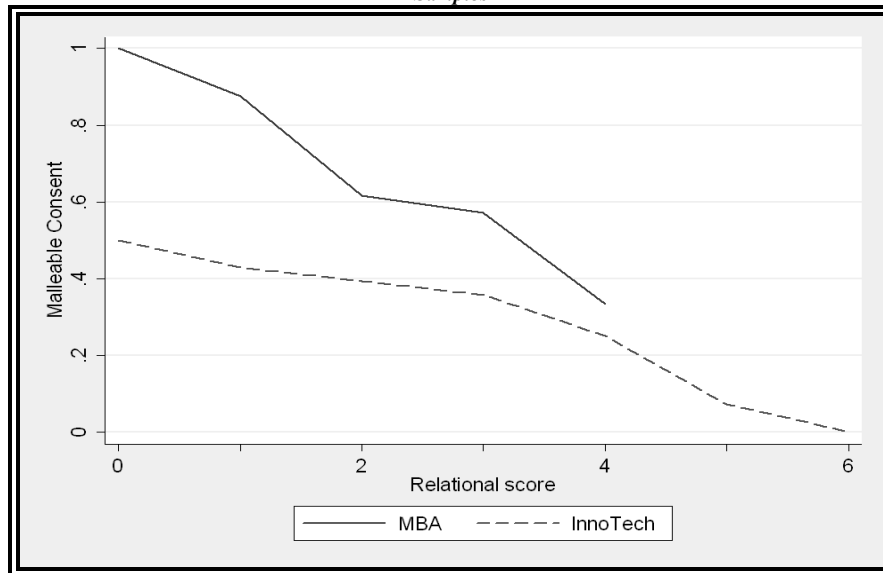
P values are in parenthesis.

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

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

and the malleable consent of the MBAs remains consistently higher than the InnoTech subjects (supporting the first hypothesis).

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



VI. IMPLICATIONS

Through their interpretations of contracts, actors instantiate their relationships with the state; they do so, it appears, on the basis of their socio-economic status, opportunities and constraints of employment, and power and potential to redress wrongs. From the vantage of individual signers, increased exposure to form-adhesive agreements is tantamount to increased loss of control over contracting capacity, a classical institutional symbol of capitalism and economic freedom.¹⁰² As Weber noted, “the present day significance of contract is primarily the result of the high degree to which our economic system is market-oriented.”¹⁰³ This loss of control over such an obvious icon of economic freedom begs the question of whether greater exposure to form-adhesive agreements has led to increased social levels of malleable consent, and consequently, perhaps, less resort to institutional (legal) means of redress when persons’ experiences suggest breach of contract (which are not read or understood).¹⁰⁴

Malleable consent may be one critical indicator of how individuals

¹⁰² See generally PIERS BEIRNE & RICHARD QUINNEY, *MARXISM AND LAW* (1982).

¹⁰³ WEBER, *supra* note 26, at 105.

¹⁰⁴ See *Supra* note 24.

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

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

These findings might have been otherwise obfuscated, or at least more difficult to discern, without measuring malleable consent. Indeed, no statistically significant differences were observed between InnoTech employees and the MBAs in terms of the rates at which subjects reported wanting to resort to law to redress the hypothetical wrongs—even in the vignettes in which they imagined being sexually harassed and losing their jobs because of illegal discrimination.¹⁰⁵ Without a measure of malleable consent, the two groups would have appeared to have equally considered the law to be a viable option in their arsenal. Research has previously demonstrated that power-disadvantaged actors are constrained from taking action to redress injustices.¹⁰⁶ In the employment context, malleable consent could be thought of as a cost that the advantaged perceive as avoidable more often than the disadvantaged.

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

¹⁰⁵ The numbers illustrated sixty-six percent for InnoTech and seventy-five percent for MBAs. This finding is consistent with prior research. See, e.g., EWICK & SILBEY, *supra* note 21 (finding many people claim that they will resort to law if they experience denial of rights, but simultaneously describe how they cannot afford a lawyer to help secure their rights).

¹⁰⁶ See generally Ewick & Silbey, *supra* note 93 (examining cognitive perceptions about law held by subjects of authors’ study); Morris Zelditch, Jr. & Joan Butler Ford, *Uncertainty, Potential Power, and Nondecisions*, 57 SOC. PSYCH. Q. 64 (1994) (finding that existence of a power structure prevents or delays actors from seeking redress for inequities).

such contracts. Individuals who regard the form-adhesive agreements they must sign as a condition of employment (in this case, a mandatory arbitration agreement) as unenforceable (high malleable consent) are more likely to view their jobs as an instrumental transaction—as simply a market financial exchange, and hence less likely to give their employers the opportunity to resolve disputes internally. When actors are more likely to regard form-adhesive agreements as enforceable (low malleable consent) they are more likely to interpret their employment as an exchange of obligations as well as rewards, imbued with a substantive, moral relationship, what industrial relations scholars often refer to as a “social contract,”¹⁰⁷ or a “relational exchange.” In other words, when actors view form-adhesive agreements as unenforceable, there is less perceived trust in the employment relationship, and hence in the employer’s ability to resolve disputes as well. This is an important finding as it is an indication of the class divide so often overlooked or ignored in recent descriptions of American social life. The measure of trust in the employer’s capacity to handle disputes and the link between this measure and citizenship therefore seems worthy of future discussion and research.

Methodological limitations notwithstanding,¹⁰⁸ these results *appear* to hold across diverse populations. One potential implication of this specific preliminary finding is the connection between the overwhelming loss of control over contract, a symbol of a democratic, capitalistic free-market economic ideal, and increased resort to non-legal forms of redress when contracts are perceived to be breached.

At the beginning of this Article, a feedback loop was described in which social constructions of law create contract, and contract in turn creates socially construed forms of private law, backed by the state. There is a fundamental discrepancy between this subjectively driven form of contract and the traditional objective theory of contract. This fundamental discrepancy becomes most apparent when examining form-adhesive agreements in which “freedom of contract” is a function of great imbalance of mutual dependency and “meeting of the minds” is fictional at best. Courts have clearly struggled with this discrepancy in deciding when to enforce boilerplate of varying adhesiveness and one-sidedness. Perhaps malleable consent is evidence in support of the feedback loop, in which individual interpretation of these unique and ubiquitous contracts trickles up at the same time as the law on the books (demonstrated in part, by

¹⁰⁷ See sources cited *supra* note 20.

¹⁰⁸ There are clear limitations, particularly when comparing across the two studies. For instance, the MBAs were asked to imagine that they had agreed to terms that the InnoTech employees had actually signed. As mentioned earlier, and described in more detail in the section below, this Article presents preliminary support for the hypotheses generated. In spite of its limitations, this Article hopes to establish some preliminary comparisons in order to provoke discussion in these theoretically important areas.

courts' and commentators' strain to apply objective theory of contract to form-adhesive contracts) trickles down.¹⁰⁹

VII. LIMITATIONS

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

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

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

Second, it is unclear at what point interpretations of contract enforceability are formed. This presents some difficulty for two reasons: one, the responses to the vignettes are measured before malleable consent; and two, it weakens the ability to draw comparisons across the InnoTech and MBA groups. There are some obvious apples-to-oranges problems comparing across the two groups, a clear limitation of this research. For example, the MBAs are asked about a contract they imagine signing at a

¹⁰⁹ This notion was suggested to the author in a conversation with Stewart Macaulay. Courts too, could be said to have some *malleableness* in rulings on enforceability of form-adhesive agreements. This Article begs the question of the extent to which individuals' malleable consent jives with that of the courts, and the extent to which courts influence individuals and vice-versa.

future job, while the InnoTech subjects are asked about a contract they have actually signed as a condition of their current employment. Understanding when malleable consent is formed may help to account for the socio-economic differences described in this Article. Future research measuring the construct over time could lead to useful causal findings indicating what experiences affect these interpretations and whether actors' views of malleable consent are mutable—a measure of the malleability of malleableness, if you will.

Third, this Article lacks a basis for determining the effect on actual behavior of being “right” or “wrong” about the enforceability of the agreement. As mentioned earlier, InnoTech fully enforces the agreement in question, and agreements to arbitrate such as the one hypothesized in the MBA survey are mostly enforceable *legally*; most of the time that organizations implement such agreements, it is because they fully intend to use them to reduce the costs of employment litigation. They are loath to make exceptions for fear of setting an undesirable precedent. What happens to the MBAs with high malleable consent who attempt to sue? Do they behave differently than those with low malleable consent who assume the worst about their employers? How so? How does this experience alter their behavior with respect to form-adhesive agreements in the future, if at all?

Fourth, and unexplored in this Article, but with potentially important implications, is the effect of malleable consent on signing habits. That is, what if malleable consent beliefs carry over from one contract area to another, leading one to believe that form-adhesive agreements are not binding when they are? For instance, if one learns to have high malleable consent from interacting with credit card companies that routinely grant leniency on late payments, over time this person will believe that all form-adhesive agreements, like credit card “Terms of Agreement,” are really unenforceable, and will become less concerned about signing forms, even if they contain unfair terms. To continue the hypothetical, this person then signs up with a private military company like Blackwater, which similarly requires new hires to sign a form-adhesive agreement that purports to release Blackwater and all of its agents, officers and shareholders from “any liability whatsoever” even when death or injury is “caused in whole or in part by the negligence” of the company,¹¹⁰ the signer thinks this form is no different from an American Express contract, and signs without worry over the enforcement of the draconian provisions that may lurk within. Blackwater relies on this form-adhesive agreement to prevent the huge number of injured and dead from suing them.¹¹¹ Understanding how

¹¹⁰ Daphne Eviatar, *Contract with America: Hard Terms for the Soldier of Fortune*, HARPER'S MAGAZINE, Oct. 2007, at 74–75.

¹¹¹ *Id.* at 74–76.

malleable consent carries over across contexts, and otherwise affects signing habits, may contribute to a decrease in the abuse of such forms, or may inform policy in ways not explored before this research.

VIII. CONCLUSION

Apparently, the devil *is* in the details. And, it has been said that “[t]here are no honorable bargains involving exchange of qualitative merchandise like souls for quantitative merchandise like time and money.”¹¹² But what happens when we do not realize that we have traded our souls away until it is too late? The hope of this line of research is to illuminate one subtle, yet ubiquitous exchange and its effects. This Article highlights the difference between law on the books (embodied by what the forms purport to do) and law in action (how signers experience and interpret the forms) and explores the gap between the two. The point, however, is that this gap is a “space, not a vacuum.”¹¹³ It is not enough that we recognize this space, but that we seek to understand what fills it, and how what fills it in turn affects the law and our interpretations of ourselves relative to others as actors bound by laws and normative constraints. Through such work, we hope to gain a better understanding of citizenship across socio-economic boundaries. As has been done in other areas, this classic socio-legal approach may open doors to explain this space to inform policy and future research.

¹¹² William S. Burroughs, *Words of Advice for Young People*, <http://www.jjjwebdevelopment.com/306sites/burroughs/burroughs.shtml> (last visited Sept. 29, 2008).

¹¹³ Ewick & Silbey, *supra* note 93 at 1040.