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CUBEWRAP CONTRACTS: THE RISE OF DELAYED TERM, STANDARD FORM EMPLOYMENT AGREEMENTS

Rachel Arnow-Richman*

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INTRODUCTION

Unlike other business relationships, employment relationships typically are not formalized in a written document. The rights of workers are set largely by statute and certain baseline common law assumptions, with the role of private ordering limited to the determination of compensation and job duties. The few negotiated terms of employment are likely to be memorialized, if at all, in a brief offer letter or job description.

Recently, however, companies have gravitated toward the use of standardized agreements to "contractualize" discrete aspects of workers' obligations.[1] Two prominent examples are noncompete and arbitration agreements.[2] Employers have increasingly demanded the former as a means of

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1. Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 2 (2003).

2. Other examples include consent forms (such as for criminal background and credit checks) and recitals of at-will or independent contractor status. I choose to focus on noncompete and arbitration agreements for several reasons. Although there appears to be no comparative data on the subject, noncompetes and arbitration agreements are among the most commonly requested standardized employment contracts. They are also among the most problematic, given that they restrict employee rights imbued with a public interest—the right to sell one's labor and be free from indentured servitude in the case of noncompetes, and the right to vindication of statutory and other externally created rights in a fair and public forum in the case of arbitration agreements. The aggregate effects of both types of agreements also likely undermine broader social and economic goals. For instance, the widespread use of noncompetes may restrict healthy economic growth by insulating employers against competition, while extensive use of arbitration agreements can impede organic development of law and precedent. Such risks have been weighed and debated by other scholars and will not be reviewed here. *See, e.g.*, Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 589–603 (1999) (suggesting that noncompete enforcement limits information spillovers that are necessary to sustain economic growth); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1043 (1996) (predicting that privatization of dispute resolution will diminish the body of authority interpreting discrimination statutes and reduce the educational role of the law in shaping social norms). Instead, the focus of this Article is on the *form* that such contracts take; that is, the practice of using standardized agreements provided on a delayed basis.

In addition, this Article does not consider other sources of contractual rights, such as employee handbooks and personnel manuals. *See, e.g.*, Woolley v. Hoffmann-La Roche,

privately augmenting their trade secret rights and extending the tort duty of employee loyalty,[3] while they have used the latter to privatize dispute resolution and limit employees' access to courts in pursuing claims under statutory discrimination laws.[4]

The widespread implementation of these targeted documents differs in important ways from the use of more comprehensive agreements in limited, and arguably exceptional, subcategories of employment relationships. Written contracts are the norm among executive and unionized workers who are governed by heavily negotiated, context-specific instruments that generally provide greater benefits to these workers than background law requires.[5] In contrast, the new model of private ordering in employment relies on boilerplate documents, unilaterally drafted by the employer and presented as a condition of employment, often subsequent to the start of work. Their purpose is not to memorialize a negotiated set of terms, but to extract waivers of rights, thus realigning statutory and default rules to better reflect employers' interests.

This trend in private ordering parallels a growing phenomenon in contracts and commercial law—the problem of "shrinkwrap" contracts limiting the

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Inc., 491 A.2d 1257, 1258 (N.J. 1985). Unlike the form of written agreement that is the focus of this Article, employee handbooks are generally not intended by employers to be contracts, and indeed, employers routinely include in such documents language expressly disclaiming their contractual significance. *See, e.g.*, Conner v. City of Forest Acres, 560 S.E.2d 606, 611 (S.C. 2002). In addition, disputes over employee handbooks generally involve claims that the employer reneged on a promised benefit contained in the handbook, such as an assurance of for cause termination. *See, e.g.*, *id.* In contrast, cubewrap contracts, as I use the term, are invariably formal contracts, which the employer intends to be legally binding and which aim to diminish employee rights rather than provide additional benefits.

3. *See* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 982–83 (describing how employers draft noncompetes to restrict employee's use of information not clearly protected under external law).

4. *See* Mary Williams Walsh, *Ruling Likely to Bring Changes to Many Jobs*, N.Y. TIMES, March 22, 2001, at C6. For collected statistics on the growth in arbitral case loads among some of the major third-party providers of employment arbitration services, see generally Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 449–50 (2004).

5. These two categories of written contracts obviously differ from each other as well. Executive contracts are individualized agreements that apply only to elite workers, whereas union contracts are collective agreements that historically have covered primarily rank-and-file workers. Yet a principal feature of both types of employment contracts is job security. *See* Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 246 (2006) (concluding based on empirical review that "overwhelmingly, the CEO contracts around the at-will default in one way or another"); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 890 ("One of the many distinguishing features of union employment is the fact that virtually all collective bargaining agreements include just cause protection.").

rights and remedies of consumers.[6] In the consumer context, such transactions have been a subject of special concern, beyond that associated with contracts of adhesion generally, because they purport to bind the parties to terms received only after purchase of the product.[7] What has escaped wide notice in the employment law literature is that standard form employment agreements frequently follow this agreement-now-terms-later model of contracting.[8] While employers and employees dicker over such things as salary, duties, and title, they generally do not discuss matters like post-termination competition and the method of resolving future disputes.[9] Documents governing such matters are usually provided to an employee—or left in his or her cubicle or workspace—after the individual not only

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6. The term "shrinkwrap" contract comes from the practice of wrapping retail packages in cellophane, making it impossible to access information contained inside until after purchase. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996). A variety of other terms have also been used to describe this practice of providing additional contract terms "in the box." *E.g.*, Jean Braucher, Commentary, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 753 ("delayed term" transactions); Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 ARIZ. L. REV. 677, 679 (2004) ("layered contracts"); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002) ("rolling contracts"). Because I agree with Professor Braucher that terms like "rolling" or "layered" contracts presuppose that delayed terms are part of the contract formation process, Braucher, *supra*, at 757, I will use the labels "delayed term" or "shrinkwrap" contracts throughout this Article.

7. Examples from the large body of scholarship on this topic include Braucher, *supra* note 6; Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000); Friedman, *supra* note 6; Hillman, *supra* note 6; William H. Lawrence, *Rolling Contracts Rolling Over Contract Law*, 41 SAN DIEGO L. REV. 1099 (2004); John E. Murray, Jr. & Harry M. Flechtner, *The Summer, 1999 Draft of Revised Article 2 of the Uniform Commercial Code: What Hath NCCUSL Rejected?*, 19 J.L. & COM. 1, 34–37 (1999); Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 616–17 (2001); James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 736–37; John D. Wladis, *The Contract Formation Sections of the Proposed Revisions to U.C.C. Article 2*, 54 SMU L. REV. 997 (2001). For an extensive listserv thread on the topic, see Deborah Ware Post, *Preface to the Gateway Thread*, 16 TOURO L. REV. 1145 (2000).

8. To be clear, many commentators have discussed the adhesive nature of such agreements, particularly in the arbitration context. *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 ("Pre-dispute arbitration clauses . . . have increasingly found their way into standard form contracts of adhesion."); Stone, *supra* note 2, at 1037 ("[M]andatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent."). But they generally have not focused on the employers' practice of delaying terms and how that affects worker choice.

9. *See* U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMMISSION ON THE FUTURE OF THE WORKER-EMPLOYER RELATIONSHIP, FACT-FINDING REPORT 118 (May 1994) ("[W]hile the labor market does permit some negotiation and variation in salaries and benefits, it is hardly likely to let employees insist on litigating, rather than arbitrating, future legal disputes with their prospective employers."); Schwartz, *supra* note 8, at 56–57 ("Pre-dispute arbitration clauses . . . are, in substance, immaterial to the core of the transaction, which would typically center around price, or in an employment contract, wages. They thus receive little attention from the adherent.").

accepts the company's offer of employment but also actually begins work.[10] For this reason, I refer to such documents as "cubewrap contracts."[11]

The proliferation of cubewrap contracts poses a significant challenge to those who might otherwise support private ordering in setting and policing the terms of employment relationships. The use of boilerplate language in any context has long raised questions about the validity of assent and the risk of overreaching by the drafter,[12] concerns that are heightened where a delay in providing terms impedes a party's ability to consider the transaction as a whole. In the employment context, such concerns redouble given the nature of both the relationship and the market. As compared with a purchase of goods, the individual employee is likely to have much more at stake in any one "sale" and ultimately has very limited ability to reject or "return" the job once accepted. These limitations allow cubewrap contracts to operate underground as a form of private legislation, rewriting the baseline common law and statutory rules that protect employee rights and society generally.

This Article draws on commercial law doctrine and literature to call for an end to cubewrap terms. It argues that the justifications for delayed-term consumer contracts are inapplicable to cubewrap agreements and that the dangers of withholding terms are particularly acute in the employment context. It calls for mandatory disclosure of terms on penalty of non-enforcement, thus providing a bright-line, formation-based rule voiding cubewrap terms regardless of their substantive content. Part I provides an overview of the law of delayed-term commercial contracts and compares judicial treatment of arbitration and noncompete agreements.[13] Part II discusses the rationale for delayed-term consumer contracts, as well as the contemporary critique of manufacturers' contracting practices.[14] It argues that the justifications proposed in support of delayed-term contracts do not carry over to employment contracts and that the legitimate concerns raised by critics and consumer rights advocates apply with even greater force in the employment context.[15] Finally, Part III offers some initial ideas about the viability of a disclosure requirement as a complement to substantive regulation in policing cubewrap terms.[16]

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10. *See* Matthew T. Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 GA. L. REV. 1, 33 (2004) ("Employers are not likely to highlight the need for an agreement before employment begins. In fact, such an agreement may only be included in the paperwork that employees fill out on their first day of work."). For case examples, see *infra* note 17 and accompanying text.

11. *See* Arnow-Richman, *supra* note 3, at 966.

12. *See generally* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

13. *See infra* Part I.A–B.

14. *See infra* Part II.A–B.

15. *See infra* Part II.A–B.

16. *See infra* Part III.A–B.

I. EMPLOYMENT RELATIONSHIPS, CONSUMER TRANSACTIONS, AND THE LAW OF CONTRACT FORMATION

Employment contracts and consumer transactions, at first blush, appear to have little in common. We think of employment relationships as precisely that, relationships, whereas consumer transactions are immediate, relatively anonymous exchanges. Those are important differences to which I shall return, but the rise of cubewrap agreements suggests an area for comparison. Modern employment contracts resemble consumer transactions in both *how* and *why* standard forms are used. In both contexts, forms are frequently produced only after initial assent to the transaction or relationship has been given, either enclosed with the product in the case of consumer purchases or upon beginning work in the case of employment relationships.[17] In addition, forms in both contexts are used primarily to extract waivers of rights from the non-drafting party. Indeed, such waivers often go to the same types of rights. For example, manufacturers and employers alike use arbitration agreements to limit individuals' access to courts in the event of breach of warranty or discriminatory treatment, respectively.[18]

While these contracts are functionally similar, there is significant departure in the way courts analyze them.[19] In the consumer context, the focus is on whether the deferred terms can become part of the agreement to which the purchaser has already ostensibly committed. In making this determination, courts have split over whether the consumer's retention of the product constitutes an

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17. For case examples in the consumer context, see Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) (arbitration clause received in shipping carton after credit card purchase of computer by phone); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996) (limitations on commercial use of software enclosed in shrinkwrapped retail packaging and displayed on screen upon use of software); and *infra* Part I.A. For examples in the employment context, see Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 374 (6th Cir. 2005) (arbitration agreement in "application packet" signed four or five days after work began); EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 745 (9th Cir. 2003) (arbitration agreement presented on first day of work); Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1465 (1st Cir. 1992) (noncompete presented on first day of work); and FLEXcon Co. v. McSherry, 123 F. Supp. 2d 42, 44 (D. Mass. 2000) (noncompete signed three days into employment). Because less attention is paid to the phenomenon of cubewrap terms, the timing of employees' receipt of noncompete and arbitration clauses is not always noted in court opinions.

18. Both also use waivers of rights to control and protect intellectual property, although the analogy is looser. In the case of a consumer transaction, this is accomplished by clauses explicitly prohibiting certain uses of the product in an effort to augment the rights afforded to the seller under copyright law. In the employment context, noncompetes are used in many instances to prevent the spread of the employer's trade secrets and confidential information by prohibiting prospective employment in which workers will likely rely on such knowledge.

19. This analytical difference owes in part to doctrinal distinctions. Employment agreements are service contracts governed by common law, while most consumer sales involve goods, which are subject to the Uniform Commercial Code. My focus, however, is not so much on the technical application of these bodies of law as on why there seems to be significant attention paid to delayed terms as a policy matter in the latter context but not the former.

acceptance of the new terms.[20] In contrast, the validity of both noncompete and employment arbitration agreements has turned largely on substantive assessments of their content, with limited attention to voluntariness in the arbitration context.[21] This Section compares these two treatments of the practice of delaying terms, suggesting that the questions of contractual assent that have dominated judicial assessment of consumer contracts ought to play a more critical role in the analysis of cubewrap terms.

A. Enforcement of Delayed Term Consumer Transactions

What has recently developed in the field of employment law is nothing new in the world of commercial transactions. Boilerplate forms are a standard feature of consumer transactions, and commentators have long disagreed over their enforceability.[22] Some have argued that form contracts should be subject to special scrutiny to protect consumers from onerous terms,[23] while others believe that businesses are well-positioned to efficiently allocate contractual risk in devising standard forms.[24] The law, however, has been clear and relatively static. Except in specially regulated areas, these agreements are enforceable subject to ordinary contract defenses, such as unconscionability.[25] To avoid enforcement of a

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20. *Compare Hill*, 105 F.3d at 1148 (finding arbitration provision shipped with computer binding on customer), *with* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (holding arbitration provision shipped with computer nonbinding). *See infra* Part I.A.

21. *See infra* Part I.B.

22. The use of form contracts dates to eighteenth-century marine insurance agreements. *See* Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1263–64 (1993). Most people's personal experience as consumers of both goods and services is enough to convince them that form contracts are commonplace. *See* John J. A. Burke, *Contracts as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000) ("Today, the use of uniform and inflexible contract terms is the unquestioned and universal manner of doing business."); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (speculating that as much as ninety-nine percent of modern paper contracts are standardized agreements).

23. *See, e.g.*, Meyerson, *supra* note 22, at 1269–70, 1278; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1237–38 (1983); Slawson, *supra* note 22, at 544–47.

24. *See, e.g.*, Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 363–64 (1991); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1392–93 (1983). *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1208–16 (2003) (describing theory that buyers exert market discipline by comparing terms and/or integrating terms in their purchase decisions resulting in socially efficient form contracts).

25. An example of the exceptional case in which courts apply greater scrutiny to form terms is the law of insurance contracts under which terms are construed in a manner consistent with how a reasonable insured would understand them. *See, e.g.*, Gerhardt v. Cont'l Ins. Cos., 225 A.2d 328, 331–33 (N.J. 1966). *See generally* W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 862–69 (discussing applicability of the doctrine of

standardized contract or term, a consumer usually must show that the agreement was reached under circumstances suggesting assent was compromised (procedural unconscionability) and that the term in question is unduly favorable to one side (substantive unconscionability).[26] Few courts are willing to view adhesiveness alone as an adequate demonstration of procedural unconscionability,[27] and even if additional procedural defects are present, only egregious terms will be stricken.

The proliferation of delayed term contracts, however, has resulted in a new body of jurisprudence. The classic delayed term transaction is the "shrinkwrap" contract, in which a consumer purchases a product that contains contractual terms within its packaging.[28] Depending on their content, such terms may significantly alter the value of the product to the consumer. In transactions involving software or digital content, for instance, terms in the box may include limits on use, such as restrictions on copying, resale, or third party use. These terms will often enhance the default intellectual property rights of the seller while defeating the expectations of the consumer.[29] In addition, a variety of products come with terms limiting consumer rights in the event of product defect, including warranty exclusions, limitations on remedies, and the now ubiquitous arbitration agreement.

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reasonable expectations). A version of general applicability is included in the Second Restatement of Contracts, *see* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981), but its influence has been limited outside of a few jurisdictions. *See, e.g.*, Lauvetz v. Alaska Sales and Serv., 828 P.2d 162, 164–65 (Alaska 1991); Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 391–94 (Ariz. 1984). For proposals advocating the broader use of RST 211 or a reasonable expectations standard in enforcing standard form consumer contracts, see Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts*, 82 WASH. L. REV. 227 (2007); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600–11 (1990).

26. *See* U.C.C. § 2-302 (2003) (official text); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).

27. *See infra* note 58. A few courts, however, place less emphasis on the procedural portion of the two-part test, suggesting that terms may be deemed unenforceable due to substantive unconscionability alone. *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (1998). Others apply a sliding scale test, requiring less evidence of procedural unconscionability in the face of especially oppressive terms. *See, e.g.*, Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).

28. *See infra* notes 29–38 and accompanying text.

29. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449–50 (7th Cir. 1996) (prohibition on commercial use of data); U.S. Surgical Corp. v. Orris, Inc., 5 F. Supp. 2d 1201, 1205–06 (D. Kan.1998) (single use restriction). As Professor Braucher has noted, in the case of transactions in information, such terms determine the product's value regardless of whether it performs as expected. Braucher, *supra* note 6, at 756. A growing literature attacks this particular type of delayed term not only on contract grounds but also as preempted by and contrary to the balance of rights struck by public intellectual property rules. *See, e.g.*, Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. (forthcoming 2007); Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 GEO. MASON L. REV. 93 (2006).

Courts are divided on the enforceability of such terms. Two cases from the Seventh Circuit have led the trend in favor of enforcement. In *ProCD, Inc. v. Zeidenberg*, the defendant purchased shrink-wrapped software at a retail establishment, which included written terms prohibiting use of the product for commercial purposes.[30] Although the defendant was not aware of these restrictions until after he completed the purchase, the court held them binding.[31] In an opinion by Judge Easterbrook, the court noted that the external packaging indicated that additional terms were supplied in the box and that the buyer was permitted to return the software if he or she found the enclosed terms disagreeable.[32] The court therefore concluded that the defendant had accepted the terms in the box by keeping and using the software once he had the opportunity to review them.[33]

The Seventh Circuit subsequently extended the holding of *ProCD* in *Hill v. Gateway 2000, Inc.*, which involved the enforceability of an arbitration agreement enclosed with a personal computer.[34] In that case the plaintiffs ordered and paid for the computer by phone and received notice of the arbitration agreement only upon opening the shipping carton.[35] In a second opinion by Judge Easterbrook, the court found the agreement enforceable because, as in *ProCD*, the purchaser could have returned the computer upon reviewing the delayed terms.[36] The court suggested that, from a practical perspective, enclosing terms in the packaging was a reasonable method of presenting them.[37] It found irrelevant the fact that the consumer had been given no notice upon ordering the computer that additional terms would be supplied in the box.[38]

Other courts have rejected this reasoning and its seeming manipulation of contract formation rules.[39] A basic reading of the transaction in both cases suggests that assent occurred at the time of purchase with the consumer agreeing to pay and the manufacturer or retailer providing or agreeing to ship the product in question. Viewed in this manner, the delayed terms come too late: the contract has already formed and neither party can unilaterally amend its terms.[40] Certainly under

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30. 86 F.3d at 1450.

31. *Id.* at 1451.

32. *Id.*

33. *Id.* at 1453; *see also* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 572 (App. Div. 1998); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000).

34. *Hill*, 105 F.3d at 1148.

35. *Id.*

36. *Id.*

37. *Id.* at 1149

38. *Id.*; *see also ProCD*, 86 F.3d at 1451; Lozano v. AT&T Wireless, 216 F. Supp. 2d 1071, 1073 (C.D. Cal. 2002).

39. *See, e.g.*, Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 104–05 (3d Cir. 1991); Klocek v. Gateway, 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000); U.S. Surgical Corp. v. Orris, Inc., 5 F. Supp. 2d 1201, 1205–06 (D. Kan. 1998); Ariz. Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 765 (D. Ariz. 1993).

40. *See Klocek*, 104 F. Supp. 2d at 1337–38 (describing the split of authority over the enforceability of shrinkwrap terms as "turn[ing] on whether the court finds that the parties formed their contract before or after the vendor communicated its terms to the purchaser").

common law, both assent and new consideration would be necessary at this point to support what must be viewed as a formal modification.[41]

Most shrinkwrap contracts cases, however, are transactions in goods arising under Article 2 of the Uniform Commercial Code (U.C.C.),[42] which allows more flexibility in both the formation and modification of a contract.[43] Even so, application of the code as currently adopted leads to the same result. Under pre-revised section 2-207 dealing with the "battle of the forms" problem, a party may unilaterally add a non-material term to the deal during the contract formation process, but only where both parties to the transactions are merchants.[44] Where the sale is between a merchant and a consumer, additional terms are treated as proposals to amend the contract, meaning that they are enforceable only if the recipient accepts them.[45]

Thus, the pivotal question in shrinkwrap contract cases is what constitutes acceptance of new terms. *Hill* asserts that one can read a consumer's failure to return a product after receipt of additional terms as an assent to their inclusion.[46] However, other courts and several scholars have understood section 2-207 to require a more explicit indication of assent.[47] Indeed, the purpose of section 2-207

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41. *See, e.g.*, Angel v. Murray, 322 A.2d 630, 634–36 (R.I. 1974).

42. *See* U.C.C. § 2-102 (2004) (revised text). It is an open question whether software sales, like that at issue in *ProCD*, are transactions in goods. Many decisions, like *ProCD* itself, proceed under that assumption, and scholars have sanctioned the approach. *See, e.g.*, Braucher, *supra* note 6, at 759. Amended Article 2, however, purports to exclude "computer information" from the definition of goods. U.C.C. § 2-103(l), (m) (2004) (revised text).

43. Under the Code, no consideration is necessary to modify a contract, U.C.C. § 2-209(1) (2003) (official text), and a contract can form despite deviations in the parties' proffered terms, U.C.C. § 2-207(1) (official text).

44. U.C.C. § 2-207(2)(b) (official text). In both *ProCD* and *Hill*, Judge Easterbrook was able to hold the terms in question enforceable in part by avoiding application of Section 2-207. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) ("Our case has only one form; UCC § 2-207 is irrelevant."); *Hill*, 105 F.3d at 1150. That aspect of his decisions has been widely criticized, and scholars almost universally agree that section 2-207 applies to delayed term consumer contracts. *See, e.g.*, Braucher, *supra* note 7, at 1821 ("Nothing in the language of section 2-207 supports the idea that its reach is limited to exchanges of forms—it is not limited to two-form transactions or even to forms at all."); Lawrence, *supra* note 7, at 1108 ("The court in both *ProCD* and *Hill* ignores any relationship to section 2-207 with the cavalier conclusion that the section is irrelevant when the transaction involves only one written form. This position is simply an inaccurate statement of law."); James J. White, *Default Rules in Sales and the Myth of Contracting Out*, 48 LOY. L. REV. 53, 81 (2002) ("When Judge Easterbrook in *ProCD* states that Section 2-207 does not apply to transactions that involve only one document, he is wrong.").

45. U.C.C. § 2-207(2) (official text).

46. *Hill*, 105 F.3d at 1148–49 (citing *ProCD*, 46 F.3d at 1451–52).

47. *See, e.g.*, Klocek v. Gateway, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) ("The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms."); Braucher, *supra* note 6, at 757–58; Lawrence, *supra* note 7, at 1108, 1114–16; White, *supra* note 7, at 736–37. As previously noted, Judge Easterbrook did not analyze the consumers' assent to new terms under section 2-207. *See supra* note 44.

was to reverse the common law "last shot" doctrine, under which the terms of the last form delivered would bind the other party upon performance.[48] Treating the failure to return as acceptance under section 2-207 would allow for the same outcome under that section as under the common law rule it was intended to supercede.[49] In addition, the requirement of explicit acceptance of delayed terms is consistent with other contract formation rules: under common law, an offeror cannot designate ordinary acts, such as silence, as acceptance,[50] and under section 2-207(2), which governs transactions between merchants, a material alteration of an offer requires a subsequent acceptance.[51] Thus, while the issue is far from settled, there appears to be ample support for the notion that a heightened examination of assent is appropriate where a manufacturer purports to add terms to a transaction that, on its face, has been executed.

B. The Formation of Cubewrap Contracts

In contrast to commercial law, assent has played only a limited role in judicial analysis of the enforceability of cubewrap contracts. The jurisprudence of noncompetes and that of arbitration agreements are discrete areas of law, which focus not on how such terms are provided, but rather on what they say.[52] In the case of noncompete agreements, courts look at whether the restraint bears a reasonable relationship to the protection of a legitimate interest of the employer, taking into account the degree to which the restraint impairs the employee's ability

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48. *See* Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1165–66 (6th Cir. 1972).

49. *Cf.* Stephen K. Huber, *Arbitration and Contracts: What are the Law Schools Teaching?*, 2 J. AM. ARB. 209, 227 (2003) (suggesting that Easterbrook's decision in *Hill v. Gateway* "reintroduce[d] the last shot doctrine into contract law").

50. *See* Brown Mach. Div. of John Brown v. Hercules, Inc., 770 S.W.2d 416, 421 (Mo. Ct. App. 1989) (acceptance cannot be assumed based on failure to object); Roger C. Bern, *"Terms Later" Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J.L. & POL'Y 641, 680 (2004) ("[C]ontrary to Judge Easterbrook's suggestion, recognizing the offeror as 'master of the offer' does not give him the power to turn the offeree's equivocal acts into acceptance."); White, *supra* note 7, at 736–37 (arguing that a form cannot transform behavior that would not normally indicate assent, such as tying one's shoelaces, into a contractual acceptance).

51. U.C.C. § 2-207(2) (official text); *see also* Braucher, *supra* note 7, at 1823 ("Section 2-207(2) recognizes that even merchants should not be expected to object to material additions in order to avoid them. If businesses cannot be expected to inspect forms sent after the making of a contract and object to material terms, a fortiori, consumers should not have this burden."); White, *supra* note 7, at 750 ("[I]t is hard to swallow that the Ford Motor Company gets the help of Section 2-207 in escaping the grasp of a seller's form, but that the consumer buyer gets no such help.").

52. The only published scholarly work of which I am aware that tackles noncompete and employment arbitration agreements as a holistic problem is Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379 (2006), arguing for treating the right to a jury trial and right to compete post employment as conditionally waivable rights.

to earn a living.[53] With respect to arbitration agreements, some courts initially assessed contractual validity under a knowing and voluntary test similar to that applied under the law of waivers and release agreements.[54] However, since the Supreme Court's decisions sanctioning arbitration of federal employment discrimination claims,[55] that trend appears to have come to an end.[56] In most jurisdictions, the enforceability of an arbitration agreement turns principally on the quality and fairness of the arbitral process selected. If the process is too one-sided, it might be viewed as a violation of the employee's underlying substantive rights,[57] or the agreement might be deemed unconscionable as a matter of state law.[58]

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53. A promise to refrain from competition is "unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public." RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a)–(b) (1981). While state law varies, courts following the common law approach or applying state legislation to the same effect typically require employers to establish both a legitimate property interest deserving protection and that the restraint is reasonable in scope in consideration of the harm to the employee and effect on the public. *See, e.g.*, Freiburger v. J-U-B Eng'rs, Inc., 111 P.3d 100, 105 (Idaho 2005); Merrimack Valley Wood Prods., Inc. v. Near, 876 A.2d 757, 762 (N.H. 2005); BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1223 (N.Y. 1999).

54. *See, e.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994).

55. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25–26 (1991).

56. *See, e.g.*, Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 761 (7th Cir. 2001) (questioning the continued validity of the Ninth Circuit's knowing and voluntary standard); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1372 (11th Cir. 2005) (concluding "that general contract principles govern the enforceability of arbitration agreements and that no heightened 'knowing and voluntary' standard applies"); Melena v. Anheuser-Busch, 847 N.E.2d 99, 108 (Ill. 2006) (rejecting knowing and voluntary test as inconsistent with the Federal Arbitration Act); Dennis Nolan, *Employment Arbitration after* Circuit City, 41 BRANDEIS L.J. 853, 856–57 (2003) (Most courts outside the Ninth Circuit "either doubt whether there is a requirement that waivers be knowing and voluntary or find a purported waiver invalid only for egregious problems of assent." (footnote omitted)). *But see* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381 (6th Cir. 2005) (sanctioning use of knowing and voluntary test).

57. *See Gilmer*, 500 U.S. at 26 (suggesting that by agreeing to arbitrate, a party must not "forgo the substantive rights afforded by the statute") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

58. *See, e.g.*, Circuit City Stores, Inc., 279 F.3d at 889, 892–93; Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000) (finding unconscionable an arbitration agreement that limited recovery of a successful employee to backpay while preserving the employer's right to file claims against employees in court). Procedural unconscionability is of course part of this analysis, however most courts are unwilling to find procedural unconscionability based purely on the adhesiveness of contract terms. *See, e.g.*, *In re* Halliburton Co., 80 S.W.3d 566, 572 (Tex. 2002) ("[I]t cannot be unconscionable, without more, merely to premise continued employment on acceptance of new or additional employment terms."). Moreover, because the unconscionability test is conjunctive, even courts willing to find procedural unconscionability in such circumstances would not void the agreement absent substantive defects in the arbitration terms. *See, e.g.*, Jones v. Genus Credit Mgmt. Corp., 353 F. Supp. 2d 598, 601–02 (D. Md. 2005); Fittante v. Palm Springs Motors, Inc., 129 Cal. Rptr. 2d 659, 670 (Cal. Ct. App. 2003).

As to employment agreements provided after-the-fact, courts generally treat the new terms as modifications and analyze them using basic common law contract principles. In the context of noncompete agreements, there is almost always a signed writing,[59] which courts uniformly accept as explicit manifestation of assent, giving short shrift to defenses or policy arguments grounded in coercion.[60] Hence, the analysis focuses on the presence or absence of consideration, with courts divided over whether the employer's retention of the employee constitutes consideration for the employee's additional promise.[61] In the arbitration context, the debate over continued employment as consideration plays somewhat less of a role because many agreements are reciprocal in nature, requiring both the employer and the employee to arbitrate any subsequent dispute. In such situations, courts treat the employee's promise to arbitrate as supported by the employer's promise to do the same.[62]

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59. Few jurisdictions recognize oral noncompete agreements and some expressly require a signed writing. *See, e.g.*, Geritrex Corp. v. DermaRite Indus., 910 F. Supp. 955, 960 (S.D.N.Y. 1996); ChemiMetals Processing, Inc. v. McEneny, 476 S.E.2d 374, 376 (N.C. Ct. App. 1996).

60. Courts have generally rejected claims brought by employees fired for refusing to sign a noncompete. *See, e.g.*, Maw v. Advanced Clinical Commc'ns, Inc., 846 A.2d 604, 611 (N.J. 2004) (termination for refusal to sign overbroad noncompete did not give rise to claim of wrongful discharge in violation of public policy); Tatge v. Chambers & Owen, Inc., 579 N.W.2d 217, 221–25 (Wis. 1998). *But see* Conradi v. Eggers Consulting Co., No. A-02-852, 2004 WL 51208 (Neb. Ct. App. Jan. 13, 2004) (recognizing promissory estoppel claim for reliance on offer of employment).

61. *Compare* Lake Land Employment Group v. Columber, 804 N.E.2d 27, 31–32 (Ohio 2004), *and* Summits 7, Inc. v. Kelly, 886 A.2d 365, 372–73 (Vt. 2005), *with* OR. REV. STAT. § 653.295 (1991) (permitting enforcement of noncompete agreed to after initial employment only upon "bona fide advancement of the employee"), *and* Sanborn Mfg. Co. v. Currie, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993). *See generally* Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 EMP. RTS. & EMP. POL'Y J. 95, 104–07 (1998) (summarizing and critiquing various jurisdictional approaches to assessing the presence of employer consideration in support of an employee's post-hire promise not to compete).

62. For this reason, a few courts have held arbitration agreements void for lack of consideration where the agreement either does not contain a reciprocal promise by the employer to arbitrate, or allows the employer such flexibility with respect to altering or utilizing the arbitration process as to suggest the absence of a meaningful promise. *See, e.g.*, Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130–31 (7th Cir. 1997); Cheek v. United Healthcare of Mid-Atlantic, Inc., 835 A.2d 656, 662 (Md. 2003) (refusing to enforce arbitration clause in employment manual that reserved to employer permission to alter agreement "at its sole and absolute discretion . . . with or without notice"). Other courts have recognized that there is no need for equivalency of obligation to arbitrate, provided there is some consideration offered by the employer, such as the job itself. *See, e.g.*, Oblix Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004) ("That [the employer] did not promise to arbitrate all of its potential claims is neither here nor there. [Plaintiff] does not deny that the arbitration clause is supported by consideration—her salary."); Walters v. AAA Waterproofing, Inc., 85 P.3d 389, 392 (Wash. Ct. App. 2004) (contract law does not require equivalency of obligation with respect to specific terms, but merely that "the contract as a whole is otherwise supported by consideration on both sides"). *See generally* Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 450–

Assent plays somewhat more of a role in courts' analyses of post-hire arbitration agreements. Prudent employers generally disseminate their dispute resolution policies in the form of an individual contract requiring a signature, which will provide objective evidence of employee assent.[63] However, some employers institute the requirement through handbooks, mailings, or even website postings, arguing that the employees agree to the change by remaining on the job. While several courts have recognized continued employment as acceptance in such contexts, others have found a lack of assent on grounds that the employee did not consciously accept the new term.[64] Similarly, some courts have paid attention to how the arbitration contract was presented, whether its language was clear, whether all arbitral rules were included or at least made available, and whether the employee had adequate time to review the agreement.[65] These courts appear to be applying some form of a knowing and voluntary review of employee assent. However, their assessment is notably grounded more in issues of knowledge than of voluntariness.[66] Relatively few courts find any problem with making an arbitration agreement a required condition of continued employment. More importantly, almost no court in either the noncompete or arbitration context has considered the timing of the employer's provision of terms relative to its extension of a job offer as part of this inquiry.[67] Agreements provided to employees for

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58 (2006) (summarizing diverging caselaw approaches to requirement of employer consideration to support employee agreement to arbitrate).

63. The Federal Arbitration Act's declaration of the enforceability of arbitration agreements applies only to written contracts. 9 U.S.C.A. § 2 (2000).

64. *Compare* Melena v. Anheuser-Busch, Inc., 847 N.E.2d 99, 109 (Ill. 2006) ("By continuing her employment with Anheuser-Busch [after employer mailed materials regarding Dispute Resolution Program], plaintiff both accepted the offer and provided the necessary consideration."), *with* Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546, 556–58 (1st Cir. 2005) (holding arbitration agreement unenforceable where policy distributed via hyperlink in e-mail notification and employee did not reply to message). *See generally* Bales, *supra* note 62, at 436–42 (summarizing cases addressing whether employee had sufficient notice of arbitration policy to permit finding of assent).

65. *See, e.g.*, Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 384 (6th Cir. 2006) (arbitration agreements unenforceable where managers hurriedly presented them and inaccurately characterized their significance); Shaffer v. ACS Gov't Servs., Inc., 321 F. Supp. 2d 682, 687 (D. Md. 2004) (arbitration clause contained on page 56 of a 71-page employee guidebook not enforceable); Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 940–41 (S.D. Tex. 2001) (arbitration agreement provided only in English not enforceable against Spanish-speaking employees); Gaylord Dep't Stores of Ala., Inc. v. Stephens, 404 So. 2d 586, 588 (Ala. 1981) (holding a clause "buried in paragraph thirty-four in a contract containing forty-six paragraphs" not enforceable). *See generally* Bales, *supra* note 62, at 442–46 (discussing cases).

66. *See* Eileen Silverstein, *From Statute to Contract: The Law of The Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 504–11 (2000–01) ("[I]t appears that the law will find a prospective waiver voluntary if individual employees or applicants had constructive notice of the waiver. This applies even if they did not have the incentive or background knowledge to understand the real world consequences of the waiver and regardless of whether they were unable to negotiate adjustments to employers' take-it-or-leave-it offers.").

67. It seems the closest courts have come to such an analysis is New Hampshire's treatment of post-hire noncompetes, under which the "bad faith" of an

"acceptance" upon the commencement of employment are treated no differently than other changes in policy administered during the course of an ongoing employment relationship.

What is missing from the analysis in both the noncompete and arbitration contexts is attention to the contracting practices of the employer. Giving courts the benefit of the doubt, there are certainly reasons why the law should allow employers flexibility in modifying employment relationships after they have begun. An employee's position may develop in such a way that he or she gains exposure to trade secrets, justifying the imposition of a noncompete agreement that was not needed at the onset of the relationship. An employer may make a cost-benefit analysis that justifies adopting an arbitration policy that did not exist before. Such concerns, however, are not implicated where an employer has an established policy requiring consent to a noncompete or arbitration agreement as an initial condition of employment. Not only is the flexibility justification absent, but the employer's decision to withhold the requisite forms until the employee has entered the relationship also suggests possible concealment or sharp practices.[68] In such situations, the question of assent and the likelihood of coercion bear closer examination, and decisions favoring enforcement based on formalistic applications of contract principles require new justification.

II. CUBEWRAP CONTRACTS AS CONSUMER TRANSACTION FINE PRINT: LESSONS FROM THE DELAYED TERM DEBATE

The previous Section described the functional similarities between delayed term consumer contracts and cubewrap contracts, as well as the limited attention paid to employers' practice of delivering noncompete and arbitration clauses post-acceptance. Given that these two categories of contract involve very different stakes and purposes, it is tempting to conclude that delayed term and cubewrap contracts have little to say to one another. Yet that would be a mistake. Examining employment contracts through the lens of consumer law calls attention to the particular practice of delaying terms as distinct from other aspects of the employment relationship that affect the quality of assent, such as general concerns about employee bargaining power. Consumer law also offers an existing framework for considering the merits of this practice. In that context, there has been vocal resistance by scholars to the enforcement of delayed terms based not only on doctrinal interpretation[69] but also on fairness grounds.[70] To the extent that

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employer in not providing advance notice can be a basis for refusing to modify an overbroad agreement. *See* Merrimack Valley Wood Prods., Inc. v. Near, 876 A.2d 757, 764 (N.H. 2005); *infra* Part III.A.2; *cf.* Kuhn v. Ameriquest Mortgage Co., No. 04-2229, 2004 WL 2782568, at *5–6 (D. Kan. Dec. 1, 2004) (enforcing arbitration agreement signed on the first day of work, noting that the employee received advance warning that it would be provided).

68. *Cf.* Braucher, *supra* note 7, at 1852–65 (suggesting that sellers' practice of withholding terms in the consumer context should be treated as a violation of unfair and deceptive trade practices laws).

69. Such arguments generally focus on courts' seeming misapplication of UCC section 2-207 in analyzing delayed terms. *See, e.g.*, Braucher, *supra* note 7, at 1821–24; Lawrence, *supra* note 7, at 1107–11, 1120–21; White, *supra* note 7, at 741–49.

thinkers find it objectionable to hamstring vulnerable consumers to undisclosed terms in purchasing a product, it appears even more problematic to allow precisely the same practice in a context where an individual's livelihood is at stake.

This Section draws out the lessons from the delayed term debate, assessing the applicability of the primary arguments in favor of shrinkwrap terms to the employment context, as well as the counterarguments that have been asserted against them. In the consumer context, the primary justifications for enforcing delayed term contracts appear to fall into two categories—formalist and realist.[71] By formalist, I mean to embrace all arguments that justify delayed terms through some manipulation of contract formation principles. By realist, I refer to arguments grounded in the exigencies of the transaction, such as concerns about the viability of other available means of delivering standardized terms. Whatever their worth in the consumer context, an issue that is subject to much debate, these justifications hold no currency where an employment relationship is at stake.

A. The Modification Fallacy: Returning the Job?

The first set of arguments in support of delayed terms justifies enforcement through a formalistic understanding of consumer assent. They either move the point of contractual liability forward in time to the moment delayed terms are received and the product retained or characterize the arrival of delayed terms and retention of the product as a modification to the initial agreement. The premise underlying both conceptions is that the consumer retains the ability to cancel the purchase by rejecting the delayed terms. Once the consumer receives the product and chooses to keep it, he or she accepts the final deal.[72]

The rationale underlying these formulations has been questioned in the consumer context given the practical and psychological barriers to rejecting a product one has already purchased.[73] Effort is required to repackage and ship a

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70. *See, e.g.*, Bern, *supra* note 50, at 696 (characterizing delayed terms as "a deceptive strategy under the guise of efficiency to bind customers to adverse terms concealed from them until after they have made the purchase decision and parted with their money"); White, *supra* note 7, at 747–48 (describing the coercive nature of post-receipt requests for consent).

71. I use these terms in a functional manner, not as reflecting any particular jurisprudential philosophy. On their significance in that context, see Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11 (2007).

72. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997) ("By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause."); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996) ("Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods."); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 571 (App. Div. 1998) ("Th[e] contract . . . was formed and acceptance was manifested not when the order was placed but only with the retention of the merchandise beyond the 30 days specified in the Agreement enclosed in the shipment of merchandise."); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000) ("Mortenson's use of the software constituted its assent to the agreement, including the license terms.").

73. *See, e.g.*, Bern, *supra* note 50, at 725; Braucher, *supra* note 6, at 768; White, *supra* note 7, at 748; Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The*

good already received. Judge Easterbrook implicitly acknowledges this in deciding against the consumer in *Hill v. Gateway*, noting that the Hills might have been more successful in arguing that they were deterred from returning their computer by the cost of shipping.[74] Added to this monetary expense is the physical inconvenience of restoring an assembled computer with all of its parts and packing material to its original carton and lugging it to the post office.[75] Finally, the consumer may be psychologically unwilling to reject a product in which he or she has already invested. Research on human psychology suggests that individuals are overconfident in assessing their own prospects for success and underestimate the likelihood that something may go wrong, particularly remote events.[76] Thus, in the consumer context, individuals may discount terms such as limitations on damages or warranties, believing it unlikely that they will be injured by a product.[77] Such biases are even more probable when the consumer has reached what he or she considers a good decision.[78] Once the individual has selected, received, and set up the product, cognitive dissonance may prevent him or her from recognizing that the deal is not as favorable as expected.

Such obstacles are all the more burdensome in the employment context, where the employee has already invested financially and emotionally in what he or she expects to be a reliable means of earning a living. Like the consumer, an employee can elect to "return" the job upon receipt of the delayed terms; in other words, he or she is free to quit. Indeed this right to reject persists well beyond the thirty days that Gateway allows customers to assess its product.[79] Yet the practical impediments to doing so are legion. The employee has likely incurred significant start-up costs in accepting the job and starting work. He or she has already quit a prior position and may have turned down other offers. Many employees have made

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Boundary between Private Contract Law and the Public Interest, 11 TEX. WESLEYAN L. REV. 579, 589 (2005).

74. *Hill*, 105 F.3d at 1150.

75. *See* Bern, *supra* note 50, at 725; Braucher, *supra* note 6, at 768. Professor White describes the consumer's perspective most vividly by imagining him "sitting in his study in International Falls, Minnesota, in his underwear with a beer when he has to decide whether to agree to the new terms or go out in the negative-thirty-degree temperature and return the computer." White, *supra* note 7, at 748.

76. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 217, 223 (1995); Korobkin, *supra* note 24, at 1232–33.

77. *See* Korobkin, *supra* note 24, at 1222–34; Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 450–54 (2002).

78. *See* Braucher, *supra* note 6, at 765–66 (suggesting that delaying terms will have a depressive effect on reading due to cognitive dissonance).

79. It is precisely because employment is at will that courts generally find cubewrap noncompetes to be valid contract modifications supported by consideration in the form of continued employment. *See, e.g.*, Lake Land Employment Group of Akron, LLC v. Columber, 804 N.E.2d 27, 31–32 (Ohio 2004); Summits 7, Inc. v. Kelly, 886 A.2d 365, 372–73 (Vt. 2005). *See generally* Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1465, 1523–28 (1987) (summarizing theory of forbearance as consideration); Staidl, *supra* note 61, at 104–07 (summarizing cases).

personal sacrifices and investments at this point, such as relocating family and accepting other lifestyle changes, all of which will deter departure.[80] Quitting means swallowing those losses, giving up a steady pay check, and re-entering an uncertain job market.

Even the employee with a marketable skill set and the financial flexibility necessary to extricate may be unable or unwilling to actually do so post-acceptance. Terms like arbitration clauses and promises not to compete require employees to value choices that will become relevant only upon the demise of the relationship, an event they are unlikely to anticipate when commencing a new job.[81] Indeed, the period immediately following hire is likely to be the one in which employees are most optimistic about their future employment. Beliefs about the quality and duration of employment may even be explicitly reinforced by management personnel who reassure the workers about their prospects and treat the required written documents as "routine paperwork."[82]

Of course, many employees are in no position to scrutinize terms regardless of when they are presented. Employers are usually better able to replace a worker than an individual is able to find new work, and the cognitive limitations previously discussed can impact decision-making at any point in the hiring process. Such defects in bargaining, particularly those that result from the basic state of the world, are generally not a basis in and of themselves for refusing to enforce an otherwise valid agreement.[83] Contract law routinely binds employees to

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80. *See, e.g.*, *Summits 7 Inc.*, 886 A.2d at 377 (Johnson, J., dissenting) (noting that "employees often have obligations and responsibilities that require them to stay with their job, even if it means signing onto an agreement that restricts their right to seek other jobs in the future"); Conradi v. Eggers Consulting Co., No. A-02-852, 2004 WL 51208, at *2 (Neb. Ct. App. Jan. 13, 2004) (employee had resigned from job, turned down promotion, signed a lease, bought a car, and moved from Seattle to Omaha by the time employer provided noncompete three weeks into employment).

81. *See* Bodie, *supra* note 10, at 38 ("As with marriage and unemployment, people do not appear to enter a job with the expectation that their employment law rights will be violated."); Schwartz, *supra* note 8, at 114 ("The prospective employee's present need for a job is immediate and real, whereas the possibility of future discrimination . . . is remote and hypothetical."). For further discussions of how cognitive limitations could affect an employee's decision to accept a noncompete or an arbitration agreement, see Bodie, *supra* note 10, at 31–39; Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1228–34 (2002); Rena Mara Samole, Note, *Real Employees: Cognitive Psychology and the Adjudication of Non-Competition Agreements*, 4 WASH. U. J.L. & POL'Y 289, 307–11 (2000).

82. FLEXcon Co. v. McSherry, 123 F. Supp. 2d 42, 44 (D. Mass. 2000); *see also* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 373–74 (6th Cir. 2005) (managers hurriedly presented arbitration agreements as part of necessary application packet). *See generally* Bodie, *supra* note 10, at 34 (describing common scenario of HR administrator presenting arbitration agreements along with other forms as a prerequisite to formal employment); Nolan, *supra* note 56, at 859 ("New employees for any employer must sign a multitude of forms. . . . [R]arely do employees have sufficient time to read and evaluate everything they sign.").

83. *See* Melena v. Anheuser-Busch, 847 N.E.2d 99, 109 (Ill. 2006) (rejecting plaintiff's argument that employer's dispute resolution policy was unenforceable as illusory

all sorts of adhesive terms. The point, rather, is that delaying terms is a choice the employer makes—a strategy that exacerbates those cognitive and practical constraints, making it even harder for workers to objectively assess and reject unfavorable terms. Indeed, the timing of cubewrap contracts appears expressly designed to capitalize on preexisting imbalances, delaying what might otherwise be deal-breaking terms until it is impossible for even a resilient worker to carefully evaluate them and ultimately refuse. Not only has that individual made a major investment, it is one that most likely cannot be recouped. Most workers will be unable to return to their prior jobs or resurrect forgone opportunities, and because the new position has just begun, the employee has gained no value of any assistance in "shopping around" for alternatives. If anything, he or she has gained a reputation as a troublemaker: an employee who has the audacity to read—and object to—an employer's standard forms.

B. Practical Exigencies? The Individual Hiring Decision

Realist arguments in support of enforcing delayed term consumer contracts center on the supposed difficulty or pointlessness of providing detailed terms in advance of purchase. In *Hill v. Gateway*, Judge Easterbrook contemplates a parade of horribles should delayed terms be found unenforceable: simple transactions will be dragged out into lengthy endeavors as sellers spell out each and every term of the deal before a purchase can be made.[84] Modern technology, however, would appear to belie any concern about the impracticality of providing detailed terms in advance.[85] Manufacturers can make all standard terms available on their websites and refer consumers to that resource,[86] and in the case of an on-line transaction, there is ample time for a consumer to review any fine print prior to submitting his or her order.[87] Nevertheless, there remains genuine debate over whether there is any point to such disclosures. If consumers do not read fine print terms in any event, providing them in the box would seem an appropriate choice, saving both the company and the consumer time and money.

Neither the practical exigencies of the circumstances nor the presence of non-readers would appear to justify cubewrap terms. The process of hiring a

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and adhesive simply because "[the employer] gave her little choice in the matter"); Schwartz, *supra* note 8, at 107 ("A *categorical* assertion of unequal bargaining power, such as exists generically in . . . employment-related contracts, will not, by itself, provide grounds to invalidate agreements to arbitrate."). *See generally* Rakoff, *supra* note 23, at 1185 (describing general rules that enforce form contracts regardless of their adhesive effects).

84. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

85. *See* Braucher, *supra* note 6, at 768 ("Advance disclosure in the age of computers and the Internet is simple and cheaper than printing copies and getting them into boxes. Sellers have the terms in an electronic file, and all they have to do is put that content on their Internet sites and tell buyers where to look." (citation omitted)).

86. Gateway now posts its complete set of standardized terms on its website. In addition, I have had at least one first-year contracts student tell me that in the course of purchasing a Gateway computer by telephone, she was informed by the sales representative that the computer would be shipped with additional terms in the box.

87. *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 839–40 (2006).

worker, no matter how regimented it has become in some contexts, is still a far cry from a mass market transaction. Manufacturers need forms and efficient means of delivering them because consumer transactions happen quickly and often the seller does not deal with end users. Customers have come to expect that they can order a product by simply swiping a credit card or clicking on a webpage without any negotiation whatsoever. On the other hand, the decision to begin an employment relationship is still a relatively personal one. Employers in many situations conduct face-to-face interviews or at least consider candidates individually. Employers may prefer to have all of their employees bound by the same set of standard terms, but there is no reason why those terms cannot be made available to the applicant prior to his or her acceptance.[88]

For the same reason, one suspects that employees are more likely than consumers to actually read the documents that are provided to them. The decision to accept a particular job generally involves deliberation, which may occur over a span of time. Employees thus have the opportunity to read and consider any written terms provided up front. Perhaps more importantly, workers have much greater incentive to read and comprehend employment forms than they do the fine print that accompanies consumer goods. Unlike an isolated purchase, accepting a job means committing to a relationship, one that is the source of one's livelihood and a critical part of one's identity. That is not to say that employees will always act rationally and judiciously in evaluating boilerplate terms.[89] It would be wrong, however, to assume that employees, even those who are non-readers in the consumer context, will dismiss written employment terms as they would the fine print that accompanies the purchase of a toaster. If employees do not read cubewrap terms, it is more likely a result of the delay in providing them than a justification for the practice.

Perhaps what truly underlies pragmatic defenses of delayed term contracting is not the notion that consumers do not read, but rather that they cannot refuse. If that is the root of the realist position, it is hardly a justification for delayed terms so much as a call for even greater intervention.[90] In the next Part, I explore further the role of external checks on the substantive content of cubewrap terms. At this juncture, however, it is sufficient to note that arguments favoring enforcement based on the improbability of reading are ultimately no different than unabashed sanctioning of the drafter's right to insist on whatever terms it chooses. If bargaining power is the issue, then the individual's proclivity for reading is irrelevant. And while many, if not most, are unable to negotiate terms, or, in the case of employees, unable even to refuse the deal, that does not justify the disenfranchisement of the few who can.

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88. At a minimum, employers can tell applicants that an arbitration or noncompete agreement will be required. *See, e.g.*, Kuhn v. Ameriquest Mortgage Co., No. 04-2229, 2004 WL 2782568, at *5 (D. Kan. Dec. 1, 2004).

89. As previously discussed, cognitive limitations such as overconfidence and the discounting of remote events can affect employees' assessment of non-salient terms. *See supra* note 76 and accompanying text.

90. *See* Braucher, *supra* note 6, at 764.

III. SAVING PRIVATE ORDERING: IS THERE A PLACE FOR STANDARDIZED FORMS IN THE EMPLOYMENT RELATIONSHIP?

The previous Section suggested that the justifications for enforcing delayed term consumer contracts are not applicable in the employment context and that the risks of standard form contracts justify special scrutiny. Yet, just as with consumer transactions, there are legitimate reasons for the use of standard forms in employment relationships.[91] Forms are convenient and predictable. They ensure consistency in personnel management across large organizations, which can enhance workforce morale and productivity. They reduce the risk that the employer will be bound by situation-specific assurances made by individual employees and provide a mechanism for clarifying which obligations the company perceives as legally binding.[92]

Thus, the question is how to legitimize this form of private ordering in the employment relationship. This Section offers a starting point for doing so, drawing on the principal response to delayed term consumer transactions—mandatory disclosure. It proposes a bright line rule that would prohibit enforcement of any terms withheld until after the employee's acceptance of the initial offer of employment. While required disclosure is not a solution to the problem of employer overreaching, it can make a difference to at least some employees while leaving open the possibility of improvements on existing substantive initiatives that protect those with less bargaining power.

A. Building on Procedural Initiatives: Mandatory Disclosure of Cubewrap Terms

One response to the problem of shrinkwrap consumer contracts has been a call for disclosure. Commentators have argued that manufacturers should be required to provide all terms in advance of purchase or at a minimum to notify consumers that additional terms will be provided with the product and their assent required as part of the transaction.[93] Under such proposals, delayed terms would be unenforceable and might constitute a violation of consumer protection laws.[94] A comparable approach could be adopted in the employment context. Either through common law or statutory initiative, any term withheld until after the employee's acceptance of the initial offer would be unenforceable if the term could have been provided as part of the hiring process.[95]

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91. Despite widespread concern about the enforcement of standard form consumer agreements and the consensus that consumers do not read or understand their terms, most commentators agree that they are an essential part of business. *See, e.g.*, Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 630 (2002) ("[F]orm contracts make the world go round.").

92. *Cf.* Rakoff, *supra* note 23, at 1223 (noting that standard form contracts serve as an "automatic check on . . . wayward sales personnel [who might] make bargains into which the organization is unwilling to enter").

93. *E.g.*, Braucher, *supra* note 6, at 769; White, *supra* note 7, at 746–48.

94. *See* Braucher, *supra* note 7, at 1807–08.

95. Courts will in some cases have to wrestle with whether the facts support a prior acceptance by the employee. For instance, an applicant may informally accept a job

1. Arbitration Agreements and Employee Volition

In the arbitration context, federal legislation might ultimately be necessary to achieve a uniform disclosure rule immune from preemption challenges.[96] However, such a move would be consistent with existing common law focusing on procedural aspects of contract formation. Notwithstanding the judicial trend in favor of arbitration, a species of the knowing and voluntary test for enforceability survives in a few jurisdictions, and courts remain willing to condemn employer behavior that is sufficiently misleading to undermine assent.

For instance, in *Walker v. Ryan's Family Steak Houses, Inc.*, the plaintiffs were former employees in a variety of low-level restaurant positions who signed an arbitration agreement contained in a twelve-page packet of application materials.[97] Most received the materials during the course of fifteen- to twenty-minute job interviews, while a few were hired on the spot, then asked to complete the application materials during their first few days on the job.[98] The court refused enforcement, citing the absence of both mutual assent to the contract and a knowing and voluntary waiver of the right to a jury trial. The court noted that the employer presented the applicants with various documents, instructed them to sign, and afforded the plaintiffs no opportunity to take the materials home for careful review.[99] It also emphasized that the employer gave the applicants incorrect and misleading information about the meaning of the arbitration agreement, telling them that it merely required internal processing of any workplace dispute as a first step to resolution.[100] Thus, while the court did not pay special attention to the fact that some "applicants" signed the agreement after having accepted and started work, it based its decision in large part on the employer's method of presenting and characterizing the agreement.

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offer with the expectation that additional terms remain to be discussed, after which the employer promptly forwards its standard forms to the applicant, who signs prior to commencing the job. In that situation, it may be appropriate for the court to find adequate disclosure by the employer and enforce the standard terms subject to existing substantive limitations. The result must turn on the timing of disclosure relative to the reasonable actions of the employee in anticipation of the new job. Consistent with the idea that delayed terms can only be enforceable if the individual has the ability to reject the deal, disclosure that comes after an employee has quit, turned down other offers, or made other significant and irreversible investments should be deemed too late.

96. Section 2 of the Federal Arbitration Act, permitting courts to revoke arbitration agreements on the same grounds that would permit revocation of any contract, 9 U.S.C. § 2 (2006), has been interpreted to preempt any state law disfavoring arbitration agreements. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). Thus, many have noted that absent reinterpretation of the FAA by the Supreme Court, efforts to more aggressively scrutinize the enforceability of employee arbitration agreements, whether by inquiry into substance or process, will require legislative action. *See, e.g.*, Nolan *supra* note 56, at 881 ("Congress could at any time amend the FAA or the anti-discrimination laws to limit or prohibit pre-dispute arbitration agreements covering statutory issues. A single sentence would do the job.").

97. 400 F.3d 370, 373 (6th Cir. 2005).

98. *Id.* at 373–74.

99. *Id.* at 381–82.

100. *Id.* at 382.

A mandatory disclosure rule complements this analysis. It recognizes that a choice to delay information is a form of misleading behavior, which is just as condemnable, if not more so, as providing inaccurate information. Cubewrap agreements mislead employees, not about the content of their terms, but about the job the employees are accepting. Absent receipt of terms in advance, the technicalities of what they require hardly matter, as it is too late for most employees to quibble about what they say, let alone reject them. In this way, disclosure also makes real the notion of fair process that decisions like *Walker* appear to endorse. A delay in providing terms fundamentally impairs the employee's ability to choose whether to accept the job irrespective of how much time he or she has to read and consider them.[101]

In this way, a rule that makes delay a determinative factor in assessing enforceability is consistent with the large body of scholarship supporting the application of a knowing and voluntary standard to pre-dispute arbitration agreements. Some thinkers have proposed tests that, like *Walker*, emphasize employee knowledge and consider such factors as the opportunity to read, seek counsel, and revoke consent.[102] Others, however, have focused more closely on voluntariness in recognition of the fact that the employee's ability to reject unilaterally drafted terms comes at the cost of employment.[103] The difficulty with such proposals is that tying voluntariness to an employee's financial independence would render unenforceable any term that is made a condition of employment. A disclosure rule acknowledges legitimate concerns about employee vulnerability, yet remains consistent with the Supreme Court's announced policy in favor of arbitration and general contract principles that do not treat limited bargaining power alone as a basis for voiding contracts. At least in this discrete set of circumstances where the employee's lack of choice is heightened as a direct result of the employer's conduct, the level of voluntariness requisite for assent should be deemed absent.

2. Agreements Not to Compete and Employer Bad Faith

In contrast to the arbitration context, the law of noncompete agreements offers relatively few examples of courts policing employee assent. At least one jurisdiction, however, has suggested that the practice of delaying terms could be

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101. *See* Schwartz, *supra* note 8, at 131 ("The drafting party could pay to send the adherent to an all-day seminar on the implications of its arbitration clause. But unless the adherent has a meaningful opportunity to bargain or shop that term, she may feel compelled to accept it no matter what."); Silverstein, *supra* note 66, at 504–10 (critiquing courts that focus on employee notice at the expense of more thorough treatment of voluntariness).

102. *See, e.g.*, Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 961–62 (1993); Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 481–83 (1999).

103. *See, e.g.*, Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 458–59 (1996); Silverstein, *supra* note 66, at 504–10; Jeffrey Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1438–42 (1990–91) (proposing "inescapable adhesion" as a defense to an arbitration agreement in context of a "necessity" such as employment).

evidence of bad faith, limiting the employer's ability to enforce an overbroad agreement. In *Merrimack Valley Wood Products, Inc. v. Near*, the employee worked for the company for six months before being asked to sign a "salesman agreement" containing a noncompete.[104] The employer stated that continued employment was contingent on signing, and the employee gave the agreement only a cursory review.[105]

In the employer's subsequent suit against the employee following his departure from the company, the New Hampshire Supreme Court refused to enforce the noncompete. It did not assess the employee's assent to the post-hire terms and seemingly took as a given that a valid contract had been formed. However, it found the scope of the restraint unreasonable and refused to modify the contract, based in part on the employer's choice to delay terms.[106] The court noted that judges have the power to reform an overly broad noncompete only where the employer acts in good faith. Such good faith refers not only to the scope of the restraint but also the circumstances surrounding the execution of the agreement. In this case, the employer withheld the noncompete during the hiring process, failing to inform the employee during his interviews with multiple company representatives that such an agreement would be required.[107] The court, therefore, held that the employer had shown bad faith, precluding judicial modification and enforcement of the delayed agreement.[108]

From this analysis, it is a short step to holding unenforceable any agreement provided after initial acceptance if the employer could have included it for employee consideration during the hiring process. The difference would be that under the disclosure approach advanced here, a cubewrap noncompete would be unenforceable regardless of its reasonableness. The fact that terms are not overly burdensome to the employee does not make an agreement volitional. If the employer's contracting practices obliterate any real option for the employee to terminate and reject the new terms, courts should treat that conduct as vitiating employee assent.

B. The Limits of Disclosure

Of course, required disclosure is by no means a full solution to the problem of adhesive employment contracts, and in the consumer context, there has

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104. 876 A.2d 757, 760 (N.H. 2005).

105. *Id.*

106. *Id.* at 763–65.

107. *Id.* at 764–65.

108. *Id.*; *see also* Ferrofluidics Corp. v. Advanced Vacuum Components, 968 F.2d 1463, 1470–71 (1st Cir. 1992) (confirming that "the timing of the initial presentation of the restrictive covenant to the employee may bear on the employer's good faith"); Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1313–14 (N.H. 1979) (holding bad faith precluded judicial reformation where employees executed noncompetes after hire and following agreement to oral terms of employment). Other courts, while not basing their holdings on such grounds, have noted the employer's delay in requesting a noncompete in finding such an agreement unenforceable. *See, e.g.*, FLEXcon Co. v. McSherry, 123 F. Supp. 2d 42, 44 (D. Mass. 2000); Corroon & Black of Nashville, Inc. v. Lee, 1984 Tenn. App. LEXIS 2695, at *4–5 (Tenn. Ct. App. Feb. 16, 1984).

been significant debate about its utility. The principal objection is that consumers do not read standardized forms, nor does it make sense for them to read given the near impossibility of renegotiating them.[109] If that is the case, disclosure makes little difference, and substantive regulation of delayed terms is needed.[110]

While such concerns are legitimate, there is reason to think disclosure will protect some employees, and perhaps more employees than consumers. As previously discussed, employees are likely to be readers. Unlike the spot purchase of a consumer good, choosing a job is a high stakes proposition that occasions a longer and more deliberative decision-making process.[111] There is both adequate time and incentive to read the written terms, which are often less dense than the usual consumer fine print. The limits of disclosure therefore do not stem from an unwillingness to read so much as an inability to bargain.

Not all employees, however, lack the ability to bargain. While individuals are less powerful than both manufacturers and employers, at least some are in a position to insist on a change of terms. Importantly, the usual process of entering into an employment contract allows for this. Relatively few terms of employment are standardized and even unsophisticated workers will negotiate over at least some terms, if nothing other than the day they are to start work. In contrast, almost all terms of consumer transactions are pro forma, and the customer generally has no access to an agent with the knowledge to explain or authority to deviate from them.[112] Indeed, in the case of a purchase made through a supplier, the customer is not even dealing with the manufacturer who drafted the terms.

In the employment context, some hiring managers may similarly lack authority to alter or omit standard forms dictated by human resource or in-house legal departments. However, in that situation, there is at least the option to raise questions up the organizational chain of command. In the noncompete context, for instance, anecdotal evidence suggests that higher level workers do in fact dicker over the scope of noncompete agreements or at least carefully consider and question their terms.[113] In addition, even failed efforts to renegotiate can ultimately

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109. *See* Eisenberg, *supra* note 76, at 243 ("Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing, and which probably aren't subject to revision in any event, a rational form taker will typically decide to remain ignorant of the preprinted terms."); Meyerson, *supra* note 25, at 600 ("[T]he benefit to be derived from acquiring adequate knowledge of contract terms is usually low and is likely to be far exceeded by the significant costs of acquiring that information. It is, therefore, rational for even a conscientious consumer to pay little, if any, attention to subordinate contract terms.").

110. For this reason, a number of scholars express skepticism about mandatory disclosure as a response to delayed terms in the consumer context. *See generally* Braucher, *supra* note 7, at 1810–13 (summarizing debate); Hillman, *supra* note 87 (describing pros and cons of forced disclosure).

111. *See supra* Part II.B.

112. *See* Eisenberg, *supra* note 76, at 242; Meyerson, *supra* note 25, at 600.

113. *See, e.g.*, Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477, 479 (D.N.J. 1999) (senior executive negotiated terms of original contract of employment and successfully refused noncompete pursuant to advice of counsel); Earthweb, Inc. v. Schlack,

be valuable for employees if they result in a stronger bargaining norm. The use of form documents is often a reflexive act, and questions about their content could prompt employers to be more flexible, or at least more thoughtful, about how and when they are used.[114]

In a similar vein, mandatory disclosure could make some employers more hesitant to insist on standard forms containing unfriendly terms for fear of adversely affecting applicant morale. A disclosure rule forces the employer, in the course of recruiting a worker, to produce documents that call attention to the risk that the relationship will go bad, documents that demonstrate not only that the company has considered that possibility, but that it is making efforts to protect itself in anticipation of that event. Even if the employee is unlikely to be able to trade on those terms, producing them introduces considerations that are in conflict with the tone most employers wish to set in hiring new staff. This could be enough to make some employers reconsider their use.[115]

Finally, the disclosure rule advocated here would not stand on its own. Extensive substantive regulation of both arbitration and noncompete agreements already exists. As previously discussed, noncompetes are subject to a rule of reason, and most courts will modify restraints that are deemed too onerous regardless of the legitimacy of employee assent. In the arbitration context, while special rules limiting enforcement are federally preempted, courts have paid close attention to the quality of process afforded under the employer's terms in applying the defense of unconscionability.[116] In addition, the arbitration industry has

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71 F. Supp. 2d 299, 311 (S.D.N.Y. 1999) (vice president claimed he noted scope of noncompete and would not have signed a broader restraint).

114. I have made it a point of principle to engage in this type of bargaining when presented with standard forms in connection with my own employment for precisely this purpose. For instance, I was unable to talk my way out of a consent to criminal and credit background check presented to me at the start of work, a good year after I had "accepted" employment. However, I succeeded in bringing the matter to the attention of university counsel who agreed that such forms will in the future be presented to workers in advance of employment.

115. Another possibility is that reputational concerns will check employers' use of some cubewrap terms. Particularly in a tight area of the labor market, such as technology, which is characterized by high turnover and a relatively knowledgeable workforce, a company may be reluctant to maintain a policy of mandatory noncompete agreements. One can imagine employers attempting to reap a market advantage by not requiring noncompetes, a prospect that is intuitively more plausible than the notion, advanced in the consumer context, that manufacturers will advertise favorable fine print terms. *See, e.g.*, Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 697. If employees are readers, however, it is possible that reputational considerations could be effective in deterring employers from requiring such terms even absent a mandatory pre-hire disclosure rule.

116. There are a surprising number of cases striking arbitration clauses as unconscionable. *See, e.g.*, Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 277–79 (3d Cir. 2004) (holding arbitration agreement imposing thirty-day statute of limitations and requiring each party to bear its own expenses was substantively unconscionable); Murray v. United Food & Commercial Workers Int'l Union, Local 400, 289 F.3d 297, 302–04 (4th Cir. 2002) (holding arbitration agreement giving employer discretion in naming possible arbitrators and constraining arbitrators' ability to rule on authority of employer's president

consistently engaged in voluntary self-regulation, articulating rules and protocols to ensure fairness in employment proceedings.[117] That is not to say that existing forms of substantive regulation are ideal or even sufficient. Certainly stronger methods of intervention could be explored, especially in the noncompete context.[118] But such efforts can occur in tandem with a disclosure rule. Disclosure benefiting those employees with options does not undermine the cultivation of rules aimed at better policing the content of employment agreements on behalf of those who have no choice.[119]

CONCLUSION

The purpose of this Article has been to challenge the legitimacy of cubewrap contracts as an exercise in private ordering. A review of just some of the arguments raised in the context of shrinkwrap consumer transactions provides ample reason to question this method of contracting, and indeed employers' motives in delaying terms. Although subject to debate, it may well be that pragmatic considerations justify the practice in the consumer context,

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was unconscionable and unenforceable). *See generally* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 766–67 (2004).

117. *See* Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1066–68 (1996) (discussing examples). One can imagine a comparable form of self-regulation on the part of employers in terms of the appropriate scope of a noncompete restraint. *See* Arnow-Richman, *supra* note 3, at 989–90.

118. For instance, a simple and effective reform would require employers to pay an employee his or her salary during the period of noncompetition. Such "gardening leave" is a standard feature of noncompetition agreements under British Law. *See* Estlund, *supra* note 52, at 425.

119. Perhaps the most significant limitation of a disclosure regime is not that it does too little, but rather that if taken to its extreme, it does too much. An inflexible disclosure rule would not adequately account for situations in which the employer has a genuine need to implement new, binding terms during the course of a relationship. As discussed previously, an employee may, in the course of employment, take on new responsibilities that involve confidential information or customers necessitating a noncompete; or an employer's strategy toward handling workplace disputes may change, necessitating an arbitration agreement. A comprehensive treatment of this problem is beyond the scope of this Article, and I have been careful to limit my recommendation to situations where disclosure could have been effected prior to hire. However, one possible way to approach enforcement of standard terms introduced post hire for legitimate reasons might be to consider the justifications that support delayed term consumer contracts, namely the needs of the business and the ability of the individual to exit the transaction. In other words, any mid-employment cubewrap terms should be provided with as much notice as the practical needs of the business allow, and in all cases with enough time for an employee to meaningfully consider and reject them. In keeping with the notion in the consumer context that recipients of shrinkwrap terms have the ability to return the product, meaningful consideration in the employment context requires an amount of notice sufficient to allow the employee to "return" the job; that is, quit for alternate employment. This means not only the opportunity to read the contract or consult an attorney but also enough time to "shop around" for a new job.

notwithstanding that a sensible reading of section 2-207 of the U.C.C. prohibits it. In the employment context, we appear to have the opposite situation. The common law of contract formation, as it has traditionally applied to employment relationships, may well recognize delayed terms as valid modifications in that they are accepted by the employee in exchange for continued employment. But surely the reality is different. Given the stakes of employment, and the effect of delaying terms, the use of cubewrap contracts is hardly a form of private ordering so much as it is a practice of indefensible coercion.

Addressing this problem requires courts and scholars to do some hard thinking about whether society is content to live with the results of an objective theory of assent in analyzing the enforceability of cubewrap terms. Such an undertaking need not wholly upset basic rules of law. Employees obviously are limited in their ability to bargain over terms of employment no matter what their form or timing, and for this reason it may be worth pursuing a more complex theory of assent in such relationships generally. But addressing the dynamic in question here need not await resolution of that broader inquiry. The use of delayed terms reflects a deliberate choice of the employer that both exacerbates and exploits preexisting imbalances. If we mean to preserve private ordering in a form that deserves the name, at a minimum we must look more critically at the quality of employee assent to delayed terms, by requiring pre-hire disclosure on penalty of non-enforcement.