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ON THE USE OF PRACTITIONER SURVEYS IN COMMERCIAL LAW RESEARCH

Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'

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As Daniel Keating's principal article attests, the literature on U.C.C. section 2-207 and the "battle of the forms" is both vast and intricate.[1] That fact, together with the distinguished array of commentators assembled here, makes it unlikely that I will be able to say anything substantially original on that subject. Accordingly, in the spirit of this overall symposium, I will focus the bulk of my remarks not on the substantive issues raised by Keating's article, but on his methodology. In particular, I will suggest that Keating's empirical method — the free-form, oral interview conducted personally by the principal researcher — is less reliable, and more vulnerable to distortion by the biases of the interviewer and respondent, than he acknowledges. While Keating is correct that this "hands-on" method can yield substantial insight and unearth information that could not be found through structured surveys or review of written company records, the information thus generated is not subject to the usual controls provided by those more conventional methods. Absent such controls, the information is much more likely to be used to confirm the interviewer's or respondent's prior beliefs than to disconfirm them, or to corroborate conventional wisdom rather than debunk it. Thus, I would take his findings — that commercial actors have adjusted fairly well to the use of standard form contracts, that the battle of the forms is relatively uncommon in practice, and that significant statutory reform is not in order — with skepticism, at least until they have been confirmed by a more traditional empirical study that makes greater use of tabulated quantitative data and that takes greater precautions to screen out interpretative bias.

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1. Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678, 2683-92 (2000) (summarizing and critiquing scholarly literature on the battle of the forms).

1. *Unstructured Interviews and Secondhand Narrative: The Pitfalls of Impressionist Methodology*

Although the drawbacks of free-form interviews are well known, and although Professor Keating briefly mentions some of them in his article, it is worth restating them here a little more fully, if only to counterbalance the short shrift he gives them. To begin rather abstractly, it is a truism of modern accounts of scientific method that empirical data do not exist in a vacuum, separate from any theoretical framework. The world is not simply waiting out there to be observed; instead, it must be put in order. An empirical researcher therefore must choose among the various features of a complex reality, selecting some to notice and record, while ignoring countless others. Which aspects of the world are salient — which are worth noticing — will necessarily depend on the theoretical lens of the observer. Similarly, the process of interpreting and summarizing data is also influenced by one's theoretical framework.

Keating's unedited interview transcripts, for example, consist of approximately 280 pages in WordPerfect electronic format. His summary of these interviews takes up approximately twenty-three pages of his final article, nine of which describe his respondents' reactions to various proposals for statutory reform. In condensing this large body of interview material down to a coherent narrative, Keating necessarily had to suppress the bulk of the information it contained. In choosing what information to suppress and what to accentuate, he was necessarily motivated by his pre-existing views of what counted as signal and what as noise. A different researcher with different theoretical preconceptions might have made quite different choices.

As I have said, these observations are commonplace ones; and Keating does refer to them before launching into his main narrative.[2] In my view, however, he does not sufficiently recognize their force. He does not cite any of the standard texts on survey research methods, for instance, or indicate that those texts generally disapprove the sort of unstructured interviews that he undertakes.[3] Nor does Keating recognize how the potential for interpretative bias, which threatens generally to infect all empirical studies, was exacerbated by several specific features of his particular methodological approach.

Before elaborating on these specific features, though, let me point out just one instance of the bias that can be introduced through the in-

2. *See id.* at 2697.

3. For general discussions of survey research methodology, see EARL BABBIE, SURVEY RESEARCH METHODS (2d ed. 1990); and FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS (rev. ed. 1988). Both texts emphasize throughout their discussions the importance of standardized question design and interview scripts in producing reliable results and minimizing interviewer bias. *See, e.g.*, Babbie, *supra*, at 144, 192-93; Fowler, *supra*, at 5-6, 70-72, 107-18.

terview method, just to illustrate the risks that are involved. In focusing on this example, I don't intend to claim that it is randomly chosen or that I am immune from any of the methodological problems that I have just described. On the contrary, the example was particularly salient to me because it stems from a theoretical claim that I regard as mistaken and have argued against in prior writings.[4] But the example is still telling, I think, because it illustrates concretely how a researcher's theoretical preconceptions can enter into — and subtly bias — a good faith attempt at empirical description.

The example that jumped out at me from Keating's article is an old and familiar claim within the literature on standard form contracts. It is, in short, that the use of standard forms and resistance to negotiating over them has something to do with market power — or as Keating calls it, leverage. Keating, like many influential writers before him, assumes that large and powerful market actors will want to use standard forms, and to present those forms on a take-it-or-leave-it basis, in order to maximize their profits from exchange at the presumed expense of their contractual partners.[5] This claim doesn't play a central role in his article, but he does refer to it at several points in his discussion and reports that his respondents believe it to be true.[6] Further, at the end of his article, he devotes an entire paragraph to this claim and identifies it as the factor that is likely to have the single most significant effect on the battle of the forms in the future.[7]

The reason why this claim stood out for me is that it is inconsistent with the standard economic account of how firms with market power maximize profits. While it is true that the users of form contracts are often unwilling to do business on terms other than their standard ones, this is not a function of monopoly. Standardization of contracts, like other forms of mass production, lowers the cost of individual transactions, thus giving competitive firms as well as monopolists an incentive to use it. The notion that a monopolist would want to offer lower-quality or more self-serving contract terms than a competitive firm depends upon a mistaken analogy between quantity and quality. Specifically, a monopolist finds it profitable to produce an inefficiently low

4. *See* Avery Wiener Katz, *Standard Form Contracts*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman, ed., 1998).

5. The claim is most famously made by Friedrich Kessler, *Contracts of Adhesion — Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); later influential reformulations of the claim include Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983); and W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). The notion that "adhesion contracts" are motivated by monopoly or market power is also prominently featured in judicial condemnation of form contract terms. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

6. *See* Keating, *supra* note 1, at 2702, 2707, 2709, 2714.

7. *See id.* at 2714.

quantity of goods because that forces consumers to compete against each other for the reduced supply, thus bidding up the price.

If the monopolist seller tried to reduce the quality of its contract terms, in contrast, it would lower the value of its product to its buyers, reducing the markup it could profitably charge. Similarly, if a monopoly buyer (often called a monopsonist) reduced the quality of its contract terms, it would raise its suppliers' costs and thus reduce the possible discount it could obtain from them. For this reason, a profit-seeking monopolist generally will make the most of its market power by choosing a level of quality and service that best suits the preferences of its marginal customers and suppliers, for to do otherwise sacrifices profits. If it is worth more to the customer or supplier to have its own standard terms than it is to the monopolist, then the monopolist does better to yield on contract terms and take its profits out in the price.[8]

To be precise, I am not disputing that larger firms might be less willing to yield on standard form terms than smaller firms. This would be the case if (and only if) the larger firms faced an increased cost in changing their terms, perhaps because they had larger bureaucracies, because they had adopted fixed methods of mass production that were more costly to change, or because their larger volume of transactions allowed them to develop reputations for quality or reliability that substitute for legal protections. But, in this case, the reason for their resistance would not be monopoly power or leverage, but efficiency.

This disparity between standard economic theory and the results reported by Keating prompted me to look more closely at the evidence supporting the claim, which Keating attributed to his respondents, that reluctance to negotiate over contract terms was related to leverage. In doing so, I was assisted by Keating's having generously made available to me an electronic copy of his interview transcripts.[9] While it would have been impractical manually to search through the

8. *See* William S. Comanor, *Vertical Price-fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985) (legally oriented exposition, focusing on product quality); Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-seller Relationships*, 43 STAN. L. REV. 361 (1991) (generalizing the analysis of product quality to contractual terms generally); A. Michael Spence, *Monopoly, Quality, and Regulation*, 6 BELL J. ECON. 407 (1975) (formal demonstration of this result using mathematical economics). More precisely, if all its customers or suppliers have the same willingness to pay for contract terms, the monopolist will do best to provide a contract with optimal terms and to extract all available profits through the price. Only if the tastes of the marginal customer or supplier are unrepresentative of the general population of contracting parties will suboptimal terms be offered. For example, if willingness to pay for a warranty is positively correlated with willingness to pay for the underlying good, then the monopolist will offer a suboptimal warranty (because then the amount that the marginal customer is willing to pay for a better warranty is less than the amount that the non-marginal customers would pay).

9. Keating Interview Transcripts (1999) (document on file with the *Michigan Law Review*).

full 280 pages for any reference to this claim, I was able to do a computer search, and find every instance in the interviews that specific words related to the claim appeared. I did this for the words "leverage," "monopoly," and "power;" and in all found thirteen interviews in which these words appeared in the context of the market power claim.[10] I then looked specifically at each such instance to see whether the word or words, or the concept of leverage itself, was first introduced into the interview by Keating, or by his respondent — a process which was in most cases straightforward, but in one or two instances required me to read the discussion in context and exercise judgment. Again, my motivation for conducting this exercise was that I regarded the leverage claim as theoretically doubtful, and so I wanted to see whether this claim was truly attributable to Keating's respondents, as he had reported, or whether instead it arose, partly or fully, out of his own theoretical framework.

The result of my exercise was that, out of thirteen interviews in which leverage was mentioned, Keating introduced the concept in eight of them.[11] In four cases, the respondent introduced the concept.[12] And in one case, I judged that the introduction of the concept was equally attributable to both parties.[13] In sum, Keating suggested the concept of leverage to his respondents roughly twice as often as his respondents suggested it to him.

I should reiterate that my review of the interview transcripts was quite limited, and I am not claiming that Keating generally supplied his respondents with theoretical interpretations or systematically put words in their mouths. Rather, I examined a single issue, the selection of which was motivated by my own theoretical preconceptions that the attributed claim was likely to be unreliable as a description of reality, and found, confirming my preconceptions, that Keating influenced it on a majority of occasions. I did not check any of the other claims he described in his article, or subject them to a similar test. Thus, the information my exercise revealed is at most anecdotal. In my view, though, it does illustrate, however symbolically, the potential for bias present in Keating's interview method.

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10. *See id.* These were Interview 3 (dated Nov. 9, 1999), Interview 7 (dated Nov. 12, 1999), Interview 8 (dated Nov. 12, 1999), Interview 12 (dated Nov. 15, 1999), Interview 13 (dated Nov. 22, 1999), Interview 16 (dated Feb. 8, 2000), Interview 17 (dated Nov. 30, 1999), Interview 19 (dated Nov. 30, 1999), Interview 20 (dated Nov. 30, 1999), Interview 21 (dated Dec. 1, 1999), Interview 22 (dated Dec. 1, 1999), Interview 24 (dated Dec. 3, 1999), and Interview 25 (dated Dec. 6, 1999). The word, "power," appeared on a few occasions in the context of electric power, but I excluded these references from my count.

11. *See id.* (Interviews 3, 12, 13, 17, 19, 20, 24, and 25.).

12. *See id.* (Interviews 7, 8, 21, and 22.).

13. *See id.* (Interview 16, involving the single respondent whose name was supplied, one Tatelbaum.).

Let me now return to that method and elaborate more fully on the features that make it, in my view, particularly susceptible to the problems I have identified. The first such feature is of course Keating's free-form conversational format, with its resultant lack of control over the wording, order, and emphasis of questions. The problem here is not just that the lack of structure makes it easier for the researcher (or the respondent, for that matter) unconsciously to guide the conversation toward conclusions that are theoretically congenial. The real difficulty, rather, is that the lack of comparability between interviews makes it impossible for outside observers to check for signs of such bias without reviewing the full set of interview transcripts. Inspecting the interview script is not an adequate substitute for such a thoroughgoing review, since that script is a mere skeleton of the subsequent performance to which it gives rise. As a designated commentator on Keating's article, I happened to have an electronic copy of the transcripts, which allowed me to develop the anecdote outlined above. But I did not review the transcripts in any systematic way, nor would it have been feasible for me to do so in the limited time that I had to prepare my remarks. The larger symposium audience did not have practical access to the transcripts at all; neither will the readership of this journal, unless Keating is generous enough to make an electronic copy available to anyone who wishes to see one, as he was with me.

A second and similar feature that makes Keating's interview method susceptible to bias is that the differences among Keating's interviews, together with his small sample size, mean that the data he collected must be summarized in narrative rather than quantitative form, and described impressionistically rather than systematically. The problem here is not just sample bias and lack of statistical significance, as Keating would have it. Rather, it is that the information he lays out may not accurately reflect the sample on which it is based; and, more importantly, that there is no realistic way for his audience to check its accuracy or consider alternative interpretations. If he had asked a more controlled set of questions, he could have presented a full set of summary statistics in quantitative and tabular format. His audience could then be confident that it received a systematic summary of the interviews, rather than just an account of the information that the author personally found salient. Readers would then be able to inspect such statistics on their own, and could look for patterns that the author had not noticed or that were based on their own theoretical frameworks rather than the author's. With an impressionistic narrative, in contrast, the audience can still deconstruct the author's text and look for counterexamples, as I did with my symbolic illustration, but its ability to re-run and re-interpret the data is substantially more limited.

Third, the questions that Keating asked were particularly open-ended and thus subject to an additional level of interpretative bias on

the part of his respondents. Keating did not, like Ronald Mann's contribution to this Symposium on the subject of letters of credit, attempt to develop a random sample of actual transactions.[14] He did not, like John McMillan and Christopher Woodruff in their study of private ordering in post-socialist transition economies, ask his respondents to comment on specific individual transactions, such as the first or most recent form contract with which they had dealt.[15] Instead, he asked his respondents to characterize their usual manner of doing business, or their general practices as they saw them. To answer such questions, Keating's subjects had to operate as theorists themselves; they had to consult a large body of empirical experience, decide which aspects of it were worth reporting, and then distill these selected aspects down to a narrative description, which they then supplied to Keating as his raw data. Accordingly, their reports were necessarily influenced by their own theoretical frameworks, and by the institutional positions that they occupied within their respective organizations. Thus, it is perhaps not so surprising that a survey population of in-house contract lawyers would report that they spent a significant amount of time reviewing other companies' forms, or that they regularly avoid the battle of the forms by negotiating all the important terms of their contracts up front. These are the sorts of tasks that in-house lawyers are paid to undertake — or that they think they are paid to undertake — and it would instead be remarkable to find the lawyers admitting that they fail to accomplish such tasks, or that they leave them to be addressed by other organizational actors such as sales and purchasing agents. Indeed, if Keating had asked the same questions to a population of sales or purchasing agents, he might have received a set of rather different answers.

Again, more important than the potential for self-serving or ideological bias in his respondents' answers is the fact that Keating's survey design did not allow him to check for such bias himself, if and when it occurred. Because Keating did not have access to the larger body of information on which his respondents based their answers, he could not perform his own search for empirical patterns that the respondents did not notice. Because he did not pin his respondents down to specific transactions, he could not be assured that the events they described, whether anecdotes or generalizations, accurately reflected the universe of their experience or the statistical frequency of such events in that universe. Because he did not consider, and did not ask, questions designed to uncover the overall theoretical framework with which his respondents approached the empirical world, he was not in a

14. Ronald Mann, *The Role of Letters of Credit in Payment Transactions*, 98 MICH. L. REV. 2494 (2000).

15. John McMillan & Christopher Woodruff, *Private Ordering Under Dysfunctional Public Ordering*, 98 MICH. L. REV. 2421 (2000).

position to discount or decode their answers in light of interpretative perspective.

For these reasons, the parts of the interviews in which Keating asked his respondents their opinion of particular statutory reforms, and the section of his article in which he reports on those opinions, seem to me particularly unreliable. Such opinions — about how commercial behavior would change under a different set of legal constraints — are necessarily theoretical. Or more precisely, they are based on the respondents' experiences under current legal and commercial institutions, together with their theoretical models of how the world works. There is little reason to think that such experiences are representative of the experiences they would have under other legal regimes, or that the process through which the respondents achieved positions of responsibility selected for success in evaluating proposed legal regimes that never existed and that they likely heard about for the first time in the course of Keating's interviews. Additionally, the respondents' views about how they would react to a change in the law reflects their assumptions regarding how other actors and institutions would react to the change — for example, if other companies redrafted their forms or changed their negotiation practices. But how these other actors and institutions would react depend on how the respondents would react and so on, so that the ultimate result would depend on the accumulated effect of a host of strategically interacting factors. There is nothing in Keating's account that suggests that either he or his respondents undertook a systematic strategic analysis of such factors.[16] Thus, his survey probably says more about his theoretical world view and those of his respondents than anything that would actually happen if such proposals were undertaken.[17]

Thus, to recapitulate my objections, Keating's methodology allowed for the conflation of empirical data with theoretical framework not once but twice — first when his respondents summarized their experiences for him and supplied him with the accounts that are found in the interview transcripts, and second when he summarized his experiences of those interviews and supplied his audience with the account that is found in his article. At both levels, the usual mechanisms for guarding against and checking for interpretative bias were absent.

16. Consider, for example, the lawyer who favored Victor Goldberg's proposed "best shot" rule, under which a court would choose whichever of the two forms is closest to the court's favored central position, then because he or she would not need to draft forms specific to each transaction. *See* Keating, *supra* note 1, at 2710. This simple response, however, is not the best strategy to follow in a world of heterogeneous contracting parties who vary in the terms they propose. When dealing with a partner who proposed very one-sided terms, it would be optimal to propose terms that are almost as self-serving, but slightly less so, just enough to win the court's favor. Against a more moderate partner, however, it would be optimal to propose more moderate terms.

17. Consider, for example, the lawyer who favored Victor Goldberg's "best shot" proposal because he was "a big fan of final offer arbitration." *Id.*

Both Keating and his subjects reported their experiences impressionistically, in a manner that left ample discretion to the reporter. There was no attempt at either level to obtain a random sample of empirical events, or to summarize the events that were reported in quantitative or other systematic fashion, so that the audience (Keating for his respondents, and us for Keating) could reasonably look to see whether the reports constituted a fair sample or displayed alternate patterns. Finally, the interactive nature of the interviews, in which both Keating and his respondents participated extemporaneously, makes it difficult — and impossible without a full review of the transcripts — to tell whether any interpretative bias found in the interviews derives from Keating's theoretical framework, from those of his respondents, or from a combination thereof. Thus, there is no straightforward way for us to discount or translate his subjective narrative into a more neutral or interpersonally reproducible version.

I don't mean by my comments to discourage further empirical surveys of the sort that Keating, at great effort and initiative, has undertaken. I agree with him that we need to supplement our theoretical models with information from the real world and with the views of nonacademics. In doing so, however, we should realize that distinguishing our theories from the facts is not a straightforward matter, that it is essential to build safeguards and checking mechanisms into our empirical techniques to guard against interpretative bias, and that the standard methods of survey and statistical research are standard for the very reason that they do provide such safeguards when applied properly and with judgment by the scholarly community.

Thus, in designing future surveys or interviews, it will be important to try to limit the opportunity for the respondents to edit their experiences or to impose on them their own interpersonally inaccessible interpretative frameworks. It will be important to present the results of such surveys in as systematic a manner as possible, in a form that allows the audience to double-check the data and test it against its own theoretical conceptions. And, in cases where the raw data is not amenable to quantitative summary, the most useful safeguard might be to be open and generous in making it available for detailed review, as Keating was with me. Free-form interviews of the sort that Keating conducted may have a legitimate role in the initial stages of a research project when data collection is being planned and survey questions are being designed. But they are not well suited for the final stages of a project or for drawing conclusions, even in the tentative fashion and with the sort of qualifications that Keating offers here.

2. *An Afterthought: The Battle of the Forms from an Organizational Perspective*

I indicated at the outset of these comments that I would concentrate my remarks on methodological issues, but before concluding, I cannot resist offering just one theoretical observation on the substantive topic of the battle of the forms. My observation is that the battle of the forms cannot be understood without reference to the problems of agency costs and organizational incentives. More specifically, form contracts are commonly used by one set of organizational actors to disable other actors from binding the organization on terms that might be in the latter actors' interests, but that the former actors do not wish to assume. Merger clauses, for example, which bar any promise or representation that does not explicitly appear in the written integration of the agreement, are commonly used for the specific purpose of taking contracting power away from the sales and purchasing agents who orally represent the organization in its dealings with outsiders, and to consolidate that power in the managers and legal professionals who control the official texts of company documents.[18]

This agency-control function, while well recognized in the scholarly literature on form contracts generally, has somehow failed to have an impact on the scholarly literature on the battle of the forms. All the commentators discussed in Keating's article, as well as Keating himself in the bulk of his discussion, talk about commercial organizations as if they are unitary rational actors that decide whether to use standard forms and whether to read the forms supplied by their contractual partners based on the overall interests of the organization. But this assumption plainly fails to comport with actual practice. Commercial form contracts are drafted by lawyers, and administered by purchasing and sales agents whose compensation structure provides them with incentives that are not identical to (or even proportional to) the benefits and costs to the firm that employs them. Thus, when a company lawyer adds a term to a standard form, or a purchasing agent makes the decision not to forward a customer's form to the in-house legal department, there is no guarantee that either decision is in the overall interests of the firm.

The battle of the forms, then, should be understood not just as a strategic struggle between rival organizations, but also as part of a

18. *See, e.g.*, Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-contractual Misrepresentations*, 33 VAL. U. L. REV. 485 (1999) (arguing that in the interests of minimizing agency costs, sophisticated commercial parties should be allowed to disclaim liability for their agents' pre-contractual and extra-contractual representations, whether fraudulent or not); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998) (suggesting that rational firms consider the costs of shirking by agents when adopting merger clauses).

strategic struggle among rival agents within organizations. Indeed, Keating's survey data attests to such a struggle, as when he tellingly recounts the belief of "more than one in-house lawyer" that "if they have taught their business people anything, it is never to actually sign the other side's form without first reading it and consulting the law department."[19] The sales and purchasing agents who are the recipients of such advice, however, presumably see this contest from a different perspective, and if Keating had interviewed a significant number of such nonlegal agents, instead of focusing his study solely on in-house counsel, he might have heard more stories about how the lawyers misunderstand the business end of contractual transactions and more anecdotes about how the sales or purchasing department managed to evade the formalistic procedures that the legal department had unsuccessfully attempted to impose.

I would conjecture that the use of one-sided terms in standard forms, and the frequency and depth with which organizational actors read the forms of other firms, will be closely connected with the quality of the incentive structures that an organization offers its agents. On this conjecture, firms that have relatively well-functioning incentive structures in place, so that the interests of in-house lawyers and of purchasing and sales agents are well aligned, will tend to use fewer one-sided terms in their own forms and will tend to communicate more thoroughly within the firm regarding the content of outside forms. In contrast, firms in which the legal and nonlegal departments are at war will use more one-sided terms in their forms — drafted by lawyers as a precaution against the purchasing and sales agents' failure to pass along outside forms or to report questionable terms — and will accordingly have poorer information regarding the content of outside forms, as the purchasing and sales agents react to the lawyers' anticipated interference by cutting them out of the informational loop. In order to test this conjecture, however, it would be necessary to design a survey that interviewed agents from various organizational departments, and that focused on agency problems and organizational conflict.

More speculatively, a study that focused on agency problems might also have the potential to shed light on the claim, which Keating raised in his article and I spent some effort above to debunk, that refusal to bargain over contract terms is somehow related to market power or leverage. As I indicated above, this claim is unpersuasive if we view monopolists as rational profit-maximizing actors; but it has been frequently put forward and is widely believed among non-economists; there might be something to it after all. If we recognize the role of agency costs in contractual negotiation, however, the claim becomes

19. Keating, *supra* note 1, at 2704. (See also his discussion, *id.* at 2710, of the differing perspectives of lawyers and business people.)

more comprehensible. For even if an ideally maximizing monopolist would prefer to take its profits in the form of a more favorable price, a real firm operated by imperfectly motivated agents might not. The agents do not enjoy the full benefits of the favorable price, and will be tempted to shirk their duties in various ways: to reduce effort, take kickbacks, and the like. It is not implausible in such a setting that shirking could take the form of the unauthorized exercise of power over contractual partners. Many people enjoy exercising power and bending others to their will; and the pleasures of such actions may well be greater for individuals whose subordinate role in a bureaucracy puts them in the regular position of taking rather than giving orders.

As a concrete illustration of this phenomenon (and as one last illustration of the phenomenon whereby the salience of empirical experience interacts with one's theoretical world view), in traveling to this symposium my family and I needed to rebook our flight. The ticketing agent with whom we dealt likely had the opportunity to exercise her discretion in a way that minimized our inconvenience and expense. This would have entailed some cost to the airline that employed her, but would have bought the airline some amount of goodwill that might have translated at a future time into increased business. Yet, because the ticket agent was unlikely to share in the profits generated by this future business, because any trouble she went to in order to accommodate us was unlikely to be recognized or compensated, and because any psychic benefits that she might enjoy from exercising petty authority over us did not have to be shared with her employer, her incentives to exercise discretion on our behalf were not perfectly aligned with the interests of the airline. It may be that the ultimate result, which was not in our favor, was one that the airline would have chosen, but it is likely for the above reasons that she was marginally less accommodating than it or its stockholders would have ideally wished.

The fact that the airline in question had a virtual monopoly position on the airport hub through which we were flying, furthermore, was not unrelated to the ticketing agent's incentive problem. Market power, together with the supernormal returns it makes possible, creates organizational slack, in that the firm can tolerate a larger degree of internal inefficiency without suffering losses, attracting competition, or drawing the attention of distant or scattered owners.[20] Such slack provides increased opportunities for shirking of various sorts, including the unprofitable exercise of power over customers and other contractual partners of the firm. Firms that do not earn monopoly profits, conversely, have less leeway to absorb or conceal the costs of such behavior, and other things being equal, will be less likely to suffer it

20. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION (1988), at 75-76 (explaining the connection between market power and organizational slack in terms of asymmetric information between owners and managers).

without changing their organizational practices. If my anecdote is representative of a widespread phenomenon, accordingly, it could go a substantial way toward explaining the widely asserted connection between monopoly power and the use of adhesion contracts.