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# Contraps

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# “Contraps”

WILLIAM J. WOODWARD, JR.\*

*Forms that purport to govern consumer transactions are a central component of our modern consumer economy. They are routinely enforced because consumers are said to “manifest assent” to them, despite the fact that they are not read and not intended to be read. Recent empirical work shows that virtually no one reads or understands consumer forms. This has cast into substantial doubt the conventional explanation for enforcement—that enough people are reading the forms to cause vendors to worry about lost sales resulting from nasty terms, that “market discipline” will thus limit vendor excess. Given the empirical findings, “assent” (in any common understanding of the word) cannot explain why we enforce terms found in forms; our attempts to reconcile enforcement with some version of knowing, voluntary action characteristic of “contract law” simply confuses the analysis. Policy choices would be substantially clarified if the confounding idea of “assent” were simply removed from the analysis. Removing consumer forms from the assent-based law of contracts—that is, changing how we teach and speak about this area of law—could be a first step towards reform.*

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\* Senior Fellow, Santa Clara University School of Law. At the conclusion of my talk during the symposium, I invited suggestions for a new name for consumer forms. Thanks go to Professor Knapp (who else?) for suggesting what has now become the title for this Article.

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## INTRODUCTION

In honor of Professor Charles Knapp’s 50th year of law teaching, I have chosen a topic—consumer forms—that has occupied a good part of his recent scholarship. This subject has spawned many books and scores of law review articles, ever since Professor Edwin Patterson called the document “delivered” by an insurance company an “adhesion contract.”<sup>1</sup> It is obviously impossible in a short Article to collect and synthesize nearly 100 years of academic output over how to think about and regulate consumer forms. Instead of attempting such a task, this Article will gather some of the more recent work—much of it empirical—that has attacked the assent-based analysis supporting enforcement of the terms present in consumer forms. That work suggests that “assent” obscures and inhibits the policy analysis needed to understand the imposition of liability in this context. Severing consumer forms from the law of voluntary liability we call “contracts” would allow a more robust inquiry into the reasons for imposing liability, empower consumers in their dealings with vendors, and stimulate the political pressure that will be necessary to effect long-term legal change.<sup>2</sup>

In the past thirty years, contract law dealing with mass-market transactions<sup>3</sup> has moved from the “modern contract law”<sup>4</sup> system—where

1. Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

2. Professor Arthur Leff essentially made this point in 1970: “My own starting place there is to argue that we should all stop thinking about these consumer adhesion ‘contracts’ as contracts altogether, and think about them as products, just like the products sold pursuant to them.” Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 352 n.18 (1970).

3. My focus in this Article is on the contract law that applies to consumers, the driving force in the contemporary economy. While their individual transactions are relatively small, the aggregate value may well constitute the bulk of contract law.

free choice was the touchstone of contract liability—to a system in which supposed efficiency justifies enforcement. This is keenly paradoxical: as an economic matter, millions of freely arrived at, informed choices are what make markets work and *be* efficient. This was part of the policy justification for “modern” contract law, where free agreement and efficiency at the individual level lined up with one another.<sup>5</sup>

But this branch of contemporary contract law—if, indeed, it belongs in the “contract law” category at all—is not about free choices and “efficiency” at that individual contract level, but rather, supposed business efficiency at the mass-market level. The focus at this mass-market level ensures that the market is delivering optimal products to consumers; it is claimed that knowing assent by individual consumers, or even a substantial portion of them, is unnecessary to this kind of efficiency. Because it is doubtful that the “mass-market” version of “efficiency” behind enforcement in many contemporary mass-market contracts cases *really* leads to general economic gains, it is likely that the contemporary system is delivering neither freedom nor “efficiency.”

This Article will take a broad (and inevitably incomplete) look at the state of contract law that governs contemporary mass-market transactions founded on business-drafted forms, show how a version of “efficiency” has replaced individual choice as a justification for enforcement in consumer mass-market contracts, and examine contemporary challenges to these notions of mass-market efficiency. The Article will then survey solutions others have offered that attempt to remedy the absence of individual assent in mass-market transactions. The analysis will conclude by arguing that our legal vocabulary and categorization may have contributed to the problems we now face because it forces form contracts into a system of liability that is otherwise characterized by “voluntary transactions.” It will then argue that a change in vocabulary and categorization might be an ingredient in the long-term solutions necessary to correct a loaded, nonconsensual system.

## I. “FREEDOM” TO, AND FROM, “CONTRACT”

There is no doubt that today’s consumers have far more choices of consumer products than they did last year or, probably, any time in history. Credit is widely available, so it is no longer necessary for many to postpone consumer gratification. Another characteristic of modern

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4. Professor Knapp provides good summaries of what he calls “modern contract law” in Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 *LOY. L.A. L. REV.* 95, 100–01 (2006) [hereinafter Knapp, *Opting Out*]; Charles L. Knapp, *An Offer You Can’t Revoke*, 2004 *WIS. L. REV.* 309, 316–19 (2004) [hereinafter Knapp, *Can’t Revoke*].

5. See Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 *VAND. L. REV.* 1051, 1056–58 (1966), quoted in STEWART MACAULAY ET AL., 2 *CONTRACTS: LAW IN ACTION* 13–14 (3d ed. 2011).

consumerism is that it is scarcely possible to purchase anything without an attempt by the vendor to bind the consumer to explicit contract terms. These terms can come tucked in the box under the mail order computer,<sup>6</sup> in the automobile's glove box, on a warranty card, somewhere on a website, on a screen that blocks access to a recently-purchased product unless the viewer clicks the "I accept" button, or perhaps, in the preparation area for undergoing a serious operation.<sup>7</sup> The idea that a business can alter the rights of persons it deals with simply by drafting a form seems to have emboldened businesses to push boundaries. At least one business apparently believes that posting an arbitration sign at its entrance can force all who enter into giving up their constitutional right to judicial redress.<sup>8</sup>

The accompanying terms often run many pages. They are usually<sup>9</sup> drafted by vendor lawyers whose primary concern is protecting their clients. This impulse manifests itself in dense, legalistic language and often—if not always—in a reduction of the background rights that a consumer entering such a transaction ordinarily would have.<sup>10</sup> To the extent that these documents are recognized as setting out the respective rights of the parties to the transaction, an expansion of product choices leads to a reduction of public rights that, in the past, would have been unaffected by these types of purchases. These are rights such as litigating in a convenient forum,<sup>11</sup> litigating before a court or jury,<sup>12</sup> participating in a class action,<sup>13</sup> or retaining one's intellectual property rights to exploit

6. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

7. See Elisabeth Rosenthal, *After Surgery, Surprise \$117,000 Medical Bill from Doctor He Didn't Know*, N.Y. TIMES (Sept. 20, 2014), <http://www.nytimes.com/2014/09/21/us/drive-by-doctoring-surprise-medical-bills.html>.

8. The sign reads:

#### ARBITRATION NOTICE

By entering these premises, you hereby agree to resolve any and all disputes or claims of any kind whatsoever, which arise from the products, services or premises, by way of binding arbitration, not litigation. **No suit or action may be filed in any state or federal court.** Any arbitration shall be governed by the FEDERAL ARBITRATION ACT, and administered by the American Mediation Association.

#### ARBITRATION NOTICE

See *The Gates of Hellfish Mandatory Arbitration?*, CONTRACTSPROF BLOG (Jan. 11, 2011), [http://lawprofessors.typepad.com/contractsprof\\_blog/2011/01/the-gates-of-hellfish-mandatory-arbitration.html](http://lawprofessors.typepad.com/contractsprof_blog/2011/01/the-gates-of-hellfish-mandatory-arbitration.html).

Alternatively, this business might think that such a sign "can't hurt" and will at least ward off some claims through simple assertion "you agreed to it."

9. Non-lawyers may have drafted some of the more extreme versions. For example, consider the sign referred to in the text, advising those who walk by it that they have agreed to arbitration of their claims. *Id.*

10. Refusing to dignify the forms with the name "contracts," Professor Margaret Radin refers to them as "boilerplate rights deletion schemes." MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 16 (2013).

11. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585–86 (1991).

12. See, e.g., *Kilgore v. KeyBank Nat'l Ass'n*, 673 F.3d 947, 952–54 (9th Cir. 2012).

13. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744–48 (2011).

one's own creations.<sup>14</sup> There may be a de facto tradeoff of personal autonomy for increased access to consumer products, but such a tradeoff of freedom for greater product choice is seldom recognized or, when it is, justified as if inevitable.

Two developments from the “modern” era have led to less personal autonomy for consumers, even as their product choices have multiplied. First, it is easier to enter into contracts and harder to get out of them.<sup>15</sup> This is a legacy of developments that characterize “modern” contract law. Second, today's consumers find themselves parties to many “relationships,” governed by terms drafted by and for businesses.

To begin with, classical—and modern—contract law found an obligation if the obligor signaled (“manifested” is the term usually used) “assent” to the other side.<sup>16</sup> The other side either had to believe or have reason to believe that the obligor was in fact agreeing to whatever terms were on the table. If the potential obligee knew or had reason to know the obligor was making a mistake, the arrangement was subject to the defense of mistake.<sup>17</sup> *A fortiori*, if the obligor had *planted* the misconception, again the contract could be avoided.<sup>18</sup> “Modern” contract law, exemplified by Uniform Commercial Code (“U.C.C.”) Article 2 and the Restatement (Second) of Contracts, took true, actual (that is, subjective) assent more seriously than classical law by focusing on the bargain of the parties *in fact* and by being very liberal in allowing evidence that might show a bargain in fact that differed from the apparent meaning of formal documents.<sup>19</sup>

But because the “modern” contract theorists<sup>20</sup> believed that classical contract law was too riddled with technical defenses to contract formation or modification, giving those obligors too many ways out of legitimate bargains, they worked to relax the formation doctrines—principally

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14. Several popular social media websites, while maintaining that you “own” your own copyright, take an irrevocable license to use (and therefore exploit) the content. See *Who Owns Photos and Videos Posted on Facebook, Instagram or Twitter?*, L. OFF. CRAIG DELSACK, LLC, <http://www.nycounsel.com/business-blogs-websites/who-owns-photos-and-videos-posted-on-facebook-or-twitter> (last updated Dec. 21, 2012).

15. Professor Danielle Kie Hart has focused on this aspect of “modern” contract law. See Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 *LOY. U. CHI. L.J.* 175, 202, 210–11 (2010). She attributes at least some of her insight to Professor Knapp.

16. The classic casebook treatment is *Lucy v. Zehmer*, 196 Va. 493 (1954). This is different from Continental law, which, typically, looks for subjective intent to contract and considers objective manifestations to be evidence of that intent rather than being coextensive with it.

17. See RESTATEMENT (SECOND) OF CONTRACTS § 153(b) (1981).

18. Mistake, misrepresentation, or fraud will offer defenses in such a case.

19. Evidence of trade usage, course of dealing, and course of performance can alter what the writing appears to provide. Probably the most extreme case is *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 779 (9th Cir. 1981) (finding “price protection” in fixed-price contract through local trade usage).

20. In his discussions of “modern contract law,” Professor Knapp offers summaries of these developments. See, e.g., Knapp, *Opting Out*, *supra* note 4; Knapp, *Can't Revoke*, *supra* note 4.

within Article 2 of the U.C.C. and later in the Restatement (Second) of Contracts)—in effect, making contracts easier to form and far more resilient to technical formation or lack-of-consideration defenses. At the same time, they vastly expanded the interpretive evidence that would be relevant in determining what the contract, as formed, meant.<sup>21</sup>

As Professor Danielle Kie Hart has shown, contract formation can be where much of the action is.<sup>22</sup> Classical courts could solve an overreaching or unfairness problem with a contract by declaring a lack of consideration<sup>23</sup> or a mismatched offer and acceptance.<sup>24</sup> As the Legal Realists pointed out,<sup>25</sup> the technical details of offer and acceptance and the consideration doctrine were often a smokescreen for substantive decisions that had much more to do with fairness than with any articulable policy. Courts should disclose the real basis of their decisions, thought the Realists; if fairness was at the core of a decision, the court should reveal that and explain why notions of fairness were violated.<sup>26</sup>

Modern contract law has left us with easy formation.<sup>27</sup> Indeed, the objective theory has been, essentially, perverted by holding that clicking an “agree” button, behind which are many thousands of words of boilerplate, is a “manifestation of assent” that gives the vendor “reason to believe” that the vendee has assented. And in the Legal Realist tradition, modern contract law has asked those complaining of defects in the bargaining process, or in the balance of the resulting bargain, to challenge the contract with defenses that directly question the bargaining process (such as duress, misrepresentation, undue influence, and unconscionability) or the fairness of the resulting bargain (such as unconscionability). Contracts are likely more stable today than they were under classical contract law—it is far harder to escape an obligation using the technical doctrines governing offer, acceptance, and consideration.

But in the process of patching doctrinal escape hatches, “modern” contract law has substituted intensely fact-based defenses for the “legal” defenses of the classic era. In so doing, it has made challenges to bad bargains far more expensive for businesses and consumers alike. But unlike businesses, consumers lack the resources to effectively pursue individual, fact-based litigation.<sup>28</sup> The Supreme Court’s recent invitation to drafters

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21. *Cf.* Knapp, *Opting Out*, *supra* note 4.

22. *See generally* Hart, *supra* note 15; Daniel Kie Hart, *In and Out—Contract Doctrines in Action*, 66 HASTINGS L.J. (forthcoming Aug. 2015).

23. *E.g.*, *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902).

24. *See* E. ALLAN FARNSWORTH, *CONTRACTS* § 3.13, at 138–40 (1982); JOHN CALAMARI & JOSEPH PERILLO, *THE LAW OF CONTRACTS* § 2.21, at 101–02 (3d ed. 1987).

25. *E.g.*, K. N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

26. The terse, enduring summary was, “Covert tools are never reliable tools.” *Id.* at 703.

27. Much of this discussion has been suggested in conversations with Professor Danielle Kie Hart.

28. *Cf.* Leff, *supra* note 2, at 354–56.

to eliminate public class action rights of consumers through arbitration clauses has made contract relief all but illusory except in cases large enough to support the substantial costs of individual arbitration.<sup>29</sup> Moreover, our easy formation doctrines have essentially altered the normal burdens of proof. Not unlike prejudgment garnishment, where a person's wages were seized (often for leverage) pending the litigation,<sup>30</sup> or confessions of judgment, which placed on unknowing consumers the burdens of escaping an already-entered judgment,<sup>31</sup> a consumer who likely clicked to get on with her day is now on the defensive. The law will now require that consumer to bear the burdens of escaping from commitments she was unaware of, rather than placing the burden on the plaintiff business to establish that the commitments existed in the first place.<sup>32</sup>

Second, today's consumers find themselves parties to many "relationships" governed by terms drafted by and for businesses. The development of the teachings of "modern" contract law has also facilitated a distinct movement towards "relational" contracts, at least in the consumer arena, that contemplate a continuing relationship (such as an intellectual property license, car lease, bank or credit card accounts, phone or cable service, or social media site access) rather than simpler transactions of an earlier time. The value of a car purchase depends primarily on the physical attributes of the car; the value of a car *lease*, by contrast, depends on

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29. The American Arbitration Association's Commercial Fee Schedule shows the lowest fees for its commercial arbitration services to be a total of \$1550. AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 2 (2013), <https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2025290>. Consumer arbitration provisions vary substantially in the forms delivered by vendors, with some requiring the vendor to pay the fees. But even if the vendor absorbed all the arbitration fees for both parties, suffice it to say that avoiding "contractual" liability where "assent" is established with a mouse click will not be easy without a lawyer, may require time off from work, and may distract the consumer from more "profitable" ways to spend time. Many consumers will not find the game to be worth playing.

In 2013, several large California technology companies settled a class action asserting that they had conspired not to hire one another's employees, thereby keeping wages from becoming competitive. David Streitfeld, *Bigger Settlement Said to be Reached in Silicon Valley*, N.Y. TIMES (Jan. 14, 2015), [http://www.nytimes.com/2015/01/15/technology/silicon-valley-antitrust-case-settlement-poaching-engineers.html?\\_r=0](http://www.nytimes.com/2015/01/15/technology/silicon-valley-antitrust-case-settlement-poaching-engineers.html?_r=0). Regardless of whether the employers change their anticompetitive behavior, if the lawyers for these companies follow the lead of other business lawyers, their response will likely be the addition of a forced arbitration provision and class action ban to cope with a more competitive labor market. An individual employee in an individual arbitration would find it virtually impossible to find a lawyer who could prosecute an antitrust violation and then prove her elusive individual damages as a result of the conspiracy. The payoff simply would not justify the substantial costs a consumer would have to sustain in order to obtain it.

30. *Cf. Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) (holding that prejudgment garnishment without prior hearing violates due process).

31. *Cf. Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970) (holding local procedure for entering judgments by confession against low-income consumers violates due process).

32. *Cf. Hart, supra* note 15, at 210–11.



what the documentation says in far more fundamental ways.<sup>33</sup> In a real sense, terms are an important economic part of the exchange<sup>34</sup>—as terms have proliferated (particularly in the online world), they have taken on a far larger part of the value conveyed, or subtracted, by the vendor.

These developments—a shared sense that consumers are engaging in some form of contractual undertaking when they deal with vendors, the implausible idea that their engagements are (or even should be) fully informed, and courts' natural reluctance to intervene<sup>35</sup>—have shifted the focus in postmodern contract law (at least that dealing with consumer forms)<sup>36</sup> from the quality of individual assent to notions of more generalized efficiency. If the utilitarian effect of blanket enforcement is to produce efficient markets, consumers as a whole are thought to benefit, even if the odd consumer, who claimed she did not or could not have agreed, fell by the wayside.<sup>37</sup> Freedom to—or from—contract has been displaced in postmodern consumer contract law by a focus on supposed economic efficiency. Postmodern contract law seems to have embraced this substitute of efficiency for plausible customer assent and has raised concerns from those who, like Professor Knapp,<sup>38</sup> are worried about the degradation of individual freedom.

Even if one were convinced that it was sound policy to support liability with this general form of efficiency<sup>39</sup> (instead of the kind of

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33. A car lease can put responsibility for maintenance, insurance, or other expenses associated with operating an automobile on either vendor or vendee. Such aspects can have a tremendous effect on the economic value to the consumer of obtaining use of the car.

34. RADIN, *supra* note 10, at 99–101.

35. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981) (offering courts a way to delete undesirable terms at the assent stage). See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) (explaining that the Restatement (Second) of Contracts section 211(3) has been spurned by most courts outside the insurance area). See James J. White, *Form Contracts under Revised Article 2*, 75 WASH U. L.Q. 315, 323–35 (1997).

36. Businesses, by contrast, do not read one another's forms. Apparently, no one thinks they should. Their (bad?) habits are accommodated by a particular (and litigation-provoking) provision of the U.C.C. addressing the “battle of the forms.” U.C.C. § 2-207 (2010).

37. Professor Radin suggests that the “taking” of a consumer's rights via a mass-market contract is analogous to eminent domain, with the “fair compensation” coming in the form of lower prices. See RADIN, *supra* note 10, at 74–78. Thinking about the problem in these terms begs the question of justification for enforcement of consumer forms in a clearer way than when it is garbled with notions of “assent” or voluntary agreement.

38. As Professor Knapp has written:

To have no ability to bargain effectively over the transactions you enter into, and then to be bound not only to whatever terms the other party may insist on at the outset, but also to whatever terms it may later choose to impose, is simply a denial of your basic humanity—of your citizenship, if you will.

Knapp, *Opting Out*, *supra* note 4, at 125.

39. There are many ways to look for efficiency in mass-market contracts. The dominant version, as discussed, *infra* beginning at note 43, envisions some subset of customers reading their contracts and rejecting unsavory terms, thereby driving the associated products from the market. A different form,

efficiency that comes from individual consumer choice), contemporary research suggests that “efficiency” as a rationale for enforcing the content of forms is starting to unravel.

In an era where long, complex forms purport to govern many relationships with consumers, constructing the argument that the resulting system is “efficient” is a Herculean task. It requires that individuals subjected to form-driven relationships make informed choices and thereby drive the market to deliver “better” products and services, while pushing those with “worse” products and services out of the market. However, contemporary “relationships” with vendors have become increasingly complex. Unlike business purchasers, who proffer their own forms, consumers receive inevitably one-sided vendor forms.<sup>40</sup> Forms, of course, save the transaction costs of one-on-one contracting. Because the contract terms are considered part of the value of the underlying goods or services,<sup>41</sup> rational and efficient customer choices require customers to understand the true value of what is being delivered. Yet nearly everyone subjected to these forms will admit they do not read them;<sup>42</sup> a critical ingredient in product “choice” (and therefore to this form of “efficiency”) thus seems to be missing.

The argument that saved the day (at least temporarily) came from Professors Alan Schwartz and Louis Wilde in the late 1970s.<sup>43</sup> They claimed that a focus on whether individuals were informed was the wrong one; “the appropriate normative inquiry is whether competition among firms for particular groups of searchers is, in any given market, sufficient to generate optimal prices and terms for all consumers.”<sup>44</sup> The influential article assumed that comparison shoppers existed and would serve as

also discussed, *infra* beginning at note 56, focuses on the efficiency implications of consumers taking the time to actually read their forms and the lost productivity that would result from them doing so.

40. Daniel Keating’s casebook on sales gives an example of the same vendor supplying two different one-sided forms, depending on whether that business is the vendor or the vendee. DANIEL KEATING, *SALES: A SYSTEMS APPROACH* 53 (5th ed. 2011).

41. RADIN, *supra* note 10, at 99–101. As an obvious example, a product with a warranty is worth more than one without one.

42. Judge Richard Posner admitted he had not read the boilerplate in his own home equity loan. MACAULAY ET AL., *supra* note 5, at 18.

In rejecting a defendant’s criminal liability tied to terms of service, Judge Alex Kozinski said the obvious:

Whenever we access a web page, commence a download, post a message on somebody’s Facebook wall, shop on Amazon, bid on eBay, publish a blog, rate a movie on IMDb, read www.NYT.com, watch YouTube and do the thousands of other things we routinely do online, we are using one computer to send commands to other computers at remote locations. Our access to those remote computers is governed by a series of private agreements and policies that most people are only dimly aware of and virtually no one reads or understands.

United States v. Nosal, 676 F.3d 854, 861 (9th Cir. 2012) (citing terms of service of many Internet sites).

43. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979).

44. *Id.*

proxies for the rest of the contracting populations. The assumed existence of these subgroups meant that *someone would* actually read, understand, and assimilate the forms and would select the “best” products (the goods or services *and* accompanying terms) accordingly. A necessary assumption behind this idea was that this group was large enough to worry vendors about lost sales if this group defected. So, to please this subgroup, the vendors would respond with terms that were acceptable (or good).

But it should be obvious that vendors are *not* naturally motivated to respond even to the supposed agents by changing terms that benefit vendors. Their economic motivation, at least, is in the opposite direction. Profit-driven vendors will want to reduce their exposure to claims and, to the extent the liability-reducing provisions will impede sales, will want to reduce the capacity of these provisions to impede sales.<sup>45</sup> There are many tried-and-true ways to do this: small print, impenetrable language, legalese, or nesting the bad terms somewhere within an impenetrable larger document.

There is nothing new about this natural economic inclination, and courts and legislatures have cobbled together “disclosure” as the solution to counteract these tactics. The idea is that if vendors are required to disclose the negative terms, people (or at least the assumed agents) will see them and make appropriate market decisions with fuller knowledge. This disclosure idea makes an early appearance in the U.C.C., requiring disclaimers to be “conspicuous.”<sup>46</sup> In the good ol’ days of the “modern” contract world, in which mass-market contracts were comparatively simple and discrete, one might expect the now conspicuous disclaimers to affect some purchase decisions and thereby (perhaps) drive the market towards efficiency. But while modern courts and legislatures have embraced disclosure as the solution to enforceability of forms,<sup>47</sup> the solution has become increasingly implausible.

There is now substantial reason to believe that in our more complex world dominated by relationships and very long paperless terms, disclosure does little to ensure that (even some) customers are making informed choices. Indeed, as developed below, there is something like a contemporary assault on the assumed connection between disclosure and informed customer decisionmaking. There are many bases for this attack, each of which is difficult to refute.

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45. That is, they can have their terms and not have them undercut sales if they bury them more deeply within the document or draft them in a way that will ensure they will not be understood.

46. U.C.C. § 2-316(2) (2010). The statute also requires that the word “merchantability” be mentioned. But “merchantability” is itself an obscure, legalistic term whose meaning will elude many consumers. The U.C.C.’s attempted revision of section 2-316, which would have required disclaimers to be in plainer language than “merchantability” in the current statute, may have had some influence on the opposition to, and ultimate demise of, Revised Article 2.

47. The American Law Institute’s Principles of the Law of Software Contracts is a contemporary example. See AM. LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010).

## A. COMPARISON SHOPPERS

The simplest assault is on the assumption that some people act as proxies for the rest of us by dutifully reading the terms and rejecting the relationships founded on bad ones.<sup>48</sup> While there are occasional examples of consumers reacting to bad terms,<sup>49</sup> common sense itself calls this idea into question as a general proposition. An Internet search for Amazon's Terms of Service will turn up many different versions, each governing a different part of the services delivered, and some with cross-references to other Terms of Service located elsewhere. Any lawyer would find the job of assembling and then deciphering the governing terms a difficult and time-consuming job. Prudential's auto loan website Terms of Use, governing what happens when a potential customer fills out a credit application, exceeds 5000 words.<sup>50</sup> Any user knows at the outset that the terms are not negotiable, and many know that they will find the same or similar terms elsewhere.<sup>51</sup> This will be particularly true of disclaimers of liability, limits on consequential or other damages, choice of forum provisions, class action waivers enveloped in arbitration provisions, or on various versions of the customer "licensing" the vendor to use, sell, or own the customer's otherwise copyrighted data. If one had the time or inclination to "comparison shop" for terms, one would find either the same terms or variants across the spectrum. If the terms were the same, then one has to withdraw from that market or accept them. If they are similar, one needs to be a lawyer to determine what the differences in language, presentation, and style may actually mean so as to choose accordingly.

Contemporary empirical research reinforces common sense. In a massive study of online behavior, researchers found that far less than one percent of online consumers actually *looked at* the terms of End User License Agreements ("EULAs"), and when they did, they gave them a

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48. See Schwartz & Wilde, *supra* note 43, at 638.

49. One recent example involves a hotel whose terms included purported agreement to a \$500 fine for each negative review posted on the Internet. See Harrison Weber, *New York Hotel Fines Guests \$500 for Bad Reviews on Yelp*, VENTUREBEAT (Aug. 4, 2014, 5:50 AM), <http://venturebeat.com/2014/08/04/new-york-hotel-fines-guests-500-for-bad-reviews-on-yelp>. "Market discipline" may have taken the form of many very negative Yelp reviews once this policy became public. *Id.* The hotel has since changed its terms of service to exclude the \$500 fine. *Id.* But, even in this case, it is unlikely that the victims reacted to the terms of service *before* they signed up; likely they examined the terms once the hotel imposed the fine. Easy contract formation meant that the monkey was on the victims' back—they had the burden of overcoming formed-contract inertia by interposing a defense.

50. *General Terms and Responsibilities (Terms of Usage)*, PRUDENTIAL AUTO LOAN, <http://prudentialautoloan.com/general-terms-and-responsibilities-terms-of-usage> (last visited May 10, 2015).

51. Public Citizen maintains a "rogues gallery" of companies that include arbitration provisions in their terms of service. *Forced Arbitration Rogues Gallery*, PUBLIC CITIZEN, <http://www.citizen.org/forced-arbitration-rogues-gallery> (last visited May 10, 2015). "Rogues" include the usual suspects (such as Internet service providers and banks), but also companies such as In-and-Out Burger, several nursing homes, and many home builders.

cursory look that was likely insufficient to absorb their legal significance.<sup>52</sup> The authors of this study contended that the assumptions behind the “agency” theory that has sustained the efficiency approach for nearly thirty years are unfounded.<sup>53</sup> One of the researchers challenged the disclosure regime put into place in the American Law Institute’s *Principles of Software Contracts*:<sup>54</sup> If virtually no one was reading the terms, then asking vendors to disclose more in order to obtain a safe harbor of enforceability is a senseless sunk cost. Vendors might well comply to enter the safe harbor, but consumer decisions—the reason for requiring disclosure in the first place—would be no more robust with or without disclosures.

Some courts and legislatures have based disclosure on the related idea that customers *ought* to read their contracts, and thus, cases often discuss the “duty to read.”<sup>55</sup> But another recent study calculated that if consumers took the time simply to read online privacy policies, the time to do that would cost the economy \$781 billion in lost productivity.<sup>56</sup> Conceivably, the market might become more efficient were customers to read (and understand) their contracts, but at what considerable expense in cumulative lost opportunities and productivity? Consumers know that it makes little sense to dedicate valuable time to parsing a complex legal form that they are unlikely to understand and powerless to change, and are being rational (and efficient) by *not* reading their contracts. They know that their time can more productively be spent on practically anything else.

## B. CHANGING THE TERMS POST FORMATION

A second assault comes in connection with the law’s recognition of “rolling contracts,” that is, contracts that contain the vendee’s purported advance agreement to any new terms proffered by the vendor.<sup>57</sup> Changes to the relationship created by the vendor are inevitable, but the corresponding burden on customers to detect change and respond to it is

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52. Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 41 J. LEGAL STUD. 1, 2–3 (2014).

53. Many others have also made the point. See, e.g., David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 609 (2010) (arguing that where vendors can change terms at will, it will make no sense for customers to read the terms even the first time).

54. Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 183–84 (2011).

55. Cf. Omri Ben Shahir & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 746 (2011) (“The ideological thrust of mandated disclosure—its origins in both market and autonomy theory—is to place choice, and thus risk and responsibility, onto the ill-informed and inexperienced person facing a novel and complex decision.”).

56. Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & POL’Y FOR INFO. SOC’Y 543, 565 (2009).

57. We can lump into this category those terms that must be “agreed to” each time a website is accessed or an update installed. Vendors leave their customers to the job of detecting terms that have changed and then evaluating the significance of the change accordingly.

nearly insurmountable. Even if one were to read and attempt to understand Apple's iTunes Terms of Service when first installing the software, can anyone reasonably expect a careful read for changes on the third or sixteenth update of the software? More importantly, if the terms can be changed at the vendor's will (or at least between updates), what sense does it make to read them even the first time?<sup>58</sup>

### C. CONSUMER IRRATIONALITY

The third assault may be the most serious, and it goes to the heart of both the disclosure regime and even the credibility and viability of the economic analysis of law itself. Social scientists and, more recently, legal researchers have challenged the entire notion that individuals can make rational decisions about the terms that accompany what they buy. Researchers have been making these points since the late 1970s<sup>59</sup> and the points have been gathering steam since. These arguments are reasonably familiar by now,<sup>60</sup> and include "bounded rationality" (that is, self-imposed limits to the time and effort to devote to a decision), unrealistic optimism, and decisionmaking biases.<sup>61</sup> These findings seem unlikely to shake the confidence of those who have made the economic analysis of legal issues the core of their livelihood.<sup>62</sup> Moreover, because legal analysis based on imagined incentives is a staple of law review—and indeed, instrumental—analysis, it is hard to imagine how legal analysis could proceed were these points more widely known and understood. Perhaps little would change: one leading researcher in the field believes that the current disclosure regime is inadequate but still advocates a form of disclosure that "should be tailored to the specific product and to the specific market conditions."<sup>63</sup> Given the wide range of consumer products and congressional gridlock, it is hard to know who will do the tailoring or whether it could ever be kept up-to-date; hit-or-miss common law courts certainly cannot do it.

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58. See Horton, *supra* note 53, at 609.

59. The pioneering work is from AMOS TVERSKY & DANIEL KAHNEMAN, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

60. See generally Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995).

61. Professor Melvin Eisenberg makes a succinct summary of some of these problems. *Id.* at 240–41.

62. Compare Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003), with Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803 (2008).

63. Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 800–02 (2008).

## II. SOLUTIONS

Solutions that both enhance personal autonomy *and* produce true efficiency in the distribution of products and services (including accompanying terms) are difficult to come by. Any solution that would do both requires a different response than has been forthcoming from most common law courts, legislative lawmakers, or administrative bodies at the state or federal levels.

### A. DISCLOSURE

The dominant disclosure regime is understandable as a relatively easy fix; disclosure is value free and preserves the fig leaf of personal autonomy consistent with deeply held American ideology.<sup>64</sup> Dominant case law in the Internet arena focuses on whether the term at issue was adequately disclosed. These cases tend to reject assent when there is no “notice,” code for a court’s conclusion that the term is too hard to find<sup>65</sup> or situations where the vendor has not set up its website in a way that blocks customer action unless she clicks an “accept” or similar button. If consumers are “clicking to get on with their day” rather than clicking to convey assent to all the legal terms that are revealed through mandatory disclosure, then disclosure is “make work” and the cases where consumers prevail are those in which the vendor’s website happened not to be set up to comply with evolving case law. Cases where consumers happen to prevail thus stem from mistakes in how the vendor presented the information, rather than from an actual failure to communicate that information (since virtually no one is reading). As a result, those who offer advice to drafters may recommend making the links or buttons more prominent to comply with evolving case law. But if few are reading the forms, this potentially costly advice will do little to either improve customer assent or increase “market discipline” on those creating the forms.

Perhaps disclosure improves things at the margin. But given modern research on consumer behavior, which vendors have at least as much access to as consumer advocates, the connection between *actual* assent and the “manifestation of assent” that comes with a mouse click is thin, if existent at all. It is folly for a vendor to believe that consumers are signaling *actual* assent (or committing some form of fraud)<sup>66</sup> by a mouse click that

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64. Even those in the center of the developing behavioral research, who know that consumers do not read form contracts and, even if they do, are not behaving rationally when they do, such as Oren Bar-Gill, include some form of mandated disclosure in their proposed solutions. *See id.*

65. *E.g.*, *Van Tassel v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 793 (N.D. Ill. 2011); *Cevent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 936–38 (E.D. Va. 2010).

66. The “I agree” button often is located next to the consumer’s purported assertion that the consumer has *actually* read the terms. I have found no fraud case in this context—that is, a case where the vendor claimed it was deceived by the consumer’s clicking without reading. Perhaps this is to be expected: it

they must “click to get on with their day.”<sup>67</sup> As previously explained, disclosure is not designed to convey information to most, or even many consumers—it is not about consumer autonomy at all. Rather, disclosure is as a way to enlist the help of some small number of consumer “agents” to police the market for everyone else.

Holding someone to a contract because it is supposedly efficient in the postmodern sense makes consumers market-enhancing tools, not individuals who freely choose to engage. This, of course, may offend the ideology of those who believe in personal autonomy.<sup>68</sup> But the offense is even greater if their function as tools for business efficiency is not even achieving that result. As modern empirical work suggests, not enough consumers participate as “comparison shoppers,” or if they do, they make irrational choices.

If “comparison shoppers” are to read terms and apply market pressure on vendors to deliver better terms, we are collectively better off delegating that job to professional entities, such as Consumers Union or Public Citizen, which have the capacity to publicize the bad terms discovered by their paid and trained employees. Thus far, third-party agents have not succeeded in attracting enough consumer attention to provide very much “market discipline.”<sup>69</sup>

## B. UNCONSCIONABILITY

Even if a consumer with a small claim could afford the lawyer needed to sustain the burden of establishing the factually intensive litigation defense of unconscionability, the defense typically requires both procedural unconscionability (trickery, undue pressure, and/or lack of choice) and substantive unconscionability. In cases where the court concludes that procedural unconscionability is present but substantive unconscionability is missing, consumers are bound by the contract, despite the court's essentially finding that the consumer did not in fact agree, in any meaningful sense, to the term she claims is offensive.<sup>70</sup> The vendor “proves” its case by showing a customer mouse click or comparable customer action as a “manifestation of assent”; the customer then has the burden

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would be difficult, if not impossible, for a vendor to satisfy the “reasonable reliance” component of misrepresentation in order to assert a kind of misrepresentation claim. The “I have read and understood” legend can more easily be understood as a clever ploy designed to later fluster the consumer in negotiations or at trial: “You mean you lied when you clicked that button without reading the terms?”

67. Indeed, online vendors undoubtedly collect information on their customers' clicking habits—it is valuable to them and, perhaps, marketable to others. Vendors take advantage of their knowledge of consumer behavior (with its cognitive and other biases) in their marketing. See Jon Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: the Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

68. Knapp, *Opting Out*, *supra* note 4, at 125.

69. See Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618, 1622 (2010).

70. *E.g.*, *Leos v. Darden Restaurants, Inc.*, 158 Cal. Rptr. 3d 384, 387 (Dist. Ct. App. 2013).



to deploy an intensely fact-based affirmative defense to establish the procedural ingredient, and then convince the decisionmaker that she should directly regulate the resulting exchange because it is substantively unfair. The odds that such a defense is affordable in an individual setting are extremely low. In a consumer arbitration, where cost and speed of decision are touted as advantages, the odds there will be the time, or patience, for fully establishing the “commercial setting, purpose and effect”<sup>71</sup> of the contract or clause are remote.

### C. LIMITED “BLANKET ASSENT” AND ITS PROGENY

Karl Llewellyn’s “blanket assent” idea, where the basic terms (price, quantity, color, delivery date, and so on) and other non-offensive terms constitute the contract,<sup>72</sup> found its way into Restatement (Second) section 211(3) and, in a different way, into U.C.C. section 2-207’s “battle of the forms” provision. Neither has been widely embraced by the courts in the consumer form setting.<sup>73</sup> This solution requires courts to independently evaluate challenged provisions and render a judgment on their likely acceptability, in general, to those who receive them. In our postmodern era, characterized by distrust of “governmental interference,” and challenges to judicial competence to make such decisions,<sup>74</sup> judicial reluctance to participate in this form of regulation is understandable, at both the individual judge and system level.

But if implemented at the formation stage, both could be seen as solutions that actually tend to enhance personal autonomy. On this view, a consumer would be bound only to what she reasonably manifested assent to; the rest of the boilerplate would be up for grabs. Such a view would also place the burden of showing agreement on the vendor attempting to enforce the term rather than on the consumer attempting to escape something her lawyer found in the boilerplate.

Restatement section 211(3) can take us only so far, however. As the provision is structured, consumers would be bound to their “reasonable expectations,” not to what that individual actually or reasonably could be said to have agreed to. This approach implicitly recognizes the efficiencies that come with vendors using standardized forms, and its point is to treat all recipients of the form alike, a requirement that is somewhat at odds with a goal of *personal* autonomy. As Professor David Slawson has pointed out, this permits a court to use third-party evidence of what is “reasonable”

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71. U.C.C. § 2-302(2) (2010).

72. KARL LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 367–70 (1960).

73. See White, *supra* note 35; Knapp, *Opting Out*, *supra* note 4, at 103; compare Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150–51 (7th Cir. 1997) (holding U.C.C. section 2-207 does not apply), with Kloeck v. Gateway, 104 F. Supp. 2d 1332, 1338–42 (D. Kan. 2000) (holding U.C.C. section 2-207 does apply).

74. See Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 Nw. U. L. REV. 847, 859–62 (2000).

in coming to a decision, a standard that does not necessarily coincide with actual consumer agreement that might be proved through circumstantial evidence in an individual case.<sup>75</sup>

#### D. U.C.C. SECTION 2-207

In cases regarding sales of goods, one could achieve a similar outcome through a correct application of U.C.C. section 2-207.<sup>76</sup> The contract forms when the actual agreement was struck—when the consumer ordered the product and committed to pay for it.<sup>77</sup> The vendor’s form would be a “written confirmation” whose terms would then be tested through U.C.C. section 2-207’s rubric. Since additional terms *never* become part of a consumer contract unless expressly agreed to,<sup>78</sup> in a one-form consumer contract, most of the terms would not become part of the contract unless, of course, the vendor could show actual assent. The result would not be a “term-free” contract<sup>79</sup> but, rather, a contract that includes agreed-to terms and the U.C.C.’s gap filler provisions.

The U.C.C. section 2-207 solution would be difficult to implement in many online settings where there is *only* a click to “manifest assent” to whatever might lie behind the accept button. Section 2-207 requires that a contract be formed *before* assent is “manifested” to the form.

#### E. OTHER REGULATORY RESPONSES

Among the many reforms Professor Nancy Kim has suggested in her exhaustive study of “wrap contracts”<sup>80</sup> is an innovative approach that could advance personal autonomy in the online setting. She has suggested that vendors obtain affirmative agreement to one-sided terms by requiring a mouse click for each of them. As the number of mouse clicks increases, customers would get a sense that the “cost” of obtaining access was higher in the many-click situations than it was in settings that required fewer clicks.<sup>81</sup> This provocative idea has promise but, of course, implementing it would seem to require a regulatory response from either an administrative agency or legislature.

Professor Margaret Radin has similarly advanced a comprehensive set of suggestions for change, including a prohibition on particular terms—black lists, gray lists, and white lists of terms that would require differential scrutiny by courts, shifting the burden of proof on various

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75. W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 856.

76. *E.g.*, *Klocek*, 104 F. Supp. 2d at 1338–42.

77. U.C.C. § 2-206(1) (2010).

78. U.C.C. § 2-207.

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

80. *See generally* NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013).

81. *Id.* at 192–200.

terms, as well as comprehensive regulation in the spirit of the E.U.'s regulation of consumer terms.<sup>82</sup>

#### F. SOME REALISM ABOUT GOVERNMENTAL SOLUTIONS

Common law solutions require common law courts to change their approaches to the problem of consumer forms. “Manifestation of assent” is all that is required, and courts consistently find such manifestation in customer responses (such as mouse clicks), even though empirical studies have found those responses to be uninformed. The needed kind of judicial break from this dominant case law seems very unlikely in any given case, at least in the short term. The wholesale change of direction in the case law that is necessary for common law solutions to become effective would take many years under the best of circumstances.<sup>83</sup>

Moreover, perhaps emboldened by judicial acceptance of disclosure and the related (but empirically challenged) assumptions about disclosure's positive influence on the market, vendors may have come to rely on the strength of their forms and have factored into their prices the increasingly small risk that the courts will upset *their* assumptions about the basis on which they sell to consumers.<sup>84</sup> There is considerable inertia in the status quo and courts may perceive that voiding a common boilerplate provision might upset a vendor's business plan and concomitant investor reliance on that plan.<sup>85</sup> Class action bans may effectively be “too big to fail.”

Finally, common law development here, even if it were viable, is inhibited in this era of widespread individual arbitration.<sup>86</sup> Apart from challenges to arbitration clauses themselves, courts are unlikely to have opportunities to develop different case law. Consumer challenges are now much more likely to occur *within* an arbitration proceeding that will leave no precedent, and perhaps, no public record<sup>87</sup> of the disposition.

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82. RADIN, *supra* note 10, ch. 12.

83. Long ago, Professor Arthur Leff suggested that the doctrine of unconscionability, a U.C.C. innovation, might have the effect of blocking the kind of legislative reform needed to effectively address consumer forms. Leff, *supra* note 2, at 356–57.

84. One could imagine, for example, that with the Supreme Court's blessing of class action waivers, see *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2010) (finding state law holding class action waivers unconscionable invalid as burden on arbitration), the reduced risk to vendors of class action litigation is reflected either in their prices or in shareholder profits.

85. This same dynamic might reduce the likelihood that the Consumer Financial Protection Bureau will ban such terms in consumer financial products.

86. See generally, Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761 (2002).

87. Private arbitration, however, leaves the mass market vendor with a *private* record which, as a repeat player, will allow the vendor to better calibrate its exposure to liability in the next case and to further perfect its form so that the occasional loss to an individual consumer will not happen again. The private adjudication system that is arbitration creates additional information asymmetries that further burden the form recipients.

Taking the matter realistically, it is unlikely that we will see a judicial fix to the broad problem of adhesive consumer forms.

Solutions from other branches of government seem, if anything, even more difficult to come by. We live in a post-*Citizens United* world<sup>88</sup> where campaign contributions flow freely to politicians as political speech. That “speech” would be substantial if businesses—who likely view their power to wield consumer forms to get what they want as an integral part of their businesses—were threatened by any form of regulation. Whether at the state or federal level, one could expect businesses to view efforts to ban various terms as a near-existential threat to what they must now regard as their prerogatives. Even extremely well-organized consumer groups would likely be overwhelmingly out-gunned were they to mount even a modest effort to curb business abuses by limiting the effectiveness of consumer forms.

### III. CHANGING THE CONVERSATION

In 1919, Professor Edwin Patterson used the term “adhesion contract” in the context of the “delivery” of a life insurance policy.<sup>89</sup> This may have been an unfortunate turn of phrase because, at least since then, we have regarded consumer forms to be “contracts.” Professor Radin has, instead, denominated them “boilerplate rights deletion schemes,” and she and others have suggested that these not be regarded as “contracts” at all.<sup>90</sup>

Perhaps what follows is little more than a thought experiment, but what would the implications be if we took these suggestions seriously and proceeded to change the vocabulary that we, and the public, use to describe consumer forms? This seems, on the one hand, a very modest suggestion. No *legal* change whatsoever would be required.

On the other hand, changing popular perception of consumer forms as “contracts” would require something akin to effecting cultural change, something that people on Madison Avenue are far better equipped to produce than are law professors. “Contract” and the freedom we associate with that idea are deeply ingrained in our consumer culture. Dislodging that idea, even for this subset of transactions, would require a sustained and unified effort, something not likely to be forthcoming from the legal academy. And because the current lumping of these forms with real contracts serves businesses well, resistance is likely to occur at every step.

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88. *Citizens United v. FEC*, 553 U.S. 310, 366 (2010).

89. Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

90. See RADIN, *supra* note 10, at 227–28; see also Margaret Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000). In 1970, Arthur Leff suggested that consumer form transactions be thought about, and regulated, like products. Leff, *supra* note 2, at 356–57; Arthur Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970). Professor, and eventually-Senator Elizabeth Warren popularized that idea in advancing the creation of the Consumer Financial Protection Bureau.

A name change would follow from a conceptual severance of consumer forms from the law of contracts. This would likely do no harm either to the law of contracts or to our analysis of consumer forms because the connection between the two is wafer thin. Contract liability is, at a very fundamental level, based on voluntariness. And while one “voluntarily” presses the “accept” button, empirical studies have shown it is unlikely that the customer is actually signaling real assent to whatever lies beneath it. In the form arena, “click to agree” and other doctrines that bind customers are inconsistent with the general law of contracts that requires the offeror to reasonably believe that the counterparty has *in fact* agreed. Vendors have reason to know (given the state of contemporary empirical work) and likely have actual knowledge (from their own studies of their customers’ behavior) that their customers are *not* assenting (in any normal sense of the word) to the vendors’ rules.<sup>91</sup> The normal, assent-based rules of contract liability under such circumstances, if applied fairly, would show that no contract comes into existence under the objective standards that dominate American contract law.<sup>92</sup>

Recognizing that this kind of change is unlikely,<sup>93</sup> it may nonetheless be useful to consider how a name change could create real change both in the law on the books and the law in the field—at the customer level. The potential for systemic change that a different vocabulary could effect may be sufficiently large so as to make the sustained effort to achieve it worthwhile.

As with effecting any legal change, the long shot is in actually making the change happen. Those with an expertise in contract law would probably have to lead the way. One easy, yet symbolic, step is course design. Instruction in law schools could sever the problem of consumer form transactions from the contracts course altogether and perhaps create a different course in “mass-market transactions.” Business schools could similarly create a category within their business law courses that is entirely separate from “contracts.” Those lawyers and business people educated in a different tradition will eventually bring a different framework and vocabulary to their professional work.

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91. When consumers challenge contract formation in the form context, they might seek discovery of the vendor’s data on how many customers actually access the terms, and for how long. The vendors’ likely knowledge that few are reading would undercut their implicit claim that they have reason to believe that they are getting customer assent. Such information is clearly relevant to contract formation under the rules that apply to other kinds of contracts. But given the potential that this information has for customers, one could expect substantial resistance from the vendors. Objections based on trade secret or, more likely, that discovery is not permitted in arbitration proceedings, seem likely.

92. See, e.g., *Lucy v. Zehmer*, 196 Va. 493, 502 (1954); cf. RESTATEMENT (SECOND) OF CONTRACTS § 20 (1981).

93. A change in vocabulary to describe consumer forms may actually be no more of a long shot (at least in the short-to-medium term) than changing the law at either the legislative or the judicial level.

Law professors are often asked to opine in public fora on legal developments. In that public discourse, we should make clear that consumers should *not* attempt to read these forms because reading will waste their productive energy that could better be spent on other activities. If we are called on to explain liability when a consumer is bound to a form, “manifestation of assent” (except when we describe it as legal “mumbo jumbo”) should be no part of it. When the occasional customer becomes ensnared, it should be made clear that the reason was *not* that she clicked without reading and thereby breached her own obligations. If there is blame to be spread for the victim’s misfortune, the victim should bear little of it.

The long-term objective would be to change the popular perception that consumer forms are contracts as we commonly understand the idea. This will be hard to do and will be met with organized business resistance. Considering these forms to be “contracts” serves vendors well, providing the ready explanation “you agreed to it” when attempting to enforce a one-sided term to the individual’s detriment. While the power that the counterfactual “you agreed” argument exerts on either the customer service line (where most disputes likely find their first audience with the vendor) or within individual arbitration proceedings is unknown, one suspects it has considerably persuasive power in those contexts when juxtaposed with the labor-intensive, fact-laden defenses that void one-sided terms despite supposed “manifestations of assent.”

While a cultural, doctrinal, and intellectual shift in how we regard consumer forms would be a long time coming even if inertia and organized resistance were overcome, the upsides could be considerable. Those very few consumers who spend their valuable time looking at terms could spend that time more productively.<sup>94</sup> The savings depend on how many customers now actually read the terms. If, as the research suggests, less than one percent of the form recipients actually read the forms, eliminating this meager effort could affect considerable savings in productivity across the entire economy.<sup>95</sup>

Taking voluntary consumer action out of the analysis would redirect attention, within both contracts courses and legal scholarship, to whatever public policy reasons there might be for allowing vendors to dictate terms that presumptively bind those who receive them. Much ink has been spilled attempting to reconcile the law of forms with the law of contracts,

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94. We might substitute for consumers’ ineffective policing of terms the efforts of professionals paid to plod through obscure language in order to find offensive terms.

95. As developed earlier, *see supra* text accompanying note 56, it was estimated that it would cost the economy \$781 billion annually if all customers were merely to read privacy policies. If the one percent who are reading EULAs (a generous figure, given the research) holds true for privacy policies (there is no obvious reason why consumers would pay more—or less—attention to privacy policies than they would to EULAs), then if consumers simply stopped reading privacy policies, the savings would be \$7.8 billion annually. Obviously, that number goes down if fewer consumers actually read, the number goes up if we were to eliminate *all* Internet form reading, not merely the privacy policies.

and each year precious time in contracts courses is wasted on this Sisyphean effort. Removing “assent” as a justification for enforcement would require a different explanation for holding people in these circumstances to what amounts to involuntary liability. Perhaps the business certainty that comes from formal enforcement would suffice; perhaps other policy explanations for enforcement would develop. The research makes clear, however, that we have not yet developed a satisfying explanation, consistent with the empirical facts, for binding consumers to unread forms. We will likely get to such an explanation sooner if notions of assent are removed from the analysis.

Finally, because “manifestation of assent” results in placing blame on consumers for *not* reading their forms, eliminating it as an explanation for liability could empower consumers themselves. One could expect them to be less docile when confronting the customer service representative insisting that “you agreed to it,” and perhaps, this would lead to more consumer success at that level. In those cases where a vendor’s term is imposed despite a lack of agreement, the story would be one of comparative power rather than “free choice.” This could, in turn, begin to alter the politics of mass-market transactions, making clear the extent to which business power lies beneath this form of liability. This could begin the slow process of legislative reform that will likely be needed to redress the economic and power imbalances that lie behind the current law.

If consumers are taught not to “blame themselves” when liability is imposed through a form they did not agree to, they may seek a different explanation or even turn the blame onto someone else. That will be an essential first step toward permanent, long-term reform.