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# The Deformation of Contract in the Information Society

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## THE DEFORMATION OF CONTRACT IN THE INFORMATION SOCIETY

Margaret Jane Radin

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**Abstract:** The HLA Hart Memorial Lecture delivered at Oxford on May 24, 2016. The Lecture considers how the advent and growth of the information society is posing challenges for the traditional theories of contract, and for the duties of the State with regard to contractual ordering. In particular, the Lecture considers the lack of ‘fit’ between certain prevalent uses of contract and the underlying justification for contract enforcement.

### 1. Introduction

The digital networked environment, the basis of today’s information society, has transformed the way that a contract is produced, delivered, and understood. Technological changes have produced social changes. For ordinary people today, at least in developed countries, many more of the needs and wants of daily life are acquired through contracts than ever before. As the reliance on contracts has been increasing, the delivery of textual content purporting to be contractual has resulted in immense proliferation of such texts. People’s ability to separate for attention any one text from the constant flood has been disintegrating.

As the features of the digital networked environment become more and more ubiquitous in the market practices today considered contractual, those features are facilitating privatization of legal infrastructures that ought to remain public. The technological and concomitant social features of today’s information society have enabled private firms to engage in massive

reorganization of legal rights in their favor, and to undermine functions that should belong to the State, such as insuring equality of treatment under the rule of law and protecting the right to redress of grievances. Until the information society made possible large-scale privatization of those functions of the polity, we largely allowed it to go without saying that the State is supposed to maintain a legal infrastructure to support the institution of contract. Now we must say it, and say it clearly.

One of my main objectives here is an attempt to achieve some of the required clarity about contract and its legal infrastructure. In pursuit of this objective I want to inquire to what extent the traditional theories of contract embedded in the law are being stretched beyond their capacity to justify contractual enforcement by the State.<sup>1</sup> To put the problem simply, contract theory presumes as its central core case a transaction between two discrete willing parties who have actually communicated and voluntarily chosen the terms of their obligations to each other. As contract has been developing in the information society, massive phenomena are dubbed “contracts” by analogy with the core case, but involve much less actual communication and voluntary choice. Traditional theory has been manipulated and stretched to cover new phenomena. That theory is a poor “fit” with some of the practices of today’s markets. That means that those practices cannot be convincingly justified under that theory.

### An Astronomical Analogy

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<sup>1</sup> Traditional theories include varieties of utilitarianism, which I lump together as Benthamite, and varieties of deontology, which I lump together as Kantian. The important factor for this essay is not the variations among these theories, but rather that they unite on the features of what I call the traditional core case of contract. See s 2 (Core Contracts) below.

In what follows I would like to pursue an analogy. The contemporary lack of “fit” between certain contemporary phenomena and the traditional theories of contract law calls to mind a situation that arose in the history of astronomy. I want to compare the stretching and manipulation of contract theory to make it cover today’s market phenomena with the introduction of “epicycles” to shore up the ancient Ptolemaic theory of the universe.

Under Ptolemy’s theory, developed in the second century AD, the earth was presumed to be the center of the universe. The heavenly bodies were presumed to move around the earth in circular orbits. But these theoretical presumptions did not fit observed facts; planetary orbits did not follow a pattern that can be interpreted as circular motion. In order to fit the observed features of planetary orbits into a geocentric theory with circular motions, it was necessary to make theoretical adjustments, which were called “epicycles.” Epicycles postulated that the heavenly bodies moved not only in circular orbits around the earth (“cycles”) but also in smaller circles (“epicycles”) around these main circular orbits. A great amount of work went into trying to define the right epicycles needed to bring empirical observation into conformity with the basic presumptions of Ptolemaic theory.

But, ironically, the proliferation of epicycles eventually subverted the posited perfection of the theory. When an alternative theory that accounted more simply for the observations of planetary movement finally emerged in the sixteenth century, the accepted theory of the universe underwent a paradigm shift. According to the new theory, the earth and other planets go around the sun, traveling in elliptical orbits. This new heliocentric theory dispensed with the assumption of perfect circular orbits of planets around the earth and thereby eliminated the need for epicycles. The new theory was considered heretical and dangerous for a time, and it underwent numerous revisions as telescopes and the science of astronomy improved, but eventually it

became the accepted theory. The paradigm shift resulted in a much better “fit” between theory on the one hand and the facts that the theory is meant to explain on the other.

I propose that some attempts to fit contemporary phenomena into the framework of “contract” are analogous to the epicycles added to Ptolemaic theory. These attempts are frequently unsatisfactory--and often unreflective--efforts to fit some of today’s burgeoning deviant phenomena into the traditional theories of contract enforcement. Like the Ptolemaic epicycles, they may be subverting the very theory that they are attempting to support.

The proliferation of epicycles in Ptolemaic theory eventually gave way to a new theoretical paradigm. I cannot now propose that traditional contract theories are obsolete and must be replaced by a new paradigm. That could turn out to be true. But for now, not being a Copernicus, I merely hope to point out that the justification of contract enforcement seems to have been expanded beyond the limits of the underlying traditional rationale. I suggest that it may be preferable to move beyond some of the doctrines and conceptions in contract law that seem analogous to epicycles by viewing them in other ways than current legal understandings might allow. I hope the Ptolemaic analogy will prompt consideration of the idea that certain phenomena in contemporary practice should be reconceptualized because they lack an appropriate level of “fit” with traditional contract theory to be dubbed “contracts” under that theory.

## 2. Core Contracts

In order to launch consideration of contract in today’s information society, I propose a list of seven criteria for identifying the core contracts that traditional contract theories take to be justifiably enforceable by the State. I believe these seven criteria are presumed by the forms of

justification found in traditional theories, whether those theories are roughly consequentialist or roughly deontological. Some of these criteria relate to the parties themselves, some to their actions, and some are conditions related to the context of the polity in which the parties' actions take place and are given effect. These latter are the conditions of State infrastructure that in the past we were able to take more for granted than we can today.

A core contract, in the sense of traditional theories, (1) shifts particular entitlements between two private parties, in a context of exchange between them, where (2) the parties to the exchange are human beings who possess free will or autonomy, or legal entities (such as corporations) managed by such human beings, and where (3) each party arrives at and commits to a particular specific exchange, a consensus ad idem, through exercise of his or her own free will or autonomy. (Consensus ad idem means that both parties must understand and freely consent to one and the same exchange, without necessarily assuming that each party must explicitly consent to each and every clause.) Further, a core contract arises under the following conditions of context: (4) The shift of entitlements in accordance with the parties' voluntary consensus ad idem occurs under rules that are established and maintained by an accepted legal infrastructure that is managed by the State. That legal infrastructure includes (5) publicly recognizable rules and methods for determining that a contract was formed and for determining the content of contractual obligations, and also includes (6) remedies for breach with the power to implement such remedies. And, finally, (7) the legal infrastructure must also be trustworthy enough in carrying out these functions that private contracting parties can rely on it.<sup>2</sup>

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<sup>2</sup> In stressing the role of trustworthiness of the infrastructure, I mean to emphasize the idea that the full benefits of civil society envisioned by this traditional justification of contract cannot be reached without all parties substantially accepting and trusting the State's role. This is not just a matter of the counterparties being able to trust each other, which is Charles Fried's emphasis. See Charles Fried, *Contract as Promise* (2nd edn, OUP 2015). The classic metaphor invoking a

I intend this as a bare-bones list that captures the core case of contract but purposely avoids more specific issues-- such as the point at which entitlement vests in the offeree; whether the parties must “intend to create legal relations”; whether contractual exchange is best understood as promissory; whether the appropriate default remedy for breach is specific performance, expectation damages or reliance; and numerous other contested areas. I am also attempting for the most part to skirt philosophical debates about the nature of free will or autonomy (or even of economic efficiency). I think traditional contract theories presume contracts with these general features, and thus contractual enforcement is most easily justified when purported contracts meet all of the criteria on the list.

I have drawn up this bare-bones list to facilitate thinking about contemporary phenomena that are dubbed “contracts” by analogy with the core instance of contract, but without fully meeting these underlying criteria. Of course, any list such as this one is subject to debate. In fact, this Lecture will be a success if such debate is forthcoming—as long as we recognize that the object is ultimately to alleviate the dissonance between theory and some of the practices it is supposed to justify. The important question is: At what point does the justification for contract enforcement fail to fit closely enough a particular transfer of entitlement in practice?

Criteria (4) through (7) on the bare-bones list relate to the role of the State in contract facilitation and oversight, the backbone of trustworthy legal infrastructure. Such an infrastructure is a condition of legally enforceable contract. When an arm of the State transfers an entitlement of a defendant—by forcing the defendant to deliver to the plaintiff either the thing itself or a sum representing its value—the State is redistributing an entitlement from the

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state of nature points up the issue that not all people can trust each other all of the time. Back-up from the State is necessary for contractual ordering to be trustworthy.

defendant to the plaintiff. For this involuntary redistribution to be consistent with legality, there must be a legal infrastructure of rules governing contract enforcement. A stable social/economic practice of contract—beyond the realm of a small and closed group in which everyone knows each other—cannot exist without such a functioning and trustworthy legal infrastructure.<sup>3</sup> In stressing the role of the polity in making a contract system possible, I am more aligned with the deontological versions of why we are required to set up systems of private law in order to enable the full realization of human autonomy. There are also utilitarian versions.<sup>4</sup> I do not believe, however, that one must hold any particular version of traditional theory to see the disjunction between theory and practice that creates doubt about justification. The matter of “fit” between a theoretical justification and actions or states of affairs it is supposed to justify in practice does not seem to depend upon the underlying philosophical basis of a proffered justification.

In previous work I coined the awkward term market-inalienability for things and rights that ought not to be traded in markets—that is, ought not to be the subject of enforceable contracts.<sup>5</sup> More recently I have argued that certain rights that are crucial for maintaining the legal infrastructure for contract—in particular, availability of legal remedies – should be

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<sup>3</sup> Although this point has hitherto been foregrounded less often than it now should be, I take it to be well understood. See, eg, Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2005) 125. According to Kimel, “Contractual activity is pursued within a framework which is largely created and the boundaries of which are largely defined, by the state. Moreover, this framework incorporates the state’s adjudicating and enforcing agencies.”

<sup>4</sup> A central tenet needed by any version of traditional contract theory is that trustworthy institutions require State back-up. See n 2. Philosophical accounts based upon utilitarian reasoning do posit a central role for the State regarding this necessary back-up, couched primarily as necessary to organize and manage coordination and prevent defection from organizational compromises needed for the cohesion of the enterprise of polity. See, eg, Russell Hardin, ‘Economic Theories of the State’ in Dennis C Mueller (ed), *Perspectives on Public Choice: A Handbook* (New York, CUP 1997) 21-34.

<sup>5</sup> Margaret Jane Radin, ‘Market-Inalienability’ (1987) 100 *Harvard L Rev* 1849; Margaret Jane Radin, *Contested Commodities* (Harvard UP 1996).



recognized as market-inalienable when a private party attempts to delete such rights on a mass-market basis.<sup>6</sup> A functioning regime of legal remedies for breach of contract must remain available to subjects of the State in order to undergird the justification of contract enforcement by the State. It is now important to be explicit about Criteria (4) through (7), because various developments in the information society are now capable of subverting them.<sup>7</sup>

In addition, we must now also consider developments that relate to criteria (1) through (3) on the list, relating to the parties' exercise of free will or autonomy in communication and action to arrive at and commit to a specific exchange. Today's developments include purportedly contractual exchanges that alter or cancel rights that are not market-inalienable (that is, they alter or cancel rights that are in principle alienable), but they do so by means of procedures that do not meet the core criteria of justifiable contractual exchange.

In short, my view is that contract law has slowly been stretched and manipulated to apply to a set of phenomena that are dubbed "contracts," but no longer meet the bare-bones criteria. Such stretching and manipulation has obscured the increasing lack of "fit" between certain recent phenomena and the traditional theories of contract that are supposed to justify enforcement, making it easier to assume that the traditional theories and doctrines of contract apply to these recent phenomena, and also easier to ignore the more fundamental challenges these phenomena present. This process of stretching and manipulation will (I hope) be illuminated by my analogy of Ptolemaic epicycles. I will shortly give some examples.

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<sup>6</sup> Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton UP 2013); Margaret Jane Radin, 'Boilerplate: A Threat to the Rule of Law?' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (OUP 2014).

<sup>7</sup> I have in mind massive imposition of exclusion (exculpatory) clauses, pre-dispute arbitration clauses, choice of forum and choice of law clauses, unlimited one-sided modifiability clauses, and others. See s 4 (Doctrinal Distortions Related to Massively Distributed Boilerplate).

### 3. Contract Theory and the Problem of “Fit”: A Working Typology

In order to situate the examples, I offer a working typology of four different phenomena that one might try to fit into the framework of a contract. I will call these four types (1) “bespoke contracts,” (2) “machine rule,” (3) “high-end boilerplate,” and (4) “massively distributed boilerplate” (hitherto known as “adhesion contracts”). I do not mean to suggest that the types I have chosen cover the entire field of contemporary practice of contracts (or procedures dubbed “contracts”). Indeed, these “types” represent mere points on a continuum, specifically points that I have selected to illustrate and argue for certain things. They are useful for attempting to clarify my argument, but in practice there will be many individual cases that do not obviously belong to one point or another.

#### (i) “Bespoke” contracts

First, consider the type of transaction that best fits the standard conditions for justifying contract enforcement. Despite recent technological changes, there still exist one-off “bespoke” deals between individuals or firms, as well as long-term and perhaps “relational” deals between firms. These deals shift particular entitlements between private parties under terms that the people involved understand and have chosen, acting freely or autonomously. Contracts like these existed long before the advent of the digital networked environment, and provide the model that best meets the traditional conditions for contract enforcement.

In “bespoke” contracting it is possible for parties to use contract for particularized risk management. Each party knows its own needs and risks, and can negotiate its own balance between meeting its needs and minimizing its risks. It is possible to infer that a

party taking on a contractual liability is probably most able to avoid or insure against the cost in question. Indeed, it is possible to infer that the party burdened with a contractual liability has probably gained from other terms of the contract an offsetting benefit he prefers.

Bespoke contract is the main domain of contemporary contract theorists. That is, contemporary contract theorists have typically launched their analysis by seeking to explain or justify contract enforcement in relation to bespoke contracts. Then, if they consider other situations that are called “contracts” in today’s world, they often simply assume that those other situations are similar enough to bespoke contracts to permit justification by analogy.<sup>8</sup>

(ii) “Machine Rule”

The worst “fit” for traditional contract theory of the four types I am examining I call “machine rule.” Machines (computers) may shift entitlements from one private party to another, without the contemporaneous involvement of any humans, and also outside the purview of the State’s legal infrastructure. Let me call this “pure” machine rule. Pure machine rule can function as if it were a private automatic injunction. A machine could delete an electronic product I have purchased without any judicial weighing of the equities by an officer of the State. The machine would have no way of learning that a buyer’s failure to transfer the monthly payment for a leased electronic program was caused by a glitch in the bank’s software unknown to the buyer, nor would it know that the electronic product was operating a life-saving medical device. Such a machine would bypass the mandates of background law that—at least in contemporary

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<sup>8</sup> See, eg, Stephen A Smith, *Contract Theory* (OUP 2004). Explicitly recognizing that not all practices called “contract” align with the bespoke model, however, Schwartz and Scott limit their contract theory to negotiated contracts between sophisticated commercial parties. See Alan Schwartz and Robert E Scott, ‘Contract Theory and the Limits of Contract Law’ (2003) 113 Yale LJ 541.

understanding-- are supposed to be weighed by a human judge before an entitlement is transferred from one owner to another.

Some digitized entitlement transfers are now being labeled contracts. Literature has begun to appear regarding practices called “algorithmic contracts,” executed by computers on both sides, or “block chain contracts,”<sup>9</sup> in which provisions are programmed to achieve “self-execution.” High-speed trading of securities is an example of algorithmic contracting. “Self-execution” could mean, for example, that if a payment for a service fails to register with a computer at a specific time, the computer will shut off the service; that is, “pure” machine rule. “Self-execution” in this sense does not involve humans exercising their autonomy to arrive at a deal, and it lacks the State’s supervision regarding whether or not a deal, if it occurred, is enforceable. In fact, this sort of “self-execution” fails all of the criteria for being recognizable as a contract that I have proposed, except that an entitlement is (allegedly) shifted from one private party to another. So with this sort of “self-execution” (“pure” machine rule) we seem to have a form of machine rule that transfers control or power over something without State backup (that is, outside the purview of the State’s responsibility).

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<sup>9</sup> See, eg, Maria Letizia Perugini and Paolo dal Checco, ‘Smart Contracts: A Preliminary Evaluation’ (2016) <<http://ssrn.com/abstract=2729548>> accessed 18 November 2016 (Smart contracts could turn contract provisions into executable codes designed for self-execution in a Bitcoin derived system); Lauren Henry Scholz, ‘Algorithmic Contracts’ (2016) *Stanford Technology L Rev* (forthcoming) (proposing a taxonomy of algorithmic contracts and discussing the limits of current contract law for addressing them). See also Business This Week, ‘Not-so-clever contracts: For the time being at least, human judgment is still a better bet than cold-hearted code’ *The Economist* (London, 30 July 2016). For predictions about how the work of professionals (including lawyers) is changing in the information society, along with copious examples of how the changes are taking place, see Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (1st edn, OUP 2016).

But to what extent can machines be used to transfer entitlements without amounting to “pure” machine rule? Perhaps a human will have set up the program that will be “self-executing”; or perhaps a human will have set up a program that will have set up the program that will be “self-executing.” Perhaps humans will have set up programs that will receive these programs. Then the question arises whether a human can be said to have autonomously proposed the “self-execution,” and further whether those against whom the execution operates could be said to have consented in a way that such consent could count as contractual. These questions apparently are yet to be thoroughly considered.<sup>10</sup>

Among those who study technology and its interface with humans, such as scholars in the field of HCI (Human-Computer Interaction), also known as CHI (Computer-Human Interaction), there is now a substantial and growing body of literature treating both machine rule and legal rule as “regulation.” State and non-state “regulation” are discussed together.<sup>11</sup> Such amalgamation seems to make it more difficult to recognize that there is a different type of

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<sup>10</sup> It seems acceptable to most customers who purchase online to let the computers take care of almost everything about the transaction (receiving payment, shipping goods, et cetera); yet they are still asked to click “I agree.” This clicking does not seem to amount to exercise of autonomy in the sense embedded in traditional contract theory. It does not seem to represent consensus ad idem because customers are paying more than the asking price in money when they also give up rights the absence of which is of value to the firm. See s 4 (iii). What is the extent to which human tasks can be delegated to computers and still count as exercise of human autonomy? We do not know. See, eg, Joshua A Kroll and others, ‘Accountable Algorithms’ (2017) 165 *University of Pennsylvania L Rev* (forthcoming). The question arises how far back in the chain of “command” there must be a human in order to find that a digital procedure becomes contract formation. For example, a human in a firm’s procurement department could program his computer to accept three different sets of terms, and the firm’s suppliers could also program their computers to accept three different sets of terms. The computers could search for a matching set of terms between the customer and the supplier, and, if one is found, close the deal, order the goods, and send them through a logistic chain for delivery. Is this contractual?

<sup>11</sup> Lachlan Urquhart and Tom Rodden, ‘A Legal Turn in Human Computer Interaction? Towards “Regulation by Design” for the Internet of Things’ (2016) <<http://ssrn.com/abstract=2729548>> accessed 18 November 2016.

justification required for rules imposed by one private party upon another private party versus rules imposed by the State. One of the reasons that machine rule is worrisome is that it seems to bypass and thereby undercut the State's legal infrastructure that enables contractual private ordering.

I brought up “pure” machine rule to illustrate a situation in which traditional contract theory clearly does not fit the facts in practice. (We can still ask, Well, then, why don't we just allow the meaning of the term “contract” to change with the times? I will come back to this question.<sup>12</sup>) In this Lecture I confine myself to (allegedly) contractual procedures involving a human as at least one immediate party. I do want to mention, though, that if we just take it for granted that machine rule is contractual, and if we start devising ad hoc explanations why this must be so, then those explanations will start to look like distortions analogous to the epicycles in Ptolemaic theory. The notion of consensus ad idem between willing human parties does not fit machine interaction.

### (iii) “High-End Boilerplate”

In the contemporary world of commerce, parties often negotiate over particular digitally stored repetitively used provisions. The fact that provisions are digitally stored and repetitively used does not necessarily prevent transactions from being bespoke contracts. In the past, law firms--and perhaps parties themselves—often kept records of previously used provisions, and those provisions could be copied by hand or typed into new contracts as needed. Now that provisions are digitally stored and can be deployed with the press of a key, it may well be true that most bespoke contracts between sophisticated parties involve the reuse of standard

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<sup>12</sup> See s 7 (What Is To Be Done?).

provisions. Further, we can probably include as bespoke contracts situations where one party selects the terms and the other party understands each of them and autonomously accepts them.

Still, there is a difference in meaningful choice and consent between selecting stored provisions one by one in a process of explicit negotiation and deploying an entire set of stored provisions without at least one party having re-read and reconsidered them. Once sophisticated parties repetitively use an entire set of stored textual provisions without reconsideration in context, that is, stored boilerplate, I will call that “high-end boilerplate.” (I am calling it “high-end” because it is being used by sophisticated parties who generally know what they are doing, or at least we feel licensed to suppose so.) The reason I characterize this as different from bespoke contracting is that the same set of digital terms is re-used without explicit consideration of different factors of risk or of individual circumstances. Thus, the assumption that all of the terms are the result of autonomous choice is more attenuated. And thus, the “fit” between this type of contract and the set of traditional criteria for an enforceable contract, as suggested in my bare-bones list, is accordingly also weakened.

The fact that “fit” is somewhat weakened does not necessarily mean that high-end boilerplate cannot be justifiably enforced as contractual at all. It is not the case that there must be perfect “fit” between the theoretical conditions that justify a general practice and every detail of a practice as it exists on the ground. (Perfect “fit” is a theoretical ideal, but its existence in the real world is rare. The real world tends to have kaleidoscopic and ever-evolving details that are at least difficult to match up perfectly with theory.) But how good must “fit” be in order for contract theory to be perspicuous, to function properly to justify enforcement by the State? That is not a question that I can answer in the abstract, nor, of course, can I answer it uncontroversially. Rather I suggest that as practices conform with fewer of the core criteria and

conditions of justifiable contract enforcement, the level of “fit” with the theory of justification gets weaker, until some practices, such as “pure machine rule,” are clearly not covered by the theory.

With regard to high-end boilerplate, consider the case examined by Mitu Gulati and Robert E. Scott in their book, *The Three-and-One-Half Minute Transaction* (subtitled “Boilerplate and the Limits of Contract Design”).<sup>13</sup> In the sovereign debt market, a particular clause, known as the *pari passu* clause, apparently dating from the nineteenth century, appeared in a repetitively used set of stored terms. The parties active in this market were all sophisticated: specialized bond underwriters, law firms specializing in sovereign debt transactions, the bond issuers themselves. A court in 2000 delivered a decision allowing a “hold-out” creditor to reap large rewards, relying on an interpretation of the *pari passu* clause that the players in the sovereign bond field believed was wrong. (A hold-out creditor is one who refuses to consent to debt restructuring.) Yet after this decision the sovereign bond experts did not rewrite their boilerplate to eliminate or revise the *pari passu* clause.

Gulati and Scott interviewed many of the market participants and attorneys, and found out that they did not really know what the clause meant. The authors offered various possible economic explanations for why the clause remained in use. (Some of the possible explanations seemed to suggest that use of the clause was economically efficient and some seemed to suggest that it was not efficient.<sup>14</sup>) At this point I just want to draw attention to the way the bond

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<sup>13</sup> Mitu Gulati and Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* (1st edn, University of Chicago Press 2012).

<sup>14</sup> *ibid.* The authors group the possible explanations for the clause’s “stickiness” into two categories: five explanations that would reflect a plausibly efficient situation for the boilerplate users (though overall efficiency would also depend on other characteristics of the market in which the stickiness occurs), and five explanations that would reflect an inefficient situation. As the authors put this, one type of theory will “explain stickiness as a rational response to either the



contract was drafted: an associate attorney pushed a key and a computer printed out the contract. That is why it is a 3-1/2 minute transaction.

I view high-end boilerplate as a borderline case for the issue of “fit” with the justification of enforcement as contract. That suggests that high-end boilerplate should not be universally assumed to be enforceable as a contract but should be examined more carefully for “fit” in particular cases or classes of cases. Sophisticated parties, those who know what they are doing when they engage the law and practice of contract, particularly experienced traders in a specific field, may have reasons for engaging in 3-1/2 minute transactions. They may recognize that the practice could cause losses, but believe that on the whole there will be efficiency gains. In the case examined by Gulati and Scott the parties had differing ideas about the meaning of the *pari passu* clause, so that it might be hard to suppose that the parties autonomously reached consensus *at idem* (unless they both considered the *pari passu* clause a useless appendage to be ignored). But on the other hand, it may be possible to suppose that the parties autonomously accepted a calculated risk of not knowing the possible effects of the clause, a risk that occurs often in practice. In a case involving sophisticated parties it might be reasonable to believe that parties have autonomously accepted such a risk when they could have avoided it by expending more time and effort. But note that the inference of autonomous risk acceptance would not be so

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perceived benefits of retaining the standardized form or the expected costs of revision” and the other type of theory will “explain stickiness as an inefficient byproduct of an underlying agency problem.” Gulati and Scott (n 13) 34. Among the “rational response” theories are network externalities and satisficing. (“Satisficing” could include unwillingness to expend resources to improve one clause of the contract.) Among the “agency costs” theories are herd behavior and cognitive biases. The authors conclude, tentatively, that the best explanation for the “stickiness” of the *pari passu* clause is probably agency costs associated with “big law.” (It might be an “agency cost,” that is, that an associate attorney who has no power to countermand the powerful partners upstairs is the one who prints out the contract, and perhaps the powerful partners upstairs do not have sufficient reason to reconsider the contract.)

reasonable when we are considering less sophisticated parties who are not likely to have the option to revise terms.

(iv). “Massively Distributed Boilerplate”

So, turning to less sophisticated parties, now let us consider massively distributed boilerplate which is alleged to be contractual. In addition to massive distribution, the significant characteristic of this type of boilerplate is that people who receive it are not “sophisticated parties”; and they lack understanding and control over the boilerplate. Moreover, such boilerplate is often directed at deleting legal rights and remedies for wide swaths of the public, with provisions such as exclusion clauses and mandatory arbitration clauses. These alleged contracts are routinely called “contracts of adhesion.”<sup>15</sup>

Massively distributed boilerplate consists of composite rigid texts, most often consisting of fine print, delivered to consumers, employees, and many businesses in the position of consumers.<sup>16</sup> Distribution may be in “cyberspace,” fully digital, only arriving at a human in the final delivery on screen. Or distribution may be to individual humans in “meat space” (ordinary physical space) after digital production and transmission to the point of distribution, such as when a firm digitally transmits boilerplate to its retailers who print it and require each customer to sign it. These “contracts” arrive at human recipients who have no control over them, other than to flee the transaction.<sup>17</sup> Human recipients are not in control because they are not in the field

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<sup>15</sup> I will later suggest that it would be more accurate to call them “transactional disclosures,” or even “attempted transactional disclosures.” See s 7 (iii).

<sup>16</sup> I am excluding for purposes of this discussion businesses which are powerful buyers from many small sellers, such as, for example, in the auto manufacturing industry. In that situation it is the buyer who has the power to dictate non-negotiable terms.

<sup>17</sup> In these features such “contracts” seem analogous to drones. (I owe this striking analogy to Prof. Mariana Mota Prado.)

of the business deploying the boilerplate; and they receive too much boilerplate in the aggregate to pay much attention to any one instance of it when many businesses deploy it; and they would most likely not understand the boilerplate if they did pay attention to it; and if they did pay attention to it and did understand it, cognitive biases would still likely hinder their ability to apply the clauses to themselves.<sup>18</sup>

Massively distributed boilerplate, especially when deployed to delete remedial rights, as it very often is, may represent a pivotal transition between the old-fashioned bespoke deals between individual parties postulated in the core theory of contract law and a possibly emerging regime of fully machine-governed entitlement shifts. In my view, both the burgeoning of massively distributed boilerplate and the onset of machine rule are symptomatic of a massive realignment of power to shift entitlements, from the legal power of the State to the private power of individual firms outside the purview of the State's legal infrastructure.<sup>19</sup>

Massively distributed boilerplate often seeks to alter or cancel the background rules of the State, such as access to remedies, in favor of the party deploying the boilerplate. It often also seeks to waive entitlements that would be in principle alienable, such as consequential damages or choice of forum, but does so for large swaths of the population and without the voluntary alienation that would occur in bespoke individualized contracts. The swiftness and ease of

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<sup>18</sup> See s 7 (iv).

<sup>19</sup> Mass-market deployment of boilerplate has become very widespread and enforceable in the United States, for various reasons having to do with US legal and economic structures. Given the globalized reach of many distribution chains, I believe mass-market boilerplate is also frequently appearing in other developed economies, but the extent to which such texts are considered enforceable contracts differs significantly between civil law and common law jurisdictions, and I believe that nowhere in the developed world are they as widely enforceable as in the US. Most of the troublesome clauses are at least presumptively illegal in the European Union. I believe that firms try to specify US choice of law where they can, but otherwise firms deploy boilerplate even when they know that much of it will not be enforceable outside the US.

copying and disseminating digital boilerplate result in the phenomenon I call “copycat boilerplate,” in which firms deploy boilerplate that has been copied from other firms that deploy boilerplate. Copycat boilerplate makes it implausible that the existence of a massively distributed boilerplate “contract” is a reliable indication of risk management, because risks would presumably vary from firm to firm, depending upon the nature of the product a firm is selling, the decisions of the firm’s management, and other matters such as the firm’s debt structure, so that the boilerplate of firm A would not likely be suited to firm B, C, or D.

#### 4. Doctrinal Distortions Related to Massively Distributed Boilerplate

As many transfers of entitlements have moved further and further away from the core circumstances characterized as bespoke contracts, courts have developed a number of doctrines that extend the language and rationales of “contract” to such phenomena. These doctrines mask the true nature of the serious deviation from the core case on which the traditional theory bases enforceability. In my view, such doctrines represent efforts to salvage a posited theory, analogous to the epicycles of the earth-centered model of the universe.

##### (i) PNTL

Consider, for example, the phenomenon known as PNTL (pay now, terms later), also known as rolling contract. PNTL refers to a procedure according to which the customer calls the seller on the telephone and buys a physical product with a credit card. The firm deposits the money and ships the product. When the buyer opens the box, a sheaf of fine-print terms is revealed (in meat space, not cyberspace; that is, on paper). The fine print contains terms favorable to the seller, such as a mandatory arbitration clause, an unlimited unilateral modification clause, a waiver of consequential damages, a remote choice of forum clause, a

clause truncating the statute of limitations. The fine print says that the recipient is deemed to have accepted its provisions if the recipient keeps the product for (let's say) 30 days. It could well be argued that a contract was formed on the telephone and the additional terms that come later are proposals for modification that would not be binding without the buyer's acceptance. But after some initial hesitancy, many US courts have held otherwise: PNTL is largely considered an appropriate method of contract formation.<sup>20</sup> Failure to return a purchased product is considered acceptance of a contract for the product including the (typically unread) boilerplate after 30 days.

In my view, US courts' approval of PNTL involves an ad hoc doctrinal distortion. It is an attempt to extend the familiar idea of voluntary contractual acceptance to cover a situation in which most people think they have already bought a product by the time they receive the box containing the terms; a situation in which most people do not even see or read the terms that they have purportedly "accepted." In other words, the doctrinal distortion involves pasting later-arriving unread terms onto a transaction that seemed complete at the point of sale, at which time money was paid and a product shipped; and then construing such terms as "accepted" through "action" that does not involve the voluntary contemplation and choice of terms involved in bespoke contracts, but instead is in fact "non-action" in relation to terms that have never been read. It is only by construing these PNTL transactions as readily analogous to bespoke contracts that they are viewed as justifiably enforceable.

(ii) Objective theory of contract

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<sup>20</sup> After PNTL was endorsed by an influential US federal appeals court, see *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) and *Hill v. Gateway Inc.*, 105 F.3d 1147 (7th Cir. 1997), other US courts have followed suit.

A more significant area of doctrinal distortion involves contemporary deployment of the traditional doctrine known as the “objective theory” of contract, as distinguished from “will theory.” Contractual obligation is based on autonomy or free will.<sup>21</sup> “Will theory” accordingly relies upon actual choice and intent by each party, a theory that is considered subjective: what does the party actually intend?<sup>22</sup> (Rather than “subjective,” I would prefer to say, “internal to the person.”) “Objective theory,” in contrast to actual intent, looks to what an observer would have understood by another person’s words and their context.<sup>23</sup> There has always been a lurking conflict between so-called “will theory” and “objective theory,” because in traditional theory contract enforceability is supposed to be justified by what a person actually did of his own free will, not what someone else would have thought about it. The lurking conflict has always added at least a worry to contract theory with regard to free exchanges, but in today’s context I believe that the latent conflict has become a patent distortion.

“Objective theory” has traditionally been used to find that a contract exists when one party denies it. If a party’s words in their context would be interpreted as “intent to form a contract” by a hypothetical observer considered “reasonable,” then intent will be ascribed to the party, no matter what the actual party was actually thinking. So, objective theory is invoked when someone tries to accept an offer that he alleges was made, but the alleged offeror denies

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<sup>21</sup> This formulation sounds more like the Kantian inflection of traditional contract theory, but in fact, a Benthamite could treat individual freedom of choice as basic too, emphasizing the proposition that one’s utility is subjective, based on one’s own choice.

<sup>22</sup> Charles Fried has long been a prominent exponent of this theory. See Fried (n 2) 60-61.

<sup>23</sup> Even traditional will theory must be somewhat objective: What are the signals of agreement or consent? “Signed, sealed, and delivered” was the original signal. (Today, the signal of alleged consent in a portion of the online world is clicking a box labeled “I agree”— but as I will address below, that is a proposition that I consider debatable.) See s 4 (iii).

that his behavior was an offer. Objective theory is also invoked when an offeror claims that behavior of an offeree is an acceptance.

Objective theory is necessary in a contract regime in which the legal arm of the State must interpret whether an agreement occurred and if so, agreement to what. “Objective” theory is not unreasonable at all-- provided we understand that our ability to construe the meaning of people’s words and actions in context depends upon shared cultural understandings.

But that is a very important proviso. And it is a proviso that we did not have to pay much attention to as long as the requisite shared cultural understandings were prevalent enough to be taken for granted.

The applicability of objective theory depends upon prevalent linguistic understandings, in the context of individual behaviors with known implied meanings, such as tone of voice, facial movements, and other physical behavior, in a context of cultural characteristics and expectations. In other words, the meaning of language in conjunction with individual speech and other physical behaviors relates to current cultural context. If current society no longer internalizes the shared cultural understandings that made the “objective theory” presumptively workable with regard to contract, then the continuing use of the “objective theory” exposes a fissure in contract law. The fissure is between internal normative underpinning (free will) and objective manifestation and implementation (observation by others in context).

As I mentioned, traditional contract doctrine embodies the objective theory in holding that if a trier of fact believes that a situation would have seemed to an offeror to be acceptance of his offer, the offeree is bound, even if she had not subjectively willed such acceptance. At the time this doctrine developed, I speculate that traders probably knew each other, had developed norms of trading, and were able to understand trading behaviors in context. Certainly there were

far fewer traders than there are in contemporary society. (Perhaps it goes without saying that many segments of society, including women and indentured servants, could not enter contracts.) Today, at least in developed countries, we are all traders. Most of us who trade in the marketplace with great frequency do not share a common culture of market trading.

### (iii) Clicking

A buyer in front of a computer screen is presented with a small digital box in which she must click “I agree” to the seller’s terms, which terms she could access by clicking a link to display the terms, but almost always does not do so. By clicking “I agree,” the instruction is most likely to say, you affirm that you have read the terms and agree to them. This common procedure has made liars of us all. Empirical research shows that we normally do not read boilerplate.<sup>24</sup> How could we? There is so much of it. And why should we? We cannot change it, and we are not likely to understand it.

The objective theory of intent has been stretched and distorted to treat these clicks metaphorically, as if they amount to “acceptance” that meets the criterion of autonomous consent in the core case of contract theory; as if such clicks were the same as saying “I accept” in response to terms that have been actually communicated and understood, and perhaps subject to one’s own input, as in bespoke contracts.

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<sup>24</sup> See, eg, Yannis Bakos, Florencia Marotta-Wurgler, and David R Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts’ (2014) 43 *The Journal of Legal Studies* 1. cf Omri Ben-Shahar and Carl E Schneider, *More Than You Wanted to Know: The Failure of Mandates Disclosure* (1st edn, Princeton UP 2014). The authors collect copious evidence that recipients do not and cannot read and understand fine-print “mandated disclosures”; all of this evidence is equally applicable to fine print that is labeled “contract”. See n 46.



There is nothing wrong with objective theory per se—it is how we understand other people through our language and cultural behaviors. But when society changes, those cultural understandings change. It seems to be true that many consumers have now been socialized to believe that they are stuck with the terms the firm has delivered once they click “I agree.”<sup>25</sup> But it is not true that a firm that deploys mass-market boilerplate can “reasonably” infer that each of the recipients of that boilerplate is consenting to its terms, where “consent” means what it means in the theory of contract that would justify contractual enforcement. There is very likely no consensus ad idem because the recipient is paying more than he thinks he is paying: he is very likely to think he is paying money for a product, such as a software update, when in fact he is paying money-plus-rights-relinquishment.<sup>26</sup> The fact that the recipient receives something she is willing to pay for does not by itself make this a contract.

Under current cultural understandings, we cannot construe the “reasonable person” in the position of the recipient of boilerplate in the way we formerly were able to construe the “reasonable person” in the position of someone who intended to accept an offer. It is now socially well known, especially by the firms deploying mass-market boilerplate, that boilerplate is not read and would not be comprehensible if it were. Indeed, the deploying firms often take steps to make it less comprehensible.<sup>27</sup> It is well known, too, that people do not properly

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<sup>25</sup> See, eg, David A Hoffman, ‘From Promise to Form: How Contracting Online Changes Consumers’ (2016) Temple University Legal Studies Research Paper <<http://ssrn.com/abstract=2724661>> accessed 18 November 2016.

<sup>26</sup> In fact, my view is that some remedial rights should be market-inalienable in the context of mass-market boilerplate. See s 2 (Core Contracts) above. Moreover, while getting rid of legal remedies is quite valuable to firms – or so we must infer because they deploy rights-deletion clauses so consistently – we recipients are subject to cognitive bias that makes us attach little value to legal remedies before we need them. See n 35 and s 7 (iv).

<sup>27</sup> cf Rory Van Loo, ‘Helping Buyers Beware: The Need for Supervision of Big Retail’ (2016) 163 University of Pennsylvania L Rev 1311 (collecting widespread “behavioral market failures” in sale of consumer goods).

estimate risks of harm to themselves. Indeed, a reasonable person in the position of the firm should be able to infer that recipients would *not* properly evaluate cancellation of legal rights.

In today's world, with respect to massively distributed boilerplate, I think we should accept that the doctrines that traditionally implemented objective theory are no longer presumptively relevant. The distortion of the traditional implementation of objective theory to make it apply to today's context erases the core requirement that free will of each party must reach consensus ad idem (bare-bones premise #3), because the distortion evades the willing basis of acceptance in the parties' actual communication including uptake of the meaning communicated. Routine use of objective theory to validate massively distributed boilerplate is a deformation of contract theory that is now analogous to a Ptolemaic epicycle.

#### (iv) Contract Doctrine's Exceptions

Meanwhile, over the years as so-called "adhesion contracts" proliferated, courts and commentators developed exceptions to the interpretation of the objective theory that would otherwise have imputed acceptance by recipients. Every once in awhile these legal actors find unconscionability or voidness as against public policy in an individual instance, often relying on "unexpectedness" of terms (regarded as harsh or unfair by the court), or "unequal bargaining power." It has been unclear what is meant by expectedness or bargaining power in this context. Lack of bargaining power is usually deployed without analysis.<sup>28</sup>

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<sup>28</sup> Lack of bargaining power might possibly encompass one or more of the following: (1) disparities in wealth; (2) disparities in knowledge; (3) cognitive deficits and biases; and (4) non-competitive market structures.

Wealth disparities: Lack of bargaining power would not normally be inferred just because there is a wealth differential between parties, but might be inferred when a recipient has very little wealth.

Knowledge disparities: Information asymmetry—that is, lack of knowledge on the

I am not sure whether the unpredictable occasional application of these exceptions fits my analogy with epicycles. Unexpectedness and lack of bargaining power operate to disallow an alleged contract rather than finding a way to recognize a contract. But the ad hoc application of these doctrines is nonetheless a stop-gap, designed to deal ad hoc with results that seem too far from justifiable contract enforcement. The appeal to unequal bargaining power, as well as to unexpectedness, may reflect a veiled realization that the alleged contract in question fails to meet the basic condition of autonomy required for contractual enforcement to be justifiable

(v) Contract without Clicking: Notice and Constructive Notice

Sometimes a firm wishes to hold recipients of its massively distributed boilerplate contractually bound to its digitally available terms even without the recipient's having clicked "I agree." Indeed, sometimes the firm wishes to hold a recipient to terms that the recipient did not

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recipient's side – can facilitate deception, and in the aggregate tends toward a race to the bottom. (In a competitive market those who offer better product attributes will not be able to survive if the customers cannot recognize and therefore pay for a better product.) See n 33.

Cognitive deficits and biases: We are all subject to cognitive biases, and firms tend to take advantage of them. (Again, in a competitive market firms might be forced to do so to stay viable.)

Non-competitive market structures: There may be only one firm accessible to customers that need the product; this happens in poor neighborhoods and therefore combines with the issue of wealth disparity. When all firms in a given market use the same boilerplate, that may seem like a non-competitive market structure. At least it seems like copycat boilerplate, and therefore most likely not arrived at by a process in which each firm determines what risk-avoidance it needs under its particular circumstances. Nevertheless, it could be argued that the identical boilerplate occupies the market because it is the best solution, so that it would be difficult to infer collusion without more.

These factors may often interact. I do not think we could at this point lay down a rule that all four of these factors (or others that may seem relevant) must be present in order to diagnose lack of bargaining power, or even that more than one of them must be present. The idea of lack of bargaining power is at least multi-faceted. Partly for this reason, and partly because lack of bargaining power is diagnosed case-by-case, I suggest that the appeal to lack of bargaining power of an individual under a contract paradigm could well migrate to deceptive or misleading behavior of a firm under a different legal paradigm, where a more generalized analysis might be possible. See s 7 (iv).

click on, did not see, and of whose existence he was probably unaware. (This scenario occurs when the terms are in “browsewrap”—an interior web page-- which the user did not click a link to open.) Here we observe a striking deformation: US courts seeking evidence of contractual behavior have devolved from looking for consent, to looking for notice, to looking for “constructive” notice to the recipient of the terms. For these courts notice means that the recipient saw or was aware of terms, not that she understood what they said; and “constructive” notice means the recipient was not aware that that were terms and did not see them, but somehow could have or should have done so. I regard this process of deformation as a process of normative degradation, meaning it gets farther and farther away from the normative basis of contractual obligation. It is analogous to an epicycle in the specific sense of contributing to the undermining of the very theory it is attempting to extend.

With regard to “constructive” notice in the context of browsewrap, we are of course in a realm of legal fiction. In this context, “constructive” notice means that a reasonable person in the position of the recipient (whose reasonableness is decided by the court proceeding) should have seen these terms. Constructive notice means the court will treat terms as-if seen, and when so treated as “seen,” the court will treat them as-if agreed to. This is a double “as-if” doctrine. For example, in the recent US case of *Nguyen v. Barnes & Noble* a consumer (Nguyen) wished to avoid a mandatory pre-dispute arbitration clause in a browsewrap so that he could bring a class action. A US federal appeals court framed the issue this way:

Nguyen contends that he cannot be bound to the arbitration provision because he neither had notice of nor assented to the website's Terms of Use. Barnes & Noble, for its part, asserts that the placement of the "Terms of Use" hyperlink on its website put Nguyen on constructive notice of the arbitration agreement. Barnes & Noble contends that this notice, combined with Nguyen's subsequent use of the website, was enough to bind him

to the Terms of Use.<sup>29</sup>

This form of reasoning illustrates how notice—and constructive notice—has become a part of the law of contractual validity and enforcement. This double “as-if” reasoning is an attempt to bring a new phenomenon, browsewrap, within a theory developed for a different phenomenon, bespoke contracts, at an earlier time. The reasoning attempts to square this double “as-if” constructive notice doctrine to the underlying normative theory of contract by supposing that plaintiff’s non-behavior is the same as the affirmative requirement of autonomous consent in that normative theory. Indeed, the single “as-if”—knowing terms exist but not reading them-- is similarly distorted; merely knowing that a list of terms exists does not mean that one contractually accepts them.

Perhaps realizing that mere notice—and a fortiori imputed notice -- does not equal consent, parties and courts that deploy these “as-if” doctrines include other circumstances to shore up the idea that notice equals consent. But those other circumstances are not related very closely (or even plausibly) to the conception of consent presupposed by the traditional justifications for contract enforcement. In fact, they seem arbitrary, as did the Ptolemaic epicycles. In the *Nguyen* case just quoted, the allegedly supporting circumstance was continued use of a website after the non-seeing of terms. For another example, after one has purchased a software product, one cannot open and use it unless one clicks “I agree” on the first screen, where the boilerplate is made available, and that click, together with proceeding to use the

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<sup>29</sup> *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1174-75 (9th Cir. 2014). *Nguyen* prevailed on appeal and may bring a class action. The court did not disavow the constructive notice doctrine, citing approval of it by various other courts. But, as many courts do when faced with such cases, the court found a way to avoid ruling for the defendant; it held that even “a conspicuous hyperlink on every page of the website” and “even close proximity of the hyperlink to relevant buttons users must click on” is “insufficient to give rise to constructive notice.” *Nguyen*, 763 F.3d at 1179.

product one has purchased, is deemed to constitute consent to unread terms. These methods of inferring contractual consent from mere notice or from “as-if” notice are far removed from the core meaning presupposed by the traditional contract theories that aim to justify State enforcement.

## 5. Defending Doctrinal Distortions

The doctrinal distortions used to validate enforcement of massively distributed boilerplate have elicited some attempts to defend them. Here I will mention only two primary lines of defense, which both depend upon generalized economic suppositions.<sup>30</sup>

Certain generalized suppositions of economic theory are thought to justify contract enforcement theoretically in simple cases, but would require empirical verification in particular complex market conditions. One such defense, which I will dub the “savvy sub-group defense,” postulates that even in mass-market boilerplate cases, a savvy subgroup of consumers in a market will be able to place an appropriate value on the product, with the cancelled rights taken into account, and the amount this savvy group is willing to pay will set the market price; that others in the market will benefit; and, indeed, that those without knowledge will be cross-

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<sup>30</sup> Another defense that is frequently heard is more like an excuse: we need such boilerplate to be valid, so we should tolerate the distortions. For example, one contract theorist writes that we should accept a “shortfall in consent,” because “making too many commercial transactions subject to serious challenge on consent/voluntariness grounds would undermine the predictability of enforcement that is needed for vibrant economic activity.” Brian Bix, ‘Contracts’ in Frank G Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2010). How does the author know whether economic activity is more “vibrant” with or without a specific level of boilerplate enforcement? Or does the author want to advocate that less “fit” with the criteria of contract will still justify enforcement under contemporary circumstances? This type of elision of argument seems like being too quick to say one’s spade is turned.

subsidized by those with knowledge.<sup>31</sup> Such a defense erases autonomy for the non-savvy majority by imagining what they supposedly would have done if they were “rational” economic actors--that is, this is an "as-if" defense.

Moreover, the savvy sub-group defense fails on its own theoretical efficiency terms. It might apply to particular markets, but it is stretched beyond its capacity when it attempts to justify mass-market boilerplate in general. That is because this defense rests upon blanket empirical assumptions that cannot apply across the board. Its applicability depends upon the competitiveness of each particular market, the degree of difficulty of market segmentation in each particular market, and (probably most important) the absence of significant information asymmetry between the firm and recipients in each particular market. All of these empirical assumptions are likely to be false in many markets in which boilerplate is deployed.<sup>32</sup> Many firms that deploy boilerplate possess significant market power. Market segmentation is very common, especially by type of customer (for example, students vs professionals), which may mean that the savvy customers will fare better than the non-savvy customers. In many markets in which boilerplate is deployed, there is significant information asymmetry (meaning that recipients do not understand the boilerplate as well as the firms do, and there is no savvy subgroup).<sup>33</sup>

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<sup>31</sup> See Alan Schwartz and Louis Wilde, ‘Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis’ (1979) 127 *University of Pennsylvania L Rev* 630.

<sup>32</sup> See, eg, Bakos, Marotta-Wurgler, and Trossen (n 24).

<sup>33</sup> In fact, information asymmetry can lead to a race to the bottom. Buyers whose information is “asymmetrical” with that of the firms will overpay for worse products, or will not pay more for products that actually would be worth the price in higher value to them. If this happens, firms wishing to supply the better quality products will be forced to lower quality or exit the market.

Another defense based upon economic suppositions suggests that firms desire above all to avoid harm to their reputations, so that they would be unwilling to deploy any boilerplate that their customers find distasteful. Therefore, it is common for law-and-economics writers to assume that any boilerplate prevalent in the marketplace owes its prevalence to the fact that it is acceptable to those who receive it.<sup>34</sup> It is acceptable to the firms that deploy it. But it is a distortion to suppose that it is acceptable to recipients, because we cannot assume that market prevalence reflects acceptance in the sense relevant to contract. If a market is not fully competitive, the fact that recipients receive particular terms does not signify they accept them in that relevant contractual sense; nor does recipients' likely failure to have apprehended what the terms actually say signify that they accept them in that sense.

It is true that firms in general care about their reputations. But how much they care depends (inter alia) upon whether or not they are monopolists or have significant market power. In the US, for example, it seems that major cell phone service providers and major cable TV providers do not care about their reputations to any great extent. Moreover, the fact, if it is a fact, that firms' reputations are not destroyed when recipients' rights to legal remedies are destroyed may seem to be efficient for firms; but—even if we stick to the economic style of justification—that does not make it efficient for society.

Yet it may indeed be true that recipients of boilerplate often accept terms that contain deletions of their legal rights without caring that that is happening—even if they somehow know what the boilerplate is doing, which is apparently not the case very often. We are cognitively

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See George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *The Quarterly Journal of Economics* 488.

<sup>34</sup> See, eg, Douglas G Baird, 'The Boilerplate Puzzle' in Omri Ben-Shahar (ed), *Boilerplate: The Foundation of Market Contracts* (CUP 2007) 131.



wired in such a way that we do not think *ex ante* that we will need to exercise legal rights.<sup>35</sup> Recipients of boilerplate do not feel injured at the time that they receive the boilerplate, even though some unlucky ones will later get hurt. Firms that cancel legal rights in broad swaths of the public can and do take advantage of cognitive biases. The practice of canceling such rights is thought to be profitable for the firm. That is why firms are making customers pay with rights deletions in addition to the asking price in money. To the extent firms are doing this, then a firm that does not adhere to the practice of rights deletion will, in a competitive market, probably fall by the wayside.<sup>36</sup> Thus, the practice of rights-deletion proliferates, and so does the practice of delivering more and more broadly worded boilerplate.

Contrary to an over-simplified neo-Benthamite view, the fact that individuals by and large do not “subjectively” value legal remedial rights before they need them (that is, at the time they receive the boilerplate accompanying a purchase) does not mean that such rights are not valuable to individuals. We never know which of us will need to use them, and our estimations about whether we will ever need them are often sorely mistaken. Remedial rights are valuable to everyone, not only to individuals that do not value them before needing them, but also to a firm that tries to erase the remedial rights of others while retaining its own. That is because such rights are basic to a regime of justifiable contractual enforcement. They are basic to the protection that individuals have entrusted to the State, and they are also basic to firms’ ability to

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<sup>35</sup> We are often likely to think that accidents and deceptions and even rip-offs happen to others, but not to ourselves, because cognitive biases may prevent recognition of danger. The relationship of cognitive deficits to recipients’ valuation of legal rights is more complex than this, though I cannot elaborate here. For example: Certain rights, such as copyright, are salient to certain customers, such as artists or photographers; and certain cognitive biases cut the other way, when we see more danger than there actually is, such as overestimating the risk of airline crashes (while underestimating the risk of driving on worn-out tires); and parents are possibly not as willing to delete rights belonging to their children as they are to delete their own rights.

<sup>36</sup> See n 33.

trust in the system of contract law. Firms should not themselves be free to rely on legal infrastructure to their own advantage while undermining its trustworthiness for others. If many firms do this, the trustworthiness of the system is weakened, and if most do it, the system collapses.

With regard to these attempts to justify practices involving massively distributed boilerplate, I submit that they do not turn mass-market boilerplate rights deletions into contracts in the normative sense that is required for justifiable enforcement as contracts. (Perhaps some boilerplate can be enforceable under other legal rubrics than contract, but that is a different question.)

#### 6. A caveat

It is time for me to pause for a caveat. I am not arguing against standardization, nor am I arguing against all standardization in the field of contracts. Standardization came to us with industrialization and it is proceeding further in the information society. Standardization is here to stay.<sup>37</sup> Yet standardization in massively distributed boilerplate carries with it issues that are not present, or at least not so much present, with digital deployment in other fields of law, and not so much present in standardization of products, whether tangible or intangible. In

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<sup>37</sup> It is a good thing that spare parts are standardized and ready to hand; no one wants to go back to the situation giving rise to the problem in *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145, where a spare part (a replacement mill shaft) had to be constructed by hand. In general, no one wants to go back to a pervasive non-standardized economy (except perhaps in fantasy), and such an economy cannot be recovered in any case. Standard form contracts have been with us long before the impact of the digital networked environment, beginning with insurance policies about a century ago. But as I am stressing here, in the information technology world their use has exploded. It is now necessary to figure out how to deal with the explosion without losing principles of equal treatment and the rule of law that underlie the institution of contract.

conjunction with the vast increase in use and distribution enabled by the digital networked environment, standardization has given rise to the difficulties I am analogizing with epicycles because of the stretches or distortions that are required in order to fit these practices with the principles of justification under contract. It will be necessary to find a way for the legal system to deal with these practices more straightforwardly, and to disallow enforcement in situations where enforcement does not fit the underlying justification, especially where enforcement on a mass-market basis would in fact undermine the institution of contract.

That does not by itself mean that these practices must all be halted. We could, instead, devise a different way to defend some of them within contract law. Otherwise, to the extent that these practices continue, and justification of them is sought, they, or at least some of them, should be regulated under principles other than traditional contract law.

## 7. What Is To Be Done?

The first answer to such a question could be, “Nothing.” What is wrong with allowing the meaning of “contract” to change with the changing times? Why not allow implementations of machine rule to be called contracts? When I taught property, I used to say “The words stay the same, but the meaning changes under them.” We still have landlords and tenants, even though we no longer have ceremonies of fealty and tenancy by knight service. Yet it should be understood that when we keep the same words but the linguistic meaning evolves, the legal meaning--the legal context-- also evolves along with it. Even though we still have landlords and tenants, their relationship changed from a status regime, to a contract regime, then to a very different contemporary hybrid regime of both contracts and status, regulated both by statutes and

contractual interpretations consonant with contemporary social and economic conditions.<sup>38</sup>

(i) Back to the Issue of “Fit”

If we still wish to apply traditional contract theories to contemporary practices, then it is not the word “contract” that matters but rather the “fit” between the justification these theories supply and the features of current practice. Questions of justification and “fit” cannot be decided by linguistic cultural conventions. For instance, to call someone a landlord does not revive livery of seisin. The unreflective use of the label “contract” to refer to the contemporary phenomena I have described is therefore something that requires more careful thought and attention. Yes, we could say the word “contract” for entitlement transfers that are not within the traditional justification of contract, but if we do, we can no longer assume that traditional contract theories justify their enforcement.

Ultimately, to address the changing times, we will need a new theory, with different cultural assumptions and normative underpinning, and a different backdrop of State enablement and oversight. We could search for an entirely new theory of contract, not based on eighteenth-century visions of individual autonomy, and not based on the classical liberal justifications of State power. That is a project I would love to see, but it is not a project for this Lecture. It has yet to be fully imagined.<sup>39</sup>

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<sup>38</sup> Legal systems long ago progressed to a contract regime from the status regime in which the law of landlord and tenant originated. The legal system abandoned such background rules as the independent covenant to pay rent and the idea that the landlord could use all kinds of self-help if a tenant did not pay. Over time the legal system arrived at background rules suited to contemporary life, including, at least for residential tenancies, market-inalienable rights such as prevention of retaliatory eviction, an implied warranty of habitability, and even (in some instances) statutory rent control and other rules such as return of deposits.

<sup>39</sup> The idea of contract as empowerment, assimilating contract to contemporary philosophical investigations of human empowerment and the moral ideal of equal respect for persons, holds promise. See Robin Kar, ‘Contract as Empowerment’ (2016) 83 *University of Chicago L Rev* 759, 763.

Meanwhile, awaiting the emergence of a theory of justification that fits the social, economic, and technological conditions of the contemporary world, I think we can ignite some salutary thoughts by ceasing to label a process of entitlement shifting as contractual when it deviates too far from the underlying justification for traditional contract enforcement. What is “too far”? I have not offered a comprehensive theory that would determine exactly when deviation is too far, and I recognize that the “fit” between theoretical justifications and practices is not always perfect. Nevertheless, as I mentioned earlier, I believe that we can begin by recognizing that some entitlement shifting practices—for example, PNTL-- are not within the compass of the justification of enforcement as contracts.

(ii) Reserving the Term “Contract” for Practices that Fit the Accepted

Justification

Perhaps we have reached the point where we should reserve the term “contract” for the practices that do fit the underlying justification embodied in the legal system: bespoke contracts and perhaps high-end boilerplate (or some instances of it). Perhaps at the same time we could examine more closely the distinctions among different boilerplate clauses, different classes of recipients of boilerplate, different market conditions. Such closer examination would require considering massively distributed boilerplate practices in the context of justifiable State enforcement, and the concomitant duties of the State in setting up and maintaining the infrastructure of legality that the information society now requires.

Perhaps the clearest case of clauses that should be held unenforceable are those that would use contract to undermine the legal infrastructure of contract itself, such as massive deletion of legal remedies. After all, undermining the legal infrastructure of contracts is not ultimately to the advantage of firms or to the advantage of trustworthy market trading in general.

A firm may be hypocritical in seeking to use contract to its own advantage in a way that undermines contract for others. Or a firm may be subject to market pressures to do this. Once the practice has been begun by other firms, the process snowballs, and becomes a process of democratic degradation.<sup>40</sup> At any rate, given that individual firms would probably not be motivated to protect the legal infrastructure on their own, action by the State would be required.

Further, we should examine more carefully when notice is actually received as communication and when it is not. Perhaps we could examine what types of provisions are socially understood and not subject to stubborn cognitive biases.

These are preliminary suggestions only. But pursuing them does indeed require relinquishing any easy reliance on the doctrines and theories I have analogized to the epicycles that were once used to shore up the earth-centered theory of the universe, but eventually helped to subvert it.

Much of contract theorizing at present presupposes a shared set of background assumptions in which bilateral agreement between autonomous parties is the central feature.<sup>41</sup> Without denying the depth or usefulness of this literature, I offer tentatively the suggestion that it may be preferable, in search of (or awaiting the emergence of) a new paradigm to move beyond

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<sup>40</sup> By democratic degradation I refer to degradation of the basic features of liberal democratic ordering. See Radin, 'Boilerplate: A Threat to the Rule of Law' (n 6). (If an elected body's members are captured by immense donations from billionaires, then the fact that that body routinely votes mainly for enactments that these donors desire is still a form of democratic degradation.)

<sup>41</sup> Those are the practices that are discussed in much of contract theory scholarship. However, reasonable theories of contract are contestable and indeterminate. Martijn W Hesselink, 'Democratic Contract Law' (2015) 11 *European Review of Contract Law* 2. Those contract theorists considering primarily bespoke contracts— actual bilateral agreements— have plenty of room for argument, such as: whether or not contract is promissory in nature; whether or not entitlement transfers from offeror to offeree at the time agreement is reached, or not until later; whether the appropriate remedy for breach is specific performance, or expectation damages, or other.

the traditional interpretations that have inspired the doctrinal distortions I have examined. As an initial inquiry, we might ask whether contracts containing terms that purport to undermine or cancel the ways a contract is typically thought to be enforceable should be understood as defective contracts.<sup>42</sup>

### (iii) Transactional Disclosures

Although I think we could consider some purported contracts defective, I think we should go further and drop the term “adhesion contract” for massively distributed boilerplate. We could refer to the terms delivered in such boilerplate as simply disclosures, perhaps “transactional disclosures.” Or indeed “attempted transactional disclosures,” for situations in which we find that attempted communication does not register with the recipients, whether because of cognitive biases, receiving too many of these things to read, or for other reasons.

A theory developed by law-and-economics scholars can be characterized as moving toward such an equation between contract and disclosure, although without ceasing to use the term “contract.” The idea is that a customer is purchasing a composite: an item (such as a computer) together with the terms that come with it.<sup>43</sup> If we call this composite item-plus-terms

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<sup>42</sup> If a contract is found to be defective, it is not necessarily thereby invalid as a transfer. Instead, the parties’ rights could revert to the background legal infrastructure. A buyer would receive the printer cartridge he wished to purchase, and the seller would receive the purchase price, but would not receive purchase-price-plus-rights-deletions. For a bit more discussion of defective contract, see s 7 (iv) para 8.

<sup>43</sup> See Baird (n 34). Although I have previously dubbed this theory the contract-as-product theory, I now want to rename it the composite product theory. See Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (n 6) 99-109. “Composite product” theorists tend to adhere to the “savvy subset” assumption about recipients. Their idea is that the “savvy” subset of the buyers in a market will take into account the speed of the processor and other physical attributes together with the choice of forum clause and other non-physical attributes, thus arriving at the appropriate market price. The non-savvy customers will benefit from the knowledge of the savvy ones (cross-subsidized, in the language of law-and-economics). There is

a product, then we should admit that the product could be defective. Thus, we could look at some instances of massively distributed boilerplate as part of a defective product, the part that renders the composite product defective. If we accept the composite product theory, there is no need to keep referring to the set of clauses that are now part of the product as a “contract.” The terms that are part of the product could just as well be called disclosures.

There’s a certain truthful relief to calling boilerplate texts “disclosure,” because that is what boilerplate is in fact to most recipients; the fine print discloses what one’s rights are (and aren’t).<sup>44</sup> Moreover, perhaps the idea of disclosure would be less resistant than is the idea of contract to changing the regulatory regime. Regarding the fine print as disclosure could result in more substantive regulatory limits on the features of such (amalgamated) products; it could make the importance of understandability by consumers more salient. It might allow for regulations that require firms to disclose to recipients the background conditions for enforcement by the State.

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plenty to criticize in this theory. See s 5 (ii). For one thing, as I mentioned earlier, it erases the autonomy of the non-savvy customers. Plus, the “savvy” subset seems to be largely illusory, at least in markets that have so far been studied. See, eg, Bakos, Marotta-Wurgler, and Trossen (n 24). The theory makes blanket assumptions about market competitiveness and information symmetry, which are probably not accurate for the markets in which massively distributed boilerplate is prevalent.

<sup>44</sup> A recent psychological experiment consisted of a questionnaire in which some subjects received a text as a “contract” and others received the same text only as a policy disclosure, a non-contractual document. The text was structured to create a plausible complaint against the drafter. The experiment found that “Policies or rules promulgated in the form of contract, whether or not that contract is read or is intended to be read, look and feel legitimate. People feel more bound, legally and morally, by policies that they agreed to, in the thinnest sense, even if the policies are clearly burdensome or problematic or otherwise unfair.” Tess Wilkinson-Ryan, ‘The Perverse Behavioral Economics of Disclosing Standard Terms’ (2016) 1633 Penn Law Legal Scholarship Repository <<http://ssrn.com/abstract=2738567>> accessed 5 December 2016. It seems here that labeling a text a contract tends to legitimate it for recipients. Of course, if this experiment turns out to be representative of most delivery of boilerplate, we ought to ask the law to make clear that merely labeling a delivered text a contract does not make it one.



If transactional disclosures cease to be regarded as “contracts,” the legal backdrop involving individual autonomy and a consensus ad idem is likely not the way issues would be framed. It might be easier to administer a system without having to investigate all those “as-if” arguments.<sup>45</sup> Legal actors would be freed from asking, case-by-case, whether a particular text was unexpected and whether it would have been seen by a reasonable person, even if not by the very person who seeks legal redress. Freed from contract, we might develop a law of misleading or deceptive disclosure.<sup>46</sup> Indeed, there is already law about misleading or deceptive disclosure in other portions of the legal universe. Massively distributed boilerplate could leave its current legal family and join another.

(iv) Other private law avenues of approach

If aspects of such boilerplate transactions are better understood as cases of information disclosure than contract, then we could turn to tort as the law that governs misleading disclosures. It is not a radical thought that a practice once thought of as contractual could migrate to tort as the world changes; particularly when the practice has become more widespread and has metamorphosed into mass-market identical instances of terms rather than one-to-one agreements.

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<sup>45</sup> See s 4 (v). The “as-if” questions that devolve from the contractual framework of consent-- Was there constructive notice or was the digital link too far away from where the customer could have seen it but did not?— are awkward for the legal system. They force judges to argue among themselves about the location of a box on a screen, and how close it is to some text they think a user would or should have seen, although she did not.

<sup>46</sup> Or useless (attempted) disclosure. Omri Ben-Shahar and Carl Schneider explain in copious detail why disclosure does not work (when mandated by the government); that is, disclosure fails to succeed in communicating particular things sought to be disclosed to recipients. Ben-Shahar and Schneider, *More Than You Wanted to Know* (n 24). Ben-Shahar and Schneider did not discuss the fact that disclosure also does not work when presented by firms themselves (a practice these authors still consider “contractual”). But the facts Ben-Shahar and Schneider marshalled about the failure of disclosure apply equally to those (alleged) contracts.

Indeed, that is what happened to warranty.

What happens if we were to consider massively distributed boilerplate as part of a possibly defective product? If we start thinking of some kinds of mass-market boilerplate rights deletions within a tort compass, we might also start asking when mass-market boilerplate deployment is deceptive. Tort law protects not only against injury caused by negligent (or worse) behavior, but also against deception that causes harm. Are companies that deploy mass-market boilerplate rights-deletion clauses engaging in a deceptive practice?<sup>47</sup>

Considering in a tort context what makes a product defective, or what makes a text misleading, might have the useful effect of asking courts to pay more attention to how humans process texts and how actual uptake of information does or does not take place.

Consider an analogy with deceptive advertising. Businesses can be held liable in tort for unfair competition if they employ bait-and switch tactics, hide fees and surcharges, manipulate measuring units, use oversized packaging, use misleading illustrations, and anything else that deceives consumers. Consumers' misunderstanding of an advertisement may sometimes be considered deceptive even if the business did not deploy deceptive tactics on purpose. And I believe that implicit in the idea of liability for deceptive advertising is the understanding that large numbers of people may be deceived, because advertising is often a mass-market phenomenon.

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<sup>47</sup> An objection to a tort of intentional deprivation of core legal rights is that if a court were to remedy the problem by deleting the offending clause, the firm's attempt to perform a tortious act would be ineffective. Stephen Waddams, 'Review of *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* by Margaret Jane Radin' (2014) 53 *Canadian Business Law Journal* 477. But would attempting a tortious act and having the attempt thwarted necessarily not be tortious in its own right under these circumstances? Even if this is not the case, it is important that the other thousands of people that had been made subject to the clause would know that it would not be enforced against them.

By analogy, there is a good case for finding businesses that deploy some types of mass-market deceptive boilerplate to be liable in tort. With fine print, it is not merely the case that the customer will make a mistake about the actual price of a product or service. (Although we must recognize that mischievous food or drug advertising can hurt or even kill people.) With fine print rights deletions, those who lose their right to pursue legal recourse may lose their homes or have to forego necessary medical care. They may find themselves or their children negligently injured by a firm whose boilerplate clause excluding liability has diminished its response to the deterrence that the law is supposed to provide.

Can mass-market deployment of boilerplate rights deletions be considered deception when the boilerplate is not even read? Can a person be deceived by a text of which she is unaware? I think the answer to this question must be “Yes.” Unlike with deceptive advertising, a primary deception with mass-market boilerplate rights deletions is the fact that rights are being erased without the customer’s knowledge. The deception in this situation is a mistaken belief, common to many customers, that a business would not use indecipherable boilerplate to divest core rights. Thus, the business is in effect charging a misleading price. The recipient will most often think she is trading only money to the company in return for her purchase, but she is really trading money plus valuable rights—and indeed rights that may be market-inalienable under these circumstances.

Moreover, there is now ample psychological evidence that individuals are unable to reason well in certain circumstances. Our cognitive biases cause us to be easily misled or deceived in certain ways. Advertisers have long understood this, and they often play to the non-rational whims of our brains. Businesses other than advertisers also know about cognitive biases. They learned by honing successful practices and dropping unsuccessful ones long before

the field of neuromarketing began to be taught in business schools. I think it is an easy surmise that knowledge of cognitive biases (vagaries of our brains) developed for advertising is also being put to work in the deployment of boilerplate rights deletions. Because of cognitive bias, we do not usually consciously value our core right to redress of grievances until we need it. At the same time, the fact that companies are massively deleting these rights shows that they are valuable to companies; that is, it is valuable to a company for consumers not to have such rights.

Why should we consider various tort approaches rather than implementing general governmental regulation? The deceptive practices that have been squeezed into contract law originated and proliferated primarily in the US, but they are important to other countries too because trade is international. The US is allergic to generalized regulation. My tentative private law suggestions--including questioning whether particular terms render an alleged contract defective as a contract; and considering deceptive or defective disclosure under other legal regimes; and encouraging more probing and specific questions--may be more feasible in the US than overarching regulation. (Though not all that feasible at present writing.) The rest of the developed world would (I think) consider generalized regulation by the State to be the proper solution to curtailing the practices that are unfair, deceptive, or undermine the State's legal infrastructure. It seems clear that that is the path the European Union has taken,<sup>48</sup> and the same is true for Australia<sup>49</sup>, and several Canadian provinces.

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<sup>48</sup> The EU's initial regulation was the 1993 Directive on Unfair Terms in Consumer Contracts. As explained by Hesselink, in spite of controversies, the regulation of consumer dealings has become more far-reaching and inclusive over time: "The bulk of EU contract law is consumer law... Consumer contract law is predominantly consumer protection law. And given that most of EU contract law is consumer law, this means that most of EU contract law has a protective aim." Hesselink (n 43) 11-12.

<sup>49</sup> In 2011, Australia replaced its previous piecemeal consumer law with a comprehensive overarching federal law, the Australian Consumer Law (ACL). See *Competition and Consumer*

Still, I think it may be theoretically preferable to recognize that overarching regulations like these may not be regulating “contracts” at all. At least in the context of mass-market consumer transactions as they arise in the information society, the “contract” label could hamper consideration of the broader purposes of the regulatory regime. Those purposes go beyond the idea of willing transfer of entitlements between two individuals to encompass broader principles of preventing unfair, deceptive, or undemocratic practices.

## 8. Conclusion

Contract came of age under one set of social conditions but has more recently been adapting—or failing to adapt—to a set of technological and social conditions that are increasingly far removed from its origins. So which is it? Adapting or failing to adapt? Of course the answer must be some of each. Yet I believe that the unreflective use of contractual terminology to refer to interactions increasingly removed from the core justification of contract enforcement has obscured the nature of some significant developments in the information society. I therefore propose, at minimum, that we should be more careful with our use of the term “contract,” and, further, that certain events now regulated under traditional contract law should be regulated in a different way.

The technological and social features of today’s information society have enabled private firms to engage in massive re-organization of legal rights in their favor. Individuals have been inundated with texts purporting to bind them to contractual terms, but which they do not read or

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*Act 2010 (Cth) sch 2.* Among other things, it provides for very stiff penalties against firms that use unfair boilerplate clauses against consumers, broadly defined.

understand. Procrustean interpretations and distortions of the traditional contract theories embedded in the law have masked or mischaracterized these processes. Perhaps a new paradigm of contract justification will emerge to fit the new conditions. In the meantime, we should be explicit about the lack of fit between traditional contract theories of justification and some of the current practices dubbed “contractual,” and we should at least take more care about what we are willing to recognize as a contract. We should consider regulating mass-market rights deletions by legal means other than contract, in order to reaffirm the role of the State in providing for equal treatment of its subjects under the rule of law, and preventing unfair, deceptive, or undemocratic practices.