THE BENEFIT OF THE BARGAIN

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Contract law has lost its way. Designed as a way to allow people to agree, it has over time become a means for large businesses to unilaterally impose terms and conditions on others. Ironically, courts are more willing than ever to defer to the words of those documents even as the documents are less and less likely to reflect any agreement between the parties. That deference is not justified by the realities of modern contract law. We have a set of default rules for contracts in the Uniform Commercial Code and the common law of contracts. Parties can and should be able to agree to change some (though not all) of those rules. But doing so should require a mutual intention to do so. And in the modern world most contracts don't involve any actual agreement.

I propose a presumption that standard form contracts are subject to and cannot vary the default rules of contract law. The parties can vary those rules only by express agreement and only when the parties make an informed choice to do so. Except in a negotiated contract setting between sophisticated parties, that informed choice should require the party offering the form contract to offer a choice between their proposed terms and the basic default rules of contract law.

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INTRODUCTION

Contract law has lost its way. Designed to allow people to agree, it has over time become a means for large businesses to unilaterally impose terms and conditions on others. In large part this is a function of a fundamental change in how we contract. A canonical contract as we teach it in law school is a written agreement negotiated between two sophisticated parties.[1] But in practice that has long been the exception, not the rule. People have always entered into agreements without reducing them to writing. Even when there was a written agreement, it often covered only a few essential elements on which the parties agreed. For most of history, for most deals, and even for most written contracts, the rules of the game were not set by the document itself but by the background customs and norms, the expectations of the parties, or the default rules of contract law.[2]

Over time, and for a variety of reasons, contracts have become more fully specified in written documents.[3] Things that used to be oral deals are increasingly written down. Things that are written down are increasingly long, lawyerly documents that claim to be the full agreement of the parties. Those long, lawyerly documents are increasingly produced not by negotiation between lawyers, but in standard forms written by lawyers for one side that are not subject to change and must be agreed to on a take-it-or-leave-it basis. And that "agreement" is increasingly itself a fiction, manifested not by signing a piece of paper or even clicking a button but by taking ordinary acts like visiting a website or even continuing to use a product you bought years ago.[4]

The result is that society has lost the "benefit of the bargain" contract law once promised. Informal deals backed by understood legal

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1. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 562 (2003).

2. *See* Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 452 (2013) ("Contract law is applied countless times every day, in every manner of transaction large or small. Rarely are those transactions reflected in an agreement produced by a lawyer; quite the contrary, almost all contracts are concluded by persons with no legal training and often by persons who do not have a great deal of education.").

3. H.B. Sales, *Standard Form Contracts*, 16 MOD. L. REV. 318, 318–22 (1953) (describing how the use of form contracts in writing grew in the early to mid-twentieth century to displace common law in situations with unequal bargaining power).

4. *See infra* Section I.B.2.

rules and norms have been replaced by long legal documents written by one side and not subject to negotiation or revision. Not surprisingly, those terms reflect the interests of the parties who wrote them. And the reach of those documents has broadened dramatically, to the point where the average citizen might enter into a dozen or more contracts in a day, binding themselves to hundreds of pages of legalese, often without having any idea they are doing any such thing.

Ironically, courts are more willing than ever to defer to the words of those documents even as the documents are less and less likely to reflect any agreement between the parties.[5] That deference is not justified by the realities of modern contract law. We have a set of default rules for contracts in the Uniform Commercial Code (U.C.C.) and the common law of contracts. Parties can and should be able to agree to change some (though not all) of those rules. But doing so should require a mutual intention to do so. And in the modern world most contracts don't involve any such actual agreement.

I propose a presumption that standard form contracts are subject to and cannot vary the default rules of contract law. The parties can vary those rules only by express agreement and only when the parties make an informed choice to do so. Except in a negotiated contract setting between sophisticated parties, that informed choice should require the party offering the form contract to offer a choice between their proposed terms and the basic default rules of contract law. Any proposed variant in terms in consumer contracts would have to offer the normal background rules of contract law as an option. Want your customers to agree to terms that vary from the norm? You'll have to offer them other terms that they like well enough to pick your contract over the default. Requiring that choice will reduce the reflexive use of form contracts and the use of one-sided terms in those contracts. I call this proposed requirement "actual choice."

In Part I, I discuss contract law's dramatic shift away from agreement. In Part II, I explain why this is problematic. In Part III, I suggest that an agreement to change the default rules of contract law should require agreement and a real choice. Finally, I consider some objections and ways companies might try to evade or game the system.

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5. *See, e.g.*, Sales, *supra* note 3, at 321 (generalizing that there is a tendency for courts to treat written contracts as binding whether or not both parties are aware of their effects).

I. THE DEATH OF CONTRACT[6]

A. Contracts as a Social Process

The basic principles of contract law are well-known and long-established. Two parties agree to exchange things they value. One makes an offer, the other accepts, and they exchange valuable consideration.[7] Lawyers tend to think of contracts as signed writings—legal documents with talismanic significance. But outside of a few specific categories,[8] contracts do not have to be in writing, and historically most of them weren't. If you went to the grocery store, the bookstore, or the shoe store, bought gas, got a massage, or did any of a thousand other things, you entered into a contract. But you didn't sign a contract governing the purchase of an apple from the grocery store. It didn't come with terms and conditions. Instead, the parties agreed—sometimes explicitly, sometimes implicitly—on a few basic things: you get an apple, and the grocery store gets some money.

Those aren't the only parts of the deal, though. There are a number of implicit norms and rules. You get to keep the apple; you don't have to give it back. You can sell it to other people. You can tell people where you got it. If it makes you sick, you may have the right to sue. You don't get to come back and get a new apple every week. The price included a sales tax, which the grocery store agreed to pay to the appropriate tax authority. None of these rules were agreed to, in writing or otherwise. They form the background norms of contract law. And many of them come from other doctrines—property, tort, or IP law, for example. As long as the parties agreed to the basic exchange—an apple for money—the law has been willing to fill in any number of terms that the parties didn't care to bargain over (or even think about). Indeed, courts have even been willing to enforce a contract that doesn't specify the price; for

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6. With apologies to Grant Gilmore who had a different death in mind. GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K.L. Collins ed., 2d ed. 1995). *But cf.* Gil Grantmore, *The Death of Contra*, 52 STAN. L. REV. 889 (2000) (noting the "death" of the introductory signal *contra*, which has since returned to the Twenty-First Edition of the *Bluebook*—so perhaps contracts, too, can be revived).

7. 17 AM. JUR. 2D *Contracts* § 18 (2023) (listing essential elements of a contract as "offer, acceptance, and consideration"); *see, e.g.*, *Goodman v. Physical Res. Eng'g, Inc.*, 270 P.3d 852, 855 (Ariz. Ct. App. 2011) ("For a valid contract to have been formed between them, there must have been an offer, acceptance of the offer, and consideration.").

8. The Statutes of Frauds require six categories of contracts to be in writing: promises by executors to pay estate debts; promises to act as a guarantor of debt; promises that involve marriage as consideration; bilateral contracts that cannot be performed within one year; the sale or transfer of land; and the sale of goods above an amount fixed in the U.C.C. § 2-201 (AM. L. INST. & UNIF. L. COMM'N 2020). 9 WILLISTON ON CONTRACTS § 21:4 (4th ed. 1993).

the courts themselves will decide how much the product costs if the parties haven't.[9]

These background terms come from a variety of sources. They may come from evidence of what the parties intended, from a course of prior dealing between the parties, or from industry custom—how similar parties behaved in the past.[10] They may also come from the common law, as court decisions interpreting incomplete contracts supplied reasonable terms that then became standard precisely because courts had blessed them.[11] Those common law rules in turn were quasi-codified in the Restatement of Contracts, which sets out background norms and assumptions not just for when contracts are enforceable but also for how to decide what terms to include.[12] For many forms of contracts, including contracts for the sale of goods, leases, security interests, and others, the U.C.C. codifies many of the terms that will be part of any contract.[13]

These rules are mostly (though not entirely) default rules. Parties can agree between themselves to change many of them, just as I can decide to pay an above-market price for an apple. But the U.C.C. limits the parties' ability to make those changes. It forbids certain kinds of deals altogether—contracts made under fraud or duress, or contracts with sufficiently unreasonable terms.[14] It imposes procedural restrictions on changing other rules.[15] And it applies different rules to consumers than it does to sophisticated parties.[16]

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9. At common law, an agreement omitting the price and without a definite method for ascertaining a price was void and unenforceable. Today, § 2-305 salvages a contract lacking a price term if the parties intend to be bound by it. The courts will imply a reasonable price term. U.C.C. § 2-305 (providing for "reasonable price at the time for delivery" if contract has an open or missing price term); *see also Fischer Imaging Corp. v. Gen. Elec. Co.*, 187 F.3d 1165, 1169 (10th Cir. 1999) (holding a jury should determine reasonable price for medical imaging devices).

10. *See generally* Lisa Bernstein, *Custom in the Courts*, 110 NW. L. REV. 63 (2015) (describing and conducting an empirical study on how the U.C.C. looks to industry custom using the "incorporation approach" to fill contractual gaps).

11. Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV 1523, 1523–27 (2016) (describing how courts traditionally filled incomplete contracts by reference to the common law, how reformers tried to replace that with the Restatements and the U.C.C., and how the common law has nevertheless persisted).

12. *Id.*

13. *See, e.g.*, U.C.C. § 2-314 (implied warranties); *id.* § 2-311 (specifications are at the buyer's option); *id.* § 2-513 (buyer's right to inspection on delivery).

14. *See, e.g.*, U.C.C. § 2-302 (contracts are unwaivably invalid for unconscionability); *id.* § 2-718 (parties can't set liquidated damages higher than the anticipated or actual harm).

15. *See, e.g.*, U.C.C. § 2-316 (to waive a warranty of merchantability "the language must mention merchantability and in case of a writing must be conspicuous").

16. *See, e.g.*, U.C.C. § 2-207 (requiring merchants to undergo extra steps to not have proposals become part of the contract).

The result is that contract law has traditionally been not just private ordering but a social process that structures and supplements what the parties agree to.[17] Two willing participants can decide together to do or not do most any lawful thing they want. But if they want it to be a *contract*—if they want to bring the power of the law to bear to enforce a deal or seek damages for its breach—they must buy into a set of rules and default terms determined not by the parties themselves but by legislators, courts, and industry norms. That has been the practice as long as courts have been enforcing contracts, and it underlies a large part of the U.C.C. and the Restatement.

B. The Modern Irrelevance of Contract Law

All this law is increasingly irrelevant in the modern world, however. Two developments, one in business practice and one in legal doctrine, mean that, as a practical matter, what we call contract law rarely has much to do with anything our forebears would have recognized as either a contract or as law.

1. STANDARD FORM CONTRACTS AND THE RISE OF THE WRAP LICENSE

The first development is the ubiquity of the "standard form" contract. As noted above, most enforceable contracts traditionally didn't require any writing at all.[18] The exceptions were things like the sale of land and transferring property by will, which were thought to be sufficiently important and subject to dispute that a written record was a good idea.[19] Even then, the contracts rarely specified all the terms or issues that might arise. It was only the critical fact of the transfer itself that needed to be in writing.[20] The parties depended on the common-law background norms to fill in gaps.

Some complex commercial contracts were also traditionally written down, perhaps because of the risk of dispute but also because of their

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17. *See* Moringiello & Reynolds, *supra* note 2, at 452 ("Contract law is applied countless times every day, in every manner of transaction large or small. Rarely are those transactions reflected in an agreement produced by a lawyer; quite the contrary, almost all contracts are concluded by persons with no legal training and often by persons who do not have a great deal of education.").

18. *See, e.g.*, *id.* at 452–53 (noting contract law traditionally was a social process before the law evolved to handle paper communications).

19. Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 427–30 (1928) (describing how the statute of frauds was created with the knowledge that in only some cases would it be expedient to require writing).

20. *See, e.g.*, Bernstein, *supra* note 10, at 65 (describing the incorporation approach to fill gaps to save written contracts under the U.C.C.).

complexity.[21] These contracts specified more terms. And they might even vary the norms of the day, for instance, by specifying who would bear the risk of loss or that a product would be delivered rather than held for pickup. But common law background rules and norms also supplement commercial contracts when they don't specify otherwise.[22]

As commerce became more routinized, businesses introduced the idea of the standard form contract. Rather than negotiating custom deals, businesses might use a form to place orders, particularly if the parties had done business before and knew the background rules. These standard form contracts were common enough by the middle of the twentieth century[23] that the U.C.C. made special provision for dealing with them, and in particular with the possibility that two parties might intend a contract but have standard forms that conflicted—the so-called "battle of the forms."[24] The law resolved the battle of the forms by providing that standard form agreements between two sophisticated parties could add terms, but agreements with consumers generally couldn't, and terms that contradicted each other would drop out, once again leaving common law and norms to supply the terms.[25]

Businesses gradually began introducing standard form contracts in consumer-facing deals as well. These occasioned quite a bit of scholarly concern, because merchants generally imposed terms on consumers on a "take it or leave it" basis.[26] Because there was no lawyer on the other

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21. *See, e.g.*, Sales, *supra* note 3, at 319 (noting that standard form contracts have a long history in various commercial fields).

22. Schwartz & Scott, *supra* note 11. For an argument that courts should reduce the role of equitable doctrines where sophisticated parties are concerned, see Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009).

23. *See, e.g.*, Sales, *supra* note 3, at 318–22 (describing how form contracts were historically common in some industries, such as shipbuilding, but grew in the early to mid-twentieth century to displace the common law in situations with unequal bargaining power).

24. *See* Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1239 (1982) ("[W]hen parties communicate with documents after dickering explicitly over some terms and relegating others to fine print, the court can act essentially as it does in the case of harmonious but incomplete documents: it can find a contract and invoke an open-ended provision of the Code or the customs and usage of the parties or trade to supply the terms on which the parties failed to agree.").

25. U.C.C. § 2-207 (AM. L. INST. & UNIF. L. COMM'N 2020); *see also* Francis J. Mootz III, *After the Battle of the Forms: Commercial Contracting in the Electronic Age*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 271, 277–78 (2008) ("Under Article 2, the parties have an effective means to protect themselves against terms that deviate from the reasonably expected gap-filling baseline in material ways without having to worry that their non-mirroring forms will interfere with the formation of an enforceable contract.").

26. *See, e.g.*, Sales, *supra* note 3, at 318–22 (lamenting contracts of adhesion, unequal bargaining power, and unequal legal advice); Nora K. Duncan, *Adhesion*

side, businesses had little incentive to write balanced terms rather than terms that unambiguously favored the drafter.[27] And because there was no form on the other side, there was no battle of the forms to limit the use of one-sided terms. That put a rather significant burden on legal doctrines like unconscionability[28] and restrictions on limiting warranties to protect consumers from unfair surprise. And those doctrines have by general agreement proven not to be up to the task.[29] Courts rarely apply

Contracts: A Twentieth Century Problem for a Nineteenth Century Code, 34 LA. L. REV. 1081, 1081–82 (1974) (same); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L REV. 529, 529–31 (1971) (same). For more general discussions of the problem of standard form contracts, see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); Robert A. Hillman & Jeffrey L. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

27. *See* Moringiello & Reynolds, *supra* note 2; *see also* Shmuel L. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. COM. L.J. 199 (2010) (noting that consumers do not even read form contracts, much less consult an attorney). *But see* Florencia Marotta-Wurgler, *Some Realities of Online Contracting*, 10 SUP. CT. ECON. REV. 11, 23 (2011) ("[F]orum selection clauses, arbitration clauses, and class action waivers are not as pervasive or used strategically as some have feared."); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008) (finding that shrinkwrap contracts did not have significantly worse terms for consumers than other standard form contracts).

28. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1979) ("If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

29. *See, e.g.*, Slawson, *supra* note 26, at 564 ("Even if normal procedures are employed, the substantive elements of unconscionability are too numerous and complex to be workable in large numbers of contracts cases."); Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1176–79 (1976) (noting the inadequacy of unconscionability to correct exploitation via form contracts in monopolistic structures). For a discussion of how to strengthen interoperability online, see, for example, Amit Elazari Bar On, *Unconscionability 2.0 and the IP Boilerplate: A Revised Doctrine of Unconscionability for the Information Age*, 34 BERKELEY TECH. L.J. 567, 567–68, 700, 886–87 (2019) (suggesting ideas like databases of unconscionable terms).

unconscionability,[30] and doctrinal innovations have limited their reach.[31] Indeed, the doctrine itself may not apply at all to the *formation* of a contract as opposed to the terms contained in that contract.[32] Further, because consumers essentially never read standard form contracts,[33] procedural doctrines that do things like put warranty disclaimers in large letters have turned out to be ineffective at protecting consumers.

Still, the role of standard form contracts was, until recently, limited by the relatively narrow set of circumstances in which those contracts were used. You might have to sign a standard form if you rented a car, went on a cruise, or had the company finance the purchase of your new couch. But you wouldn't sign a written contract to buy a book or a record or an apple, or an Apple computer for that matter, or to hire someone to perform routine services.

Computers and the internet changed that. Software vendors in the 1990s sold their wares in prepackaged boxes or preloaded on computer hardware.[34] They wanted to bind end users of the software to a contract, but they faced a problem—they weren't selling that software directly to

30. Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 775–91 (2014) (finding that the majority of states almost never entertain unconscionability, and in others, "if the challenged contract provision is not related to arbitration, these courts rarely, if ever, find the challenged provision unconscionable"); *cf.* Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 MD. L. REV. 46, 87–88 (2021) (finding that unconscionability claims in the subset of 364 analyzed cases succeeded about twenty percent of the time when argued to judgment). For arguments that unconscionability can play a greater role, see Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965 (2019) (noting the doctrine's continued application in the consumer banking field).

31. For instance, courts deciding the unconscionability of a contract that includes an arbitration clause can consider only whether the arbitration clause itself is unconscionable; they can't consider the context of the whole contract. *E.g.*, *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1107 (C.D. Cal. 2002) (citing *Gray v. Conesco, Inc.*, No. SA CV 00–322DOC(EEX), 2000 WL 1480273, at *3 (C.D. Cal. Sept. 29, 2000)). *But see Penilla v. Westmont Corp.*, 207 Cal. Rptr. 3d 473, 489 (Ct. App. 2016) (finding that a contract with "more than one unlawful term" weighs against severing the term but enforcing the balance of the contract). Further, contracts are unconscionable only if they are both procedurally and substantively problematic. *See Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 690 (Cal. 2000).

32. Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L.J. 135, 151–52 (2021); *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001) ("The doctrine of unconscionability is a defense to the enforcement of a contract or a term thereof. No such defense arises without a contract.") (cleaned up).

33. *See infra* notes 123–27 and accompanying text.

34. Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 (1995) (explaining typical forms of shrinkwrap licenses at the time).

the end user.[35] It might go through a store, or the software might be loaded on a computer that was then sold in a store. Either way, the software maker was contracting with a distributor, not with the user.[36] They sought to get around this problem with a technical innovation—the "shrinkwrap license" or "end user license agreement" (EULA).[37] The theory here was that the consumer who purchased a box with software in it was really buying only an option—to tear open the package and install the software inside. The act of tearing open the shrinkwrap, on this theory, was an agreement to the terms printed on the box.[38] This new innovation in contracting practice offered the promise of something contract law had never before provided—a way to enter into a contract with someone you never encountered or had any economic exchange with, what Molly van Houweling has called "obligations, that 'run with the software'"[39]

2. ENFORCING SHRINKWRAPS AND THEIR PROGENY

There was just one problem: shrinkwrap licenses were pretty clearly not contracts at all under the traditional understanding of the law. Shrinkwrap licenses don't follow the normal model of contracts. Black-letter-contract law sets out three predicates to the formation of a contract: offer, acceptance, and consideration.[40] Behind these requirements is the overarching notion of mutual assent between the parties.[41] In the prototypical contract, where the parties meet face to face and discuss the

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35. *See* David L. Hayes, *Shrinkwrap License Agreements: New Light on a Vexing Problem*, 15 HASTINGS COMM. & ENT. L.J. 653, 664 (1992) (discussing the enforceability issues vendors faced as a result of resellers distributing software to the end user).

36. *See id.* at 660, 664.

37. *See* Michael Terasaki, *Do End User License Agreements Bind Normal People?*, 41 W. ST. U. L. REV. 467, 468 (2014) ("[T]he EULA is a 'legal agreement *between the manufacturer and purchaser* of software that stipulates the terms of usage.'") (emphasis added); Hayes, *supra* note 35, at 654.

38. Lemley, *supra* note 34, at 1241–42.

39. *See* Thomas M.S. Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577, 585–92 (1994) (comparing contracts that run with the software to feudal servitudes); *cf.* Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23, 30–39 (2007) (analogizing certain software agreements to chattel servitudes disfavored in real property law).

40. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981); *see also* LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW (4th ed. 1981).

41. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71. The theory behind the bargain requirement is that contracts are valuable where they represent two or more parties voluntarily engaging in a "mutually advantageous cooperative venture," in which each agrees to restrict his or her own rights in some way. JOHN RAWLS, A THEORY OF JUSTICE 342–43 (1971).

terms before coming to an agreement, the bargain is obvious. But where is the agreement in a standard form shrinkwrap license that is not even signed by the party against whom it will be enforced?

Early courts relied on U.C.C. Sections 2-207 and 2-209 in concluding that shrinkwrap license terms are not generally enforceable. The most detailed discussion of this issue is the Third Circuit's decision in *Step-Saver Data Systems, Inc. v. Wyse Technology*.[42] The case involved a breach of warranty claim brought by Step-Saver Data Systems, Inc. (Step-Saver), the purchaser of a shrinkwrapped computer program, against the vendor, The Software Link, Inc. (TSL).[43] The shrinkwrap license disclaimed all express and implied warranties on the software, including certain prior warranties allegedly given by TSL to Step-Saver. The district court directed a verdict for TSL on the warranty claims, holding that the shrinkwrap license terms constituted the complete and exclusive agreement between the parties.[44]

The Third Circuit reversed. The court applied the provisions of U.C.C. Section 2-207.[45] It reasoned that a contract was formed when Step-Saver, responding to magazine advertisements by TSL, placed telephone orders for copies of TSL's software, and TSL shipped the software.[46] At this point, the contract was formed by agreement and performance because both parties had acted as if a contract existed. The issue therefore concerned the nature of the terms of the contract. Because the contract was formed before Step-Saver ever received the shrinkwrap license, the court treated the license provisions as both a written

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42. 939 F.2d 91 (3d Cir. 1991).

43. *Id.* at 94.

44. *Id.* at 94–95.

45. *Id.* at 98–105. The subsections of U.C.C. § 2-207 are as follows:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

U.C.C. § 2-207 (AM. L. INST. & UNIF. L. COMM'N 2020).

46. *Step-Saver*, 939 F.2d at 95–96, 98.

confirmation and an attempt to modify the terms of the contract (under U.C.C. Sections 2-202 and 2-209, respectively).[47] Because those provisions require that both parties intend to adopt the additional terms, the court held that the shrinkwrap license did not bind Step-Saver. This conclusion was confirmed by the court's application of U.C.C. Section 2-207:

> UCC § 2-207 establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties's [sic] contract is not sufficient to establish the party's consent to the terms of the writing . . . . In the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the UCC.[48]

In other words, because the parties agreed to a contract at the point of telephone order and product shipment, only those terms became part of the contract. Other terms could be implied, if necessary, from the U.C.C.'s default rules. But the shrinkwrap license was ineffective to modify the contract terms unless Step-Saver expressly agreed to such a modification.

Other early cases generally lined up with *Step-Saver* in refusing to enforce shrinkwrap licenses. Two courts reached this result on the grounds that the licenses are "unenforceable contracts of adhesion."[49] Others took the position that the contract was formed the way contracts had always been formed—when stores handed goods over in exchange for payment. Any terms provided after that point were proposed additions to the contract. Until 1996, every court that considered the validity of a shrinkwrap license held it unenforceable.[50]

The tide began to turn with Judge Easterbrook's 1996 opinion upholding a shrinkwrap license in *ProCD, Inc. v. Zeidenberg*.[51] ProCD held Zeidenberg bound to terms he first saw when he loaded ProCD's software into his computer, even though he paid for the software before

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47. U.C.C. § 2-209 provides that modifications to an existing contract do not require additional consideration.

48. *Step-Saver*, 939 F.2d at 99.

49. *Vault Corp. v. Quaid Software Ltd.*, 655 F. Supp. 750, 761–63 (E.D. La. 1987), *aff'd*, 847 F.2d 255 (5th Cir. 1988); *see also Foresight Res. Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1010 (D. Kan. 1989) (noting in dictum that "there is some reason to question the enforceability of any such agreement").

50. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006). Portions of these paragraphs are adapted from that article.

51. 86 F.3d 1447 (7th Cir. 1996).

being made aware of the terms.[52] The court reasoned that someone who didn't like the terms could always return the product for a refund.[53] The court's legal reasoning is certainly questionable. Judge Easterbrook relied on U.C.C. Section 2-204, which provides that a contract can be formed in any way the parties agree.[54] But arguably he should have treated the additional terms as a proposed modification to the contract Zeidenberg entered into when he handed money to a store clerk in exchange for a box containing software. Under U.C.C. Section 2-209, such proposed new terms can become part of the contract without additional consideration, but not if they make material changes to the contract, as ProCD's terms did.[55]

ProCD represented a turning point. While a number of courts since 1996 have continued to reject shrinkwrap licenses,[56] still more courts

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52. *Id.* at 1450–55.

53. That was an option in theory under the shrinkwrap license, but it isn't a practical option for software. Here's one example of some of the hoops you need to go through to return tax software at one company, for instance:

> • Customer expressly agrees to not use any method to circumvent this Refund and Return Policy, including a credit card charge-back. Should Customer attempt to obtain a refund through any financial recovery methods offered by a financial institution, UTS reserves the right to charge Customer a $50 fee.
>
> • Please give our Support Team at least one full business day to get back to you on your request. Refund requests should contain a detailed reason for why you are applying for a refund. Please, make sure your request does not contradict our Terms and Conditions or this Refund and Return Policy.
>
> • Any refund will be issued within one business day after approval of the refund by UTS. Such approval may be contingent upon customer completing any informational form, as requested by UTS in certain situations.
>
> • Except where there is a Special Refund Circumstance, Customers may only request a refund on software once in their account history with UTS.

Refund Policy, ULTIMATETAX, https://www.ultimatetax.com/legal/refund-and-return-policy/ [https://perma.cc/W3CB-Q7VE] (last visited February 20, 2023). Imagine having to do all that before the Internet.

54. *ProCD, Inc.*, 86 F.3d at 1452.

55. *ProCD* rejected the application of Section 2-207 because there was only one form and hence no "battle." *See id.* That decision finds some support in the language of the section, but that leads to the peculiar result that merchant buyers get more protection against a seller's standard form than consumers do. The court's policy rationale is equally questionable. While Judge Easterbrook expresses considerable concern about making transactions costless for sellers, he ignores the considerable costs his approach imposes on buyers. *See* AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 68–69 (2016) (making this point).

56. *See Klocek v. Gateway, Inc.*, 104. F. Supp. 3d 1332, 1339–42 (D. Kan. 2000); *Novell v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218, 1224–25 (D. Utah 1997), *vacated in part*, 187 F.R.D. 657 (D. Utah 1999); *Rogers v. Dell Comp. Corp.*, 138 P.3d

have followed *ProCD* and enforced those licenses.[57] Indeed, they expanded the idea of "terms later" contracts to any number of other circumstances, so that sending terms after the contract was complete has now become an accepted standard under the law.[58]

Shrinkwraps today are less common for a simple reason—an increasing number of transactions occur online. The early online equivalent was the clickwrap license. The clickwrap has two significant differences from the shrinkwrap: while it's still a standard form, it is presented before the transaction is complete, and consumers click to accept the terms of the form. Because the user has "signed" the contract by clicking "I agree," every court to consider the issue has held clickwrap licenses enforceable,[59] though some cases have rejected particular clickwraps because of the failure of the company to actually obtain agreement to certain terms or the failure to make those terms "conspicuous" within the clickwrap.[60]

826, 832–34 (Okla. 2005); *cf. Morgan Lab'ys, Inc. v. Micro Data Base Sys., Inc.*, No. C96–3998 TEH, 1997 WL 258886, at *2–4 (N.D. Cal. Jan. 22, 1997) (refusing to allow a shrinkwrap license to modify a prior signed contract).

57. *See, e.g.*, *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325 (Fed. Cir. 2003); *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1092 (N.D. Cal. 2000); *Info. Handling Servs., Inc. v. LRP Publ'ns Inc.*, No. Civ.A. 00–1859, 2000 WL 1468535, at *1–2 (E.D. Pa. Sept. 20, 2000); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527–28 (W.D. Pa. 2000); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000).

58. *See, e.g.*, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149–50 (7th. Cir. 1997).

59. *See, e.g.*, *Jung*, 422 F.3d at 632; *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) (enforcing a forum selection clause not initially visible in a clickwrap agreement); *I-Sys., Inc. v. Softwares, Inc.*, No. Civ. 02-1951(FLN), 2004 WL 742082, at *7 (D. Minn. Mar. 29, 2004); *I.LAN Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 329 (D. Mass. 2002); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1999); *cf. Hotmail Corp. v. Van$ Money Pie, Inc.*, No. C-98-20064JW, 1998 WL 388389, at *1–9 (N.D. Cal. Apr. 16, 1998) (assuming such an agreement was enforceable without discussing the issue); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 301–03 (D. Mass. 2016) (finding a clickwrap contract enforceable), *aff'd*, 918 F.3d 181 (1st Cir. 2019); *Campinha-Bacote v. AT&T Corp.*, No. 16AP–889, 2017 WL 2817566, at *2 (Ohio Ct. App. June 29, 2017) (enforcing a clickwrap contract despite a claim that the consumer never got a chance to review the terms). *See generally* Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577 (2007) (describing how clickwrap contracts have become widely accepted).

60. In *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002), for instance, Netscape sought to enforce terms of use against individuals who downloaded free software from the Netscape site. Netscape pointed to the fact that it had terms of use on its site and that those terms provided that anyone who visited the site necessarily agreed to those terms. The individuals claimed that they had not seen any link to the terms of use and had not read those terms. The court held that because Netscape did not show the terms of use to the individuals downloading the software, much less require

Clickwraps were increasingly supplemented (and, more and more, supplanted) by browsewraps—statements of terms of use placed on a website that claim that the mere use of the website constitutes agreement to the terms. Early browsewrap cases were mostly brought against competitors, frequently those who wanted to scrape the plaintiff's website for data. In *Ticketmaster v. Tickets.com*,[61] for example, the plaintiff sold tickets to concerts and similar events online and had exclusive rights to sell tickets for a number of events.[62] Tickets.com competed with Ticketmaster. When it could not sell tickets to a particular event because of Ticketmaster's exclusivity, it linked to the place customers could buy that ticket on Ticketmaster's site.[63] To create such a link, Tickets.com regularly searched the Ticketmaster site.[64] Ticketmaster objected to Tickets.com's use, even though it got sales from this link, likely because it thought it could disadvantage its competitor by making it unable to link directly to the Ticketmaster site. Ticketmaster sued on a variety of theories. While the district court rejected its copyright and trespass claims, and initially rejected its contract claims as well, it ultimately held that Ticketmaster might be able to enforce its terms of use against Tickets.com because Tickets.com was aware that Ticketmaster objected to its competitor accessing and linking to the Ticketmaster site.[65]

By contrast, early browsewrap cases against consumers did not fare as well, perhaps because of the nature of the terms being enforced[66] or

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them to agree, the terms did not constitute an enforceable agreement. *See also Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998) (finding that an arbitration term in click-wrap contract was unconscionable). *But see Emmanuel v. Handy Techs., Inc.*, 992 F.3d 1 (1st Cir. 2021) (finding that a checked box saying "I agree to Handy's Terms of Use" with a hyperlink to those terms created a contract with a valid arbitration clause).

61. *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV99–7654 HLH(BQRX), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000).

62. *Id.* at *1.

63. *Id.*

64. *Id.*

65. *Id.* at *1–3 (granting Ticketmaster's breach of contract motion "with leave to amend in case there are facts showing Tickets' knowledge of [Ticketmasters' terms and conditions] plus facts showing implied agreement to them"); *see also Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C04-04825, 2005 WL 756610, at *3−6 (N.D. Cal. Apr. 1, 2005); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000). *But cf. Register.com v. Verio, Inc.*, 356 F.3d 393, 431–32 (2d Cir. 2004); *Sw. Airlines Co. v. Kiwi.com, Inc.*, No. 21-CV-00098-E, 2021 WL 4476799 (N.D. Tex. Sep. 30, 2021); *Sw. Airlines Co. v. Boardfirst, L.L.C.*, No. 06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007).

66. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20−21 (2d Cir. 2002) (refusing to enforce a browsewrap term); *Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) (holding the defendant's online privacy policy insufficient to sustain a breach of contract action); *cf. Briceño v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 178–81 (Fla. Dist. Ct. App. 2005); *Hubbert v. Dell Corp.*, 835 N.E.2d 113,

perhaps because there wasn't a continuing relationship between commercial entities.[67] But increasingly, courts enforced browsewraps even against consumers, on the theory that they were given notice—not of the terms of the contract themselves, but merely of the fact that there *were* such terms. Pointing to the presence of terms on a website was enough to provide this "inquiry notice."[68] Indeed, pointing to a place where there are terms, that in turn point to a different place where there are still different terms, is enough to make all those terms binding.[69] Amazon's Alexa alone purports to incorporate twelve different statements of terms and conditions.[70]

In the last fifteen years, enforcement of this mutant form of contract has become widespread even in consumer cases as more and more of our daily life transitions online.[71] Courts in many jurisdictions have repeatedly breached the line between clickwraps and browsewraps, to the point where terms of service may be enforced as a contract even if there

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117–19 (Ill. App. Ct. 2005) (enforcing an arbitration clause included in an online "Terms and Conditions of Sale" hyperlink); *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 558 (1st Cir. 2005). For a discussion, see Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Contracts*, 59 BUS. LAW. 279 (2003) (proposing rules for when browsewraps should be valid).

67. This was the explanation I offered for the state of browsewrap cases in 2006. Lemley, *supra* note 50, at 462–63.

68. *See, e.g.*, *Douglass v. Serenivision, Inc.*, 229 Cal. Rptr. 3d 54, 68 (Ct. App. 2018); *Serna v. Northrop Grumman Corp.*, No. CV16-2047, 2016 WL 11693571, at *5 & n.5 (C.D. Cal. July 27, 2016).

69. *See, e.g.*, *Foster v. Walmart, Inc.*, 15 F.4th 860 (8th Cir. 2021); *In re Holl*, 925 F.3d 1076, 1084 (9th Cir. 2019); *Shaw v. Regents of the Univ. of Cal.*, 67 Cal. Rptr. 2d 850, 856 (Ct. App. 1997). For a discussion, see Karnow, *supra* note 32, at 136–38 ("[T]hese cases . . . are analyses of notice of notice of the terms of the contract, not notice of the terms themselves.").

70. Karnow, *supra* note 32, at 141–42.

71. *See, e.g.*, *Nevarez v. Forty Niners Football Co.*, No. 16-CV-07013, 2017 U.S. Dist. LEXIS 131208, at *25–26 (N.D. Cal. Aug. 15, 2017) (enforcing a browsewrap contract that "prominently informed [users] on at least two occasions prior to [the purchase]" since they clicked "Accept and Continue" or "Sign In," and after that "Submit Order" and therefore they agreed to the ToS, "which were always hyperlinked and available for review") (quoting *Graf v Match.com, LLC*, No. CV-15-3911, 2015 U.S. Dist. LEXIS 90061, at *4 (C.D. Cal. July 10, 2015)); *Emmanuel v. Handy Techs., Inc.*, 992 F.3d 1, 3 (1st Cir. 2021) (finding that a checked box saying "I agree to Handy's Terms of Use" with a hyperlink to those terms created a contract); *Home Advisor, Inc. v. Waddell*, No. 05-19-00669-CV, 2020 WL 2988565, at *1–2 (Tex. App. June 4, 2020) (putting a click button near a statement that use of the services was subject to terms and conditions bound a consumer to those terms and conditions). For a useful survey of recent cases, see NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 35–52, 70–81 (2013); Nancy S. Kim, *Developments in Digital "Wrap" Contracts*, 77 BUS. LAW. 275 (2021–22).

is literally no way for a consumer to see it, much less agree to it.[72] They sometimes enforce contracts "agreed to" by robots that have no power to do any such thing.[73] Courts treat as assent not just an affirmative act like opening a package or even accessing a website, but even view continuing to use a product consumers already own as implied assent to terms that might have changed as lawyers update their contracts.[74] Even visiting the terms of use page itself to see whether you want to agree to those terms has been deemed agreement to the terms.[75] Indeed, parties sometimes write terms of use that include advance agreement to unspecified future changes in terms.[76] While courts won't enforce pre-agreement to such changes,[77] they do sometimes hold that repeatedly visiting a website binds the customer not just to the initial terms posted

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72. *See, e.g.*, *Foster v. Walmart, Inc.*, 15 F.4th 860 (8th Cir. 2021); *Sw. Airlines Co. v. Kiwi.com, Inc.*, No. 3:21-cv-00098-E, 2021 WL 4476799, at *3, *7 (N.D. Tex. Sep. 30, 2021) (finding an enforceable contract in part because "[t]he Terms are hyperlinked at the bottom of each page of Southwest's website with a statement that use of the website constitutes acceptance of the Terms"). This sort of catch-twenty-two provision—by coming to the site, you agree to terms that you can't possibly read without coming to the site—is surprisingly common in browsewraps. *See, e.g.*, *Terms of Use*, IBM (Nov. 20, 2020), http://www.ibm.com/legal/us/ [https://perma.cc/7TJY-CZTD] ("By accessing, browsing, and/or using this web site, you acknowledge that you have read, understood, and agree, to be bound by these terms . . . . If you do not agree to these terms, do not use this web site."); *Terms of Use*, XE.COM, http://www.xe.com/legal [https://perma.cc/U9QW-658X] (last visited February 20, 2023) ("Your use of this website or of any content presented . . . indicates your acknowledgement and agreement to these Terms of Use . . . .").

73. *See, e.g.*, *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825, 2005 WL 756610, at *2–3 (N.D. Cal. Apr. 1, 2005) (enforcing "agreement" by a robot to litigate exclusively in eight different jurisdictions simultaneously). It is possible that future AIs could be bound by smart contracts using the blockchain, but we are not yet at that point. Steve Omohundro, C*ryptocurrencies, Smart Contracts, and Artificial Intelligence*, 1 AI MATTERS 19, 19–20 (2014). For a discussion of the contradictory terms in enforceable browsewraps, see Lemley, *supra* note 50, at 478–80.

74. *See Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012); Colin P. Marks, *Online and "As Is,"* 45 PEPP. L. REV. 1, 12 (2017).

75. *Foster*, 15 F.4th at 864–65.

76. Most sites provide that their terms will change periodically and that the user is automatically bound to those changed terms. They generally suggest that the user "periodically visit" the terms of use to "determine the then current terms to which you are bound." *Terms of Use*, IBM, *supra* note 72; Email from YouTube to YouTube users (Nov. 27, 2021, 6:27 AM) ("On January 5, 2022, we're updating our Terms of Service . . . . By continuing to use YouTube after that date, you are agreeing to the updated Terms.") (on file with author). For a discussion of the growth of "terms later" contracting, see John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35, 38–57 (2012); Eric A. Posner, ProCD v. Zeidenberg *and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1181–84 (2010).

77. *E.g.*, *Int'l Mkts. Live, Inc. v. Thayer*, No. 2:22-cv-00077-RFB-DJA, 2022 WL 4290310 (D. Nev. Sept. 16, 2022).

there but to any changed terms that may thereafter appear.[78] And if you have already given your data to a company under a particular privacy policy, they may (and frequently do) unilaterally change what they do with the data they already have about you.[79] The result would make Darth Vader proud.[80]

Nor have courts been willing to impose many limits on substantively abusive terms. While courts in some states impose restrictions on arbitration clauses,[81] even those sensible limits sometimes must give way to a federal demand to enforce standard terms, particularly in arbitration clauses.[82] The application of doctrines like unconscionability remains rare even as the sweep of standard form contracts has grown vastly broader. Courts conclude that agreeing to your cell phone provider's terms of use gives them the right to disclose your location to law

78. *See, e.g.*, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401–03 (2d Cir. 2004). *But see Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1086 (9th Cir. 2020) (applying original rather than later terms, though doing so to benefit the drafter of the terms).

79. Jessica L. Roberts & Jim Hawkins, *When Health Tech Companies Change Their Terms of Service*, 367 SCI. 745, 746 (2020) (stating "[a] recent study of the privacy policies of 90 consumer genetics companies revealed that all of the companies surveyed included unilateral amendment provisions, whereas only a handful promised to inform individual users" of changes to how their data was handled); Leah R. Fowler, Jim Hawkins & Jessica L. Roberts, *Uncertain Terms*, 97 NOTRE DAME L. REV. 1 (2021).

80. As the dialogue in the movie goes:

Darth Vader: "Calrissian, take the princess and the Wookie to my ship."

Lando Calrissian: "You said they'd be left in the city under my supervision."

Darth Vader: "I'm altering the deal. Pray I don't alter it further."

See THE EMPIRE STRIKES BACK (Lucasfilm 1980).

81. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1173 (9th Cir. 2014) (concluding that Barnes & Noble did not provide reasonable notice of its Terms of Use, and that Nguyen therefore did not unambiguously manifest assent to their arbitration provision); *Berman v. Freedom Fin. Network*, 30 F.4th 849, 853 (9th Cir. 2022) (same); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012) (applying California law); *Soliman v. Subway Franchisee Advert. Fund Trust*, 999 F.3d 828, 830–31 (2d Cir. 2021) (holding an advertisement notice pointing to website with arbitration clause was not sufficiently conspicuous); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573–74 (App. Div. 1998) (arbitration term in click-wrap contract was unconscionable). *But see B.D. v. Blizzard Ent., Inc.*, 292 Cal. Rptr. 3d 47, 51–53 (Ct. App. 2022) (reversing finding that notice of arbitration was not conspicuous where it appeared near the top of a scroll-down clickwrap agreement).

82. *See, e.g.*, *Seifu v. Lyft, Inc.*, 142 S. Ct. 2860 (2022) (order vacating judgment restricting arbitration in light of *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (2022)). *Viking* is only the latest in a long line of cases requiring arbitration despite clear state or federal policies. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233–35 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 615, 628–29 (1985). For an explanation of why these decisions are not based on a sound interpretation of the Federal Arbitration Act, see Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 10–12 (2015).

enforcement.[83] Courts will even enforce contracts that take away the very item the deal was supposed to provide, turning purchases of media and consumer goods into involuntary rentals terminable at will by the company without notice.[84] And they even conclude that finding yourself bound to terms of use somewhere on a website means you have "agreed" to give up your constitutional rights.[85]

True, some courts have pushed back on browsewrap licenses. California in particular has held that the mere posting of "terms of use" without a clickwrap *or* a clear opportunity to see those terms does not create an enforceable contract.[86] Courts have refused to bind plaintiffs thinking of suing a company to arbitrate merely because their lawyer visited the website to investigate the facts of the suit.[87] And the Massachusetts Supreme Judicial Court has refused to enforce (against a blind person) terms incorporated only by white text on the bottom of a payment screen several clicks into an app that said "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy."[88]

But even efforts to restrict browsewraps and terms of use, admirable as they are, are mostly ineffective. Even most courts that require reasonable notice only require what Nancy Kim calls "notice of notice"—a statement somewhere that there *are* terms and conditions, not notice at the time of contracting what those terms are.[89] Most commonly, courts

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83. *United States v. Adkinson*, 916 F.3d 605, 608, 611 (7th Cir. 2019).

84. AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 4–5 (2016); Aaron Perzanowski & Christopher J. Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 338 (2017). The move from downloading to streaming has only facilitated this shift. Mark A. Lemley, *Disappearing Content*, 101 B.U. L. REV. 1255, 1262 (2021).

85. *See* Orin S. Kerr, *Terms of Service and Fourth Amendment Rights*, U. PA. L. REV. 7–13, 38–39 (forthcoming 2023) (citing cases and arguing that they are wrong).

86. *See Sellers v. JustAnswer LLC*, 289 Cal. Rptr. 3d 1, 31–32 (Ct. App. 2021) (holding that notices provided in "sign-in wrap agreements" on "start my trial" screens were not sufficiently conspicuous to bind consumers); *Nguyen,* 763 F.3d at 1173 (concluding that Barnes & Noble did not provide reasonable notice of its Terms of Use, and that Nguyen therefore did not unambiguously manifest assent to their arbitration provision).

87. *Callahan v. PeopleConnect, Inc.*, No. 21-16040, 2022 WL 823594 (9th Cir. Mar. 18, 2022).

88. *Kauders v. Uber Techs.*, 159 N.E.3d 1033, 1039–40 (Mass. 2021); *see also C.D. v. Massage Envy Franchising*, No. ESX-L-3263-19, 2020 N.J. Unpub. LEXIS 2382, at *26–27 (N.J. Super. Ct. Law Div. Dec. 3, 2020) (placement of link to additional terms at the end of a consent form customer signed did not call sufficient attention to those terms); *Resorb Networks, Inc. v. YouNow.com*, 30 N.Y.S.3d 506, 508 (Sup. Ct. 2016) (hyperlinked "Terms of Use" unenforceable where it was not clear it even was a link).

89. Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 131, 139 (2022); Karnow, *supra* note 32, at 138. As Kim points out, true notices are conspicuous and immediately communicate the relevant prohibition, such as no trespassing or no parking signs. Kim, *supra*, at 110–16.

have sought to rein in browsewrap licenses and terms of use by requiring that certain provisions be reasonably conspicuous within the terms and conditions themselves.[90] But the mere notice that there are terms and conditions arguably isn't of much help to consumers who never see the contract at all, much less individual terms within the contract, and aren't even required to take the nominal step of agreeing to them.[91] Conspicuousness *within* the terms and conditions consumers never even look at is effectively meaningless.

3. THE UBIQUITY OF "TERMS OF USE"

Combined, these two developments—the rise of standard form contracts that purport to bind nonparties and the willingness of courts to abandon even the fiction of assent—have fundamentally changed what it means to contract in the modern world. Terms of use have spread to any number of contracts that would never before have been written down. Because it is now trivial to attach a complex, one-sided "contract" to virtually any consumer transaction, more and more companies do so. Media are the easiest. As people began to acquire or use media online, the same contracts that once covered software now extended to any form of online content, and to access to web pages themselves.[92] Similarly, it has become trivial to "attach" terms and conditions to the sale of any consumer product online, because you don't need to get the consumer to sign anything or even make them aware they are binding themselves to those terms. And even the dwindling number of products sold in actual stores are increasingly subject to terms and conditions, because any credit card or electronic payment transaction now comes with those terms.[93]

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90. *See, e.g.*, *Sellers*, 289 Cal. Rptr. 3d at 5.

91. And it's not clear they could understand them even if they did look. Rated on a commonly accepted test for reading comprehension, "[o]nly Immanuel Kant's famously difficult 'Critique of Pure Reason' registers a more challenging readability score than Facebook's privacy policy." Kevin Litman-Navarro, Opinion, *We Read 150 Privacy Policies. They Were an Incomprehensible Disaster*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html; *see also* Amanda Reid, *Readability, Accessibility, and Clarity: An Analysis of DMCA Repeat Infringer Policies*, 61 JURIMETRICS J. 405, 419 (2021) (finding that copyright infringement polices are rated "very difficult" for average readers).

92. Kim, *supra* note 89, at 96.

93. *See* Karnow, *supra* note 32, at 140–41 ("There are contracts for everything: credit card agreements, music, agreements with telephone companies and internet providers . . . . With the 'internet of things,' most physical products—beds, dishwashers, stoves, lamps, toys, thermostats and thermometers, and even the front door—can be linked to the internet with concomitant licensing, privacy, and other issues which gives rise to the felt need for contracts. That's a lot of contracts.") (cleaned up).

So too with services. Unless you pay in person in cash—and fewer and fewer people do[94]—you are subject to terms and conditions. And even if you do, you may well find that the ticket you are handed points you to terms and conditions somewhere on a website or the package you later open includes a contract, both with terms courts are increasingly willing to enforce despite the absence of any traditional offer, acceptance, or consideration.[95]

It's not just that we have replaced oral contracts with written ones. Because it is costless to impose a written contract, companies write one-sided terms that are increasingly complex and complete.[96] Those terms are displacing the normal default rules of contract law in virtually every transaction. They often do so explicitly; one of the standard terms in these new contracts is an "integration clause" that disclaims any terms in the contract besides those in the writing.[97] And courts enforce those terms too.[98] Indeed, the assumption of a full written contract is so ingrained today that courts seem skeptical of the very idea of a common-law supplement to what the parties theoretically agreed to, treating the

94. Jessica Dickler, *More Americans Say They Don't Carry Cash*, CNBC (Jan. 15, 2019, 11:14 AM), https://www.cnbc.com/2019/01/15/more-americans-say-they-dont-carry-cash.html [https://perma.cc/YKM9-X7ED].

95. *See, e.g.*, *Hill v. Gateway 2000*, 105 F.3d 1147, 1148–51 (7th Cir. 1997) (enforcing an arbitration clause from an agreement that came along with a box of computers, said to govern if the consumer didn't return the computer within a month); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–95 (1991) (enforcing a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket).

96. Indeed, the Oculus terms and conditions spans dozens of pages and incorporates numerous other long documents in turn. *See Oculus Terms of Service*, META (Aug. 23, 2022), https://www.meta.com/legal/quest/terms-for-oculus-account-users/ [https://perma.cc/3KWD-J82C]. And that's just the hardware; apps come with their own voluminous contracts as well. Indeed, just the privacy policies on all the apps on a smartphone may exceed a million words. *See* Geoffrey A. Fowler, *I Tried to Read All My App Privacy Policies. It Was 1 Million Words*, ANCHORAGE DAILY NEWS, https://www.adn.com/nation-world/2022/06/04/i-tried-to-read-all-my-app-privacy-policies-it-was-1-million-words/ [https://perma.cc/D3G7-D5YY] (last updated June 4, 2022); Yifat Nahmias, Dalit Ken-Dror Feldman, Ganit Richter & Daphne R. Raban, *Games of Terms*, 45 VT. L. REV. 387, 406 (2021) (highlighting that a Norwegian demonstration showed that the average smartphone had more than 250,000 words of privacy policies).

97. RESTATEMENT OF THE LAW CONSUMER CONTRACTS § 8 cmt. 3 (AM. L. INST., TENTATIVE DRAFT 2019) ("Consumer contracts often contain 'merger clauses' stating that there are no affirmations of fact, promises, or agreements between the parties except those found in the writing.").

98. *Bilmar Drilling, Inc. v. IFG Leasing Co.*, 795 F.2d 1194, 1198 (5th Cir. 1986) (excluding another alleged agreement because the lease agreement contained an integration clause and the alleged agreement was inconsistent with a lease provision); *ADR N. Am. v. Agway, Inc.*, 303 F.3d 653, 657–59 (6th Cir. 2002); *City of Grantsville v. Redevelopment Agency*, 233 P.3d 461, 468–70 (Utah 2010); *Country Cove Dev., Inc. v. May*, 150 P.3d 288, 295–96 (Idaho 2006).

application of what were normal rules of contract law in previous decades as a sort of judicial activism displacing the will of the parties.[99] The common law of contracts is disappearing, replaced by standard, off-the-shelf documents written and imposed by one party on another today in the vast majority of transactions.[100]

II. BENEFITS WITHOUT BARGAINS

Law is not normally optional. I don't get to decide which criminal laws I want to obey, or whether I have to pay under tort law for the wrongs I do to strangers, or when and how to pay my taxes or comply with myriad other regulations. Indeed, the power of courts to grant injunctions—and to back up even civil suits with the threat of jail time if I don't comply with a court order[101]—highlights the fact that even if people don't like the rules the law sets, they have to obey them or pay the price the law specifies.

Contract law is different. With relatively few exceptions, we allow people to set the terms of their own deals, even if we think they are unwise to enter into those deals. That flexibility to set terms extends even to the principles of contract law itself. Once we are satisfied the parties have entered into a binding contract, we give them considerable freedom to set the terms of that contract, including many, but not all, terms that change what the law would otherwise do.[102] Similarly, parties can regularly contract away other legal rights—not against the world, but in a private, voluntary transaction with another. I have a right to exclude others from my land, but I can agree to let someone use that land. I have a right to prevent others from copying this Article, but I can license particular people to make particular uses of it, or even sell the land or the copyright altogether. I have a right to free speech, but I can agree not to exercise it in particular ways. There are limits to this freedom. For example, I can't sell myself into slavery, or sell my kidney, or agree to allow racial discrimination against me. But by and large, contract law

99. *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 420 (7th Cir. 1998) ("Thus, when a contract is unambiguous, we refuse to indulge in judicial activism by construing the contract beyond its clear and obvious language.") (cleaned up); *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1075 (Del. Ch. 2012) (noting "Delaware's pro-contractarian public policy").

100. *See* Kim, *supra* note 89, at 101–02.

101. *See generally* Ronald Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962).

102. Schwartz & Scott, *supra* note 11, at 1523.

gives willing parties considerable freedom to vary not just contract law but how other legal obligations apply between those parties.[103]

The basis for that freedom is the fundamental idea that a contract represents a voluntary transaction freely entered into by two parties that determines only their rights vis-à-vis each other, not the rest of the world.[104] The principle of mutual assent is central to what makes contracts different than any other rights.[105] Heidi Hurd calls it "moral magic."[106]

The core elements of contract formation are offer, acceptance, and consideration. Each reflects the importance of that voluntary agreement. One party must decide of its own volition to make an offer. The second must decide of its own volition to accept it. Each side must get something it values, though we don't police how "good" a deal each one received.[107] Lastly, there must be a "meeting of the minds."[108] That is, each party must understand what they're getting and what they're giving up. If they

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103. Judge Curtis Karnow calls this the "replacement power" of contracts. Agreements replace numerous other legal obligations. Karnow, *supra* note 32, at 148–49.

104. By contrast, I don't have the same freedom to limit the rights of non-parties. One of the things that distinguishes contract law from other rules and justifies contracting around those rules is that the effects of the deal are, at least in theory, limited to the willing participants. Courts have, for instance, held that patent and copyright law preempt state laws that purport to set additional or inconsistent legal rules. But they exempt contract law from that list on the grounds that the presence of a voluntary transaction is an additional element that makes the contract unlike a quasi-IP right. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) ("[W]hether a particular license is generous or restrictive, a simple two-party contract is not 'equivalent to any of the exclusive rights.'"); *see also* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 169–71 (1999).

105. *See Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002) ("Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today."); Kim, *supra* note 89, at 88. The U.C.C. defines a contract as the "legal obligation which results from the parties' agreement." U.C.C. § 1-201(12) (AM. L. INST. & UNIF. L. COMM'N 2020); *see also* FARNSWORTH ON CONTRACTS § 3.1 (3d. ed. 2004). For a discussion of the moral underpinnings of the promise theory of contract, see Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009).

106. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).

107. Edmund Polubinski Jr., *The Peppercorn Theory and the Restatement of Contracts*, 10 WM. & MARY L. REV. 201, 203 (1968) (noting that courts have even occasionally accepted consideration that is not paid).

108. Samuel C. Damren, *A "Meeting of the Minds"—The Greater Illusion*. 15 LAW & PHIL. 271, 271 (1996); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1155–54 & n.64 (2019).

don't—if the promise is illusory, or impossible, or if the parties simply think they are agreeing when in fact they are talking about different things—courts will conclude there is no contract and so no legal obligation that restricts the rights of either party. Similarly, if there is reason to think that parties who actually entered into an agreement didn't do so freely and voluntarily, courts will reject the contract. Thus, a contract is void if it is procured through fraud or duress, not because there wasn't offer and acceptance, but because the agreement wasn't voluntary.[109] Courts will even allow parties to void voluntarily chosen contracts if they believe the parties aren't capable of making an informed and truly voluntary decision. For example, a child or someone who is mentally ill can't be bound to a contract even if they really, truly want to enter into the deal because the law presumes they don't have the deliberative mental capacity to make that agreement truly voluntary.[110]

The changes I described in Part I essentially eliminate any requirement of assent from contract law. In so doing, they take away the very thing that makes contract law contract law. The result, as Peggy Radin has put it, is "to move the word consent far from what it used to

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109. 3 CORBIN ON CONTRACTS § 9.19 (2022) ("An executory promise that has been induced by fraud or duress or certain kinds of mistake is unenforceable against the promisor.").

110. *Id.* § 9.18. These contracts are "voidable," where the promisor with full knowledge, gets the option to keep the contract relying on the past consideration or void the contract.

To be clear, that presumption is probably unreasonable, at least as to older children and at least without a proportionality limit. The law literally takes the position that a seventeen-year-old can't enter into a binding contract to buy a hamburger or a video game. That is nonsense. And as a practical matter our economy largely ignores that rule because children don't normally try to revoke their contracts. But it happens sometimes. Hibah Yousuf, *Apple to Refund Millions for Kids' In-App Purchases*, CNN (Jan. 15, 2014, 3:52 PM) https://money.cnn.com/2014/01/15/technology/apple-ftc-settlement [https://perma.cc/DU4C-4WV8]; James Chang & Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, 2 U.C. IRVINE L. REV. 627, 642–43 (2012). And the fact that the rule exists at all is an indication of just how seriously contract law takes the concept of truly voluntary assent.

Some courts have held that terms of service sufficient to bind adults may not suffice to put minors on notice. Some courts have held that terms of service sufficient to bind adults may not suffice to put minors on notice. *See Doe v. Roblox Corp.*, 602 F. Supp. 3d 1243, 1256 (N.D. Cal. 2022) ("Doe would not have been put on inquiry notice by this agreement. Even if the notice would be sufficiently conspicuous and understandable for an adult, it is not for a child [of ten]."). For an interesting approach to trying to bind minors, *see* Email from YouTube to Professor Mark Lemley (Nov. 27, 2021, 6:27 AM) ("[I]f you allow your child to use YouTube Kids, . . . take a moment to talk to them about these changes [to the Terms and Conditions].") (on file with author).

mean, and far from what it has meant in the political, legal, and social understanding of the institution of contract."[111]

The very idea of a standard-form, take-it-or-leave-it contract already puts considerable strain on the principles of contract law.[112] The parties to a rental car contract aren't bargaining over the terms of that contract in any meaningful sense. Indeed, a renter who tries to bargain over terms—there or with any other large retail or service company—will be met with a blank stare, followed by incredulity, and ultimately by a provision in the standard form itself that makes it clear that none of the company's agents have the power to vary the terms of the form.[113] But at least a classic standard form contract is presented to the buyer in the context of a potential transaction. "Take it or leave it" isn't a great option, but it generally is *an* option. The renter who doesn't like the deal can usually walk away from it.[114] As Radin has explained, that doesn't mean there was real agreement to all the terms, but at least it means there *was* an agreement.[115]

That's not always the case, though. Standard form contracts become more problematic from an assent perspective if "leave it" is not a practical option.[116] Courts invoke duress primarily in emergency situations.[117] If I'm having a heart attack, I don't have the luxury of shopping for the best terms among ambulance companies that will take me to the hospital. But assent may be fictional in other circumstances as well. I don't have any choice as to the terms of the contract with my water company, because I need water and there is only one, government-

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111. Margaret Jane Radin, *Regulation by Contract, Regulation by Machine,* 160 J. INST. THEORETICAL ECON. 142, 152 (2004); *see also* Margaret Jane Radin, *Taking Notice Seriously: Information Delivery and Consumer Contract Formation*, 17 THEORETICAL INQUIRIES L. 515, 522 (2016) ("The underlying theory that justifies the State in enforcing (or refusing to enforce) disputed contracts is based on the principle that contracts are formed by voluntary agreement of the two parties, not by one party giving the other party notice of its terms.").

112. *See, e.g.*, Kar & Radin, *supra* note 108, at 1141–42; Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1223, 1246 (2006).

113. Try it sometime. I have.

114. Becher & Unger-Aviram, *supra* note 27, at 201 (pointing out that consumers face genuine choice in some instances, but still typically assent to these form contracts).

115. Kar & Radin, *supra* note 108, at 1176–78.

116. George A. Nation III, *Contracting for Healthcare: Price Terms in Hospital Admission Agreements*, 124 DICK. L. REV. 91, 122–25 (2019) (noting that standard form terms apply to patients admitted to emergency care in hospitals).

117. 28 WILLISTON ON CONTRACTS § 71:14 (4th ed. 1993) ("[F]or duress to be found, three elements are necessary—an improper or wrongful threat, that induces the victim to assent to the coercing party's proposal, and finally, the absence of any alternative but to agree to the proposal.").

franchised company that is permitted to sell it to me. Other companies hold monopoly power without a government franchise, but many people still don't have effective choice over, say, where they get internet service.[118] Employment contracts too are almost never presented in circumstances that give the employee an effective choice.[119]

Take it or leave it may also not be a practical option if the industry has coalesced around similar contract terms.[120] I have two basic choices of smartphone software—iOS and Android—but that doesn't mean Apple and Google can or will compete to offer me better contract terms. And if they don't, my assent to the contracts they hand me at the store doesn't reflect any real agreement.[121] And industry standardization around similar terms is common.[122]

Assent to particular terms in a standard form contract is likely fictional for another reason—no one reads the terms.[123] This is common sense; even lawyers and law students generally scroll past terms that appear on the screen and flip to the last page of a paper contract to sign it. Empirical evidence has measured how much time people spend with the multipage clickwrap agreements they are presented with.[124] And there are numerous delightful examples of companies burying "Easter egg" terms in their contracts, only to have them go undiscovered for years.[125]

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118. There are two broadband wires running into some homes but by no means all. And many homes have no broadband access at all. Christopher Mitchell & Katie Kienbaum, *Report: Most Americans Have No Real Choice in Internet Providers*, INST. FOR LOC. SELF-RELIANCE (Aug. 12, 2020), https://ilsr.org/report-most-americans-have-no-real-choice-in-internet-providers/ [https://perma.cc/W2Q8-5V8Y].

119. For a discussion in the employment context, see Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 878–80 (2021).

120. *See* Eric Goldman, *The Crisis of Online Contracts (As Told in 10 Memes)*, 2 NOTRE DAME J. EMERGING TECHS. 1 (2021); Thomas D. Haley, *Illusory Privacy*, 98 IND. L.J. 75, 75 (2022) (noting that the market power of tech platforms means that any appearance of choice of policies is illusory).

121. *See* Haley, *supra* note 120.

122. *See* Uri Y. Hacohen, Amit Elazari & Talia Schwartz-Maor, *A Penny for Their Creations—Apprising Users' Value of Copyrights in Their Social Media Content*, 36 BERKELEY TECH. L.J. 511, 539–43 (2021) (studying terms governing user-generated content).

123. Becher & Unger-Aviram, *supra* note 27, at 212–13; Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (finding that 0.2 percent of consumers look at a EULA for more than one second); Hacohen, Elazari & Schwartz-Maor, *supra* note 122, at 558–64; Nahmias, Feldman, Richter & Raban, *supra* note 96, at 387 ("[M]ost users will not even glance at these documents.").

124. Bakos, Marotta-Wurgler & Trossen, *supra* note 123, at 3, 22.

125. My personal favorite, which speaks for itself:

> Should you fail to register any of the evaluation software available through our web pages and continue to use it, be advised that a leather-winged demon

Courts have generally rejected the "no effective choice" and "no one reads it" arguments as reasons to void a contract, at least where the contract is presented at or before the point of purchase and ultimately agreed to by the buyer.[126] Courts rejecting the "no one reads it" argument are on reasonably solid legal ground. Parties who could read the terms and choose not to are perhaps showing that they do not care enough to bargain over those terms, though the fact that this happens likely also reflects widespread consumer understanding that there is nothing they could do to alter those terms even if they did read them.[127]

By contrast, courts should be more sympathetic to the "no effective choice" argument where markets are not competitive or where the industry all uses standard terms. Consumers in those circumstances are entering into a transaction, but only because they have no choice. That's not what contract law has in mind when it speaks of assent.[128]

But the doctrines I discuss in this Article are in any event far worse from an assent perspective than the already bleak prospect of standard-form contracts, for several reasons.

First, the innovation of shrinkwrap and later browsewrap licenses separates the presentation of terms from the point of sale. It is one thing to be handed a form and told to sign it if you want to rent a car. It is

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> of the night will tear itself, shrieking blood and fury, from the endless caverns of the nether world, hurl itself into the darkness with a thirst for blood on its slavering fangs and search the very threads of time for the throbbing of your heartbeat. Just thought you'd want to know that. Alchemy Mindworks accepts no responsibility for any loss, damage or expense caused by leather-winged demons of the night, either.

Lemley, *supra* note 50, at 470 ("I hereby surrender my soul for all eternity to the clerks at I Luv Video and will become part of their legion of zombies."); Matthew S. Schwartz, *When Not Reading the Fine Print Can Cost You Your Soul*, NPR (Mar. 8, 2019, 9:55 AM), https://www.npr.org/2019/03/08/701417140/when-not-reading-the-fine-print-can-cost-your-soul [https://perma.cc/9666-TRTD] (documenting numerous other examples); Nahmias, Feldman, Richter & Raban, *supra* note 96, at 408 (reporting that users in a study ignored a contract term requiring users to give up their first-born child in exchange for access to a social media site).

126. *See supra* notes 70–78 and accompanying text.

127. Kar & Radin, *supra* note 108, at 1139. It may also reflect their inability to read at all, or to read English, or to understand the legalese in which most contracts are written. But courts say that doesn't matter either. *See Ramos v. Westlake Servs. LLC*, 195 Cal. Rptr. 3d 34, 44 (Ct. App. 2015) ("[T]he fact that Ramos signed a contract in a language he may not have completely understood would not bar enforcement of the arbitration agreement. If Ramos did not speak or understand English sufficiently to comprehend the English Contract, he should have had it read or explained to him."); 1 WILLISTON ON CONTRACTS § 4.19 (4th ed. 1993) ("[O]ne who is ignorant of the language in which a document is written, or who is illiterate . . . is bound [nonetheless].").

128. *See* James Grimmelmann, *Spyware vs. Spyware: Software Conflicts and User Autonomy*, 16 OHIO ST. TECH. L.J. 25, 47 (2020) ("Whatever this is, it is not actual consent); Neil M. Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1486–88 (2019).

quite another to enter into a sales transaction for an Oculus headset, pay your money, and receive the device, only to get it home and discover an actual book of dozens of pages of terms and conditions that govern whether and how you can use the device you bought. Early shrinkwrap licenses at least purported to show you the terms you were agreeing to by opening the package, but almost all retailers abandoned that practice soon after the courts validated such agreements. It wasn't good marketing practice to put your legal terms on the outside of the box. And besides, virtually no modern terms and conditions could fit on a single page, even in microprint.

The inclusion of terms and conditions inside the box was a further move away from even the fiction that consumers were actually agreeing to what they saw. Now they can't even see what they are supposedly agreeing to. Terms included in the box that purport to govern a transaction that has already happened are not terms that the buyer can assent to in any meaningful way. While some companies theoretically offer the buyer the right to return the product if they don't agree to the terms, many don't, and in any event the "right" is inconvenient and often illusory. More to the point, these "take it or return it" terms are emphatically not what buyers think they are getting. They are unilateral efforts to change the deal after it has been made and to put the burden on the consumer to undo the original deal if they don't like the new one.

The move online actually offered the potential to improve things on this axis. Clickwrap licenses are at least presented at the point of sale, just as traditional standard form contracts are. But even there, companies frequently opt not to present their terms and require consumers to click, likely because consumers recognize the futility of reading the terms and don't want to waste their time. Instead, companies increasingly use "browsewrap" licenses that place terms somewhere on their website, perhaps in a link on the home page but often at the bottom of a long scroll or hidden in submenus like "Legal."[129] Some of those contracts say that visiting the website itself constitutes agreement to the terms. It is literally impossible to view those contract terms without agreeing to them.[130] But even ones that include a link make assent more fictional by removing the

129. For an example of a Court expressing skepticism that those following this trend actually provide notice, see *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010). Companies are savvy and exchange best practices on just how unnoticeable they may make notices while still being enforceable. *2022 Clickwrap Litigation Trends Report: Overview*, IRONCLAD, https://ironcladapp.com/journal/contract-management/clickwrap-litigation-trends-report-overview/ [https://perma.cc/H8PA-VWQZ] (last visited Mar. 5, 2023).

130. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (1996); Lemley, *supra* note 50, at 460.

terms from the point of sale itself. The result is not consent but the fiction of consent to terms no one actually has access to.[131]

Second, companies have taken the "terms later" approach to an even further extreme, binding customers not only to the terms of a contract they don't provide until after the deal is done but seeking to bind them to unknown future changes to those terms. This has been most evident in the privacy context, where some corporate privacy policies offer a "one and done" disclosure that asks customers not only to agree to current uses of their data but also to acknowledge that the privacy policy can change at any time and without notice.[132] Indeed, in one particularly sensitive area—health and genetics information—unilateral amendment appears to be the norm.[133]

Third, changes to the law and practice of contracts have opened the door to companies to impose contract terms on third parties. One of the most important limits the requirement of assent has traditionally imposed on the reach of contract law is the doctrine of privity.[134] Because contract

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131. *See* Daniel J. Solove, *Fictions of Consent in Privacy Law*, 104 B.U. L. REV. (forthcoming 2023) (manuscript at 6) ("Inaction is not an indication of consent; it signifies nothing.").

132. *See* Jennifer Schlesinger & Andrea Day, *Most People Just Click and Accept Privacy Policies Without Reading Them—You Might Be Surprised at What They Allow Companies to Do*, CNBC, https://www.cnbc.com/2019/02/07/privacy-policies-give-companies-lots-of-room-to-collect-share-data.html [https://perma.cc/LHT9-UY8U] (Mar. 15, 2019, 1:49 PM) ("Many policies include language that says a company can change the policy at any time without notice."). This practice has been limited somewhat in the privacy context by European and California privacy regulations, which require companies to offer customers a real choice in what cookies are placed on their computers. Council Directive 2009/136, art. 20, 2009 O.J. (L 337) (EC), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF [https://perma.cc/RUA5-W2GM]; Cal. Civ. Code § 1798.100(a) (West 2023).

The Ninth Circuit rejected such a changing terms provision in *Stover v. Experian Holdings, Inc.*, but ironically did so to benefit the corporate drafter of the provision that accessing the website constituted assent to the "then current" terms, which decided in the case before it that it preferred its original terms. 978 F.3d 1082, 1085–86 (9th Cir. 2020).

Ironically, given the willingness of companies to change privacy policies and disclose user information when it suits them, companies also use the privacy of their customers as a pretextual shield against having to disclose information to government agencies or competitors. *See* Rory Van Loo, *Privacy Pretexts*, 108 CORNELL L. REV. (forthcoming 2022) (discussing examples).

133. Roberts & Hawkins, *supra* note 79 (stating "[a] recent study of the privacy policies of 90 consumer genetics companies revealed that all of the companies surveyed included unilateral amendment provisions, whereas only a handful promised to inform individual users" of changes to how their data was handled); Fowler, Hawkins & Roberts, *supra* note 79, at 4–5; J.W. Hazel & Christopher Slobogin, *Who Knows What and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J. L. & PUB. POL'Y 35, 38–39 (2018).

134. 13 WILLISTON ON CONTRACTS § 37:1 (4th ed. 1993) ("Under the traditional common-law rule, only parties in privity of contract could sue on the contract: It is

law applied only to voluntary transactions, it bound only the transacting parties. Third parties couldn't be bound to someone else's contract, and while the law occasionally recognizes third party beneficiaries, the circumstances in which it does so are limited.[135] Modern EULAs, by contrast, purport to run with the product or even service in question, binding any end user who comes in contact with the product.[136] The result is that not only are buyers of products potentially bound to terms they can't see or assent to, but those terms follow the product, purporting to bind purchasers of used goods after resale or even those who pick up the product to use it with the permission of the buyer. This takes contract law out of the realm of private deals and turns it into private legislation, good against those we can't even pretend consented to it.

Finally, judicial acceptance of these mutant forms of contract has contributed to the spread of written terms of use or EULAs to circumstances where they have never before been used or viewed as necessary.[137] Common household purchases are now bound by written terms and conditions in a way that was never true before. That creates the potential for unfair surprise, particularly when those terms are at odds with longstanding consumer expectations and with contract law's default rules.

For instance, those who bought books on Amazon's Kindle were quite surprised to learn that their books could suddenly disappear.[138] Books are things people have traditionally owned, and the ownership of a particular book includes the right to possess it, resell it, lend it, and the like. Efforts to limit the resale of books by including a statement in the book prohibiting it were struck down as unlawful a century ago.[139] But now that putting a unilateral declaration of the seller's desire somewhere in the book seems to create a binding contract, booksellers may well be able to achieve just that result, not just online but with physical books as well.[140] And as James Grimmelmann notes, increasingly we "agree" to

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essential to the maintenance of an action on any contract that there should subsist a privity between plaintiff and defendant in respect of the matter sued on.") (cleaned up).

135. *Id.*

136. *See* Hemnes, *supra* note 39, at 585; Van Houweling, *supra* note 39, at 30–33.

137. Doing so may "place[] onerous cognitive burdens" on people "not expecting to be thrust into a legal situation" merely because they visited a website. Kim, *supra* note 89, at 103.

138. *See* Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 17, 2009), https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html. The book in question was George Orwell's 1984, showing that irony is not in fact dead.

139. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350–51 (1908).

140. Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 31–32, 40–41 (1994); PERZANOWSKI & SCHULTZ, *supra* note 84, at 105–06.

multiple, conflicting terms of use that allow software programs to take actions that contradict and undermine each other.[141]

The cumulative effect of these changes is to unmoor contract law from the very things that make it contract law. Most consumer contracts in the modern world lack anything like traditional notions of assent. Indeed, Nancy Kim has argued that many of them are not contracts at all, but other "adhesive terms" that businesses have gotten more favorable treatment for by labeling them as contracts.[142] That's bad for contract law, which relies on assent for its legitimacy and which developed common law norms for a reason. It's bad for consumers, who give up important rights like the right to reasonable compensation for breach of a warranty or the right to bring class actions or antitrust claims in court without even the potential power to object.[143] And because courts are so willing to allow parties to contract around other legal rules, it's bad for other areas of law too because it creates nonenforcement zones in which companies are free to violate tort laws with impunity and even to take deliberate action to brick our devices.[144] In a world in which everyone is held to have agreed to give up their legal rights by virtue of a form posted somewhere on a website, no one is left to enforce those rights.[145]

III. RESTORING CONSUMER CHOICE

In this Part, I suggest a simple but profound change to restore the purpose of contract law and the benefit of the bargain contracts are

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Copyright owners sometimes claim they are not selling anything but merely licensing their physical goods. For explanations of why that is untrue, see, for example, David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 34–40 (1999); Jessica Litman, *The Tales that Article 2B Tells*, 13 BERKELEY TECH. L.J. 931, 934–39 (1999).

141. Grimmelmann, *supra* note 128, at 48–49.

142. Kim, *supra* note 89, at 88.

143. U.C.C. § 2-316 (AM. L. INST. & UNIF. L. COMM'N 2020); Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J.L. & TECH. 1, 22–28 (2009); *Viking River Cruises v. Moriana*, 142 S.Ct. 1906 (2022) (barring enforcement of California labor laws). On the harm caused by contractual restrictions on class actions and antitrust enforcement, see Lemley & Leslie, *supra* note 82, 13–41.

144. Grimmelmann, *supra* note 128, at 26–34; Rebecca Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 DUKE L.J. 583 (2019); Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 788–801 (2019).

145. Yonathan Arbel and Roy Shapira have offered a theory of how a few people who aggressively assert their rights can protect the large majority who don't. Yonathan Arbel & Roy Shapira, *The Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929 (2020). But ubiquitous terms of use squeeze out the nudniks of the world.

supposed to offer. I set out the basic idea in Section A. In Section B, I consider objections and loopholes that companies will try to take advantage of.

A. Restoring Actual Agreement

My proposal is sheer elegance in its simplicity.[146] If you want to change the default rules in your contract, you must show that the parties did so voluntarily. Want to persuade a court to accept your standard form in place of what legislatures and courts have established as sensible default rules? Show the court that both parties had a choice and actually agreed to those terms. Not just a "take it or leave it" choice of "agree to the terms or don't proceed with the transaction," but a choice of which terms to apply to that transaction. If you aren't willing to do that, you don't really have agreement to the non-standard terms. And if there is no actual bargain around those terms, but just a unilateral statement of preferences, there is no reason we should throw away the legal rules contract law has already established.

In a standard form contract, that means that consumers must be offered a choice at the point of purchase or engagement between the off-the-shelf default rules of contract law and the company's preferred alternative. Want to persuade a consumer to agree to your terms? Make your terms sufficiently clear and sufficiently attractive that consumers who have a meaningful choice to take the default rules the law offers want your package of terms instead. That may mean that if you hope to impose a term consumers *won't* like—say, a limitation on warranties or a requirement to arbitrate and give up class action claims—you will need to offer them something sufficiently attractive that they will choose your package over the default rules.

This doesn't mean that every consumer transaction has to offer two different contracts, much less a term-by-term choice. As I noted earlier, many transactions don't need written terms and conditions at all. And in other instances the contract may simply fill in terms like price, quantity, or details that the law doesn't specify. Only if the contract purports to override the normal rules of contract law and agree to different rules should we make sure that the parties actually made a choice to change the rules. And even then, all the company needs to offer is a single choice—my terms or the normal rules of contract law.

146. *See generally* THE MIDDLEMAN (ABC Family).

B. But What About . . . ?

Of course, nothing is that simple. In this Section I consider a number of objections, complications, and the inevitable efforts to game or nullify the benefit of the bargain rule I propose.

1. DO CONSUMERS REALLY NEED THIS?

Some might object that existing rules suffice to protect consumers. But I think experience has shown that that isn't true.

Yes, we have legal doctrines that prevent the formation of contracts under certain circumstances, like fraud and duress.[147] And we have doctrines like unconscionability that are aimed at preventing the imposition of unreasonable terms. But unconscionability is rarely used today, and none of these doctrines have prevented companies from including outrageous or surprising terms in their contracts or prevented courts from regularly enforcing agreements that deprive consumers of substantial rights without even the fiction of consent.[148] Perhaps we could envision an unconscionability doctrine robust enough to police unfair terms, but it is not the doctrine we have today. And the fact that terms of use and other standard form contracts change the rules of contract law itself, coupled with judicial deference to contract terms and a fear of judicial "activism,"[149] means we are unlikely to see court expand those doctrines to actually require meaningful choice.

Nor do the various procedural doctrines contract law has sometimes adopted mitigate the practical effect of the death of consent in modern contract law. CONSIDER THE RULES FOR DISCLAIMING WARRANTIES. CONTRACT LAW SAYS SUCH DISCLAIMERS MUST BE "CONSPICUOUS."[150] IN PRACTICE, THAT HAS MEANT THAT STANDARD FORM CONTRACTS DISCLAIM WARRANTIES USING ALL CAPITAL LETTERS, OFTEN IN LONG BLOCK PARAGRAPHS, BECAUSE THE U.C.C. TREATS THAT AS AN EFFECTIVE MEANS OF CALLING ATTENTION TO INFORMATION.[151]

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147. *See supra* notes 107–110 and accompanying text.

148. *See* Joe McGauley, *7 Sketchy Terms and Conditions You Didn't Read (but Probably Should)*, THRILLIST (Oct. 8, 2015, 12:05 AM) https://www.thrillist.com/tech/nation/terms-and-conditions-youve-mindlessly-agreed-to-fine-print-in-end-user-license-agreements [https://perma.cc/P95M-N7U6].

149. *See supra* notes 56–58 and accompanying text.

150. U.C.C. § 2-316 (AM. L. INST. & UNIF. L. COMM'N 2020).

151. "(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the

But as the preceding paragraph demonstrates, that's not true. While all-caps text is "conspicuous" in the sense that it might stand out from the surrounding text, it is harder, not easier, to read.[152] As one court colorfully explained, "[l]awyers who think their caps lock keys are instant 'make conspicuous' buttons are deluded."[153] And even block capital text might not stand out if there is so much of it that it seems like the whole contract is written that way.[154] Some courts have imposed limits on font size to be conspicuous and in some states sufficiently important terms in documents like wills might require a separate click or initial to show that the consumer is aware of them.[155]

In fact, though, the problem is worse than just "conspicuous" text that is actually hard to read. The entire point of making text conspicuous is to call a reader's attention to unusual or surprising terms the consumer should know about. But doing so won't accomplish anything if no one

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surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language." U.C.C. § 1-201(b) (10). Courts have also held that all-caps or bolded language calls sufficient attention to other types of provisions, such as arbitration clauses. *See, e.g., HomeAdvisor, Inc. v. Waddell*, No. 05-19-00669-CV, 2020 WL 2988565, at *4 (Tex. App. June 4, 2020) (holding that, in a lengthy terms of service agreement, bolding and capitalizing the arbitration provision provided reasonably conspicuous notice).

152. *See* Yonathan Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862, 886–88 (2020) (finding empirically that all-caps provisions are harder to read).

153. *Am. Gen. Fin., Inc. v. Bassett*, 285 F.3d 882, 889 (9th Cir. 2002) (cleaned up):

> Lawyers who think their caps lock keys are instant "make conspicuous" buttons are deluded. In determining whether a term is conspicuous, we look at more than formatting. A term that appears in capitals can still be inconspicuous if it is hidden on the back of a contract in small type. . . . Terms that are in capitals but also appear in hard-to-read type may flunk the conspicuousness test. A sentence in capitals, buried deep within a long paragraph in capitals will probably not be deemed conspicuous. Formatting does matter, but conspicuousness ultimately turns on the likelihood that a reasonable person would actually see a term in an agreement. Thus, it is entirely possible for text to be conspicuous without being in capitals.

154. *See Broberg v. Guardian Life Ins. Co.*, 90 Cal. Rptr. 3d 225, 171 (Ct. App. 2009) ("But the placement of the disclaimers (buried in a sea of same-sized, capitalized print), coupled with the absence of any cautionary language on the first page of the policy illustration, which contains the deceptive language and figures indicating Powell's out-of-pocket payments will 'vanish,' preclude a determination the disclaimers are adequate as a matter of law.").

155. *See, e.g.*, *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp.*, 890 F.2d 108, 114–15 (9th Cir. 1989) (holding that a warranty disclaimer printed in seven-point font was not conspicuous).

reads the text (and no one reads the text).[156] Indeed, companies periodically reinforce this point by including Easter eggs or even cash prizes for people who read the contract, only to wait months or years before they are claimed.[157] They don't read it because the text is long, generally written in impenetrable legalese,[158] and because they can't do anything about it other than click "accept."

The fact that no one reads standard form contract terms helps explain Florencia Marotta-Wurgler's otherwise surprising empirical finding that the terms in clickwrap and other novel forms of online contracting historically aren't much worse for consumers than the terms in more traditional consumer contracts.[159] That doesn't mean those terms are favorable to consumers or that somehow competition is driving the market towards reasonable terms. If that were true, there wouldn't be any need for terms that varied the default rules of contract law. The fact that standard form contracts systematically change those rules suggests that companies see advantage in doing so. And indeed, the evidence we have suggests that when people *are* given a choice, they reject some defaults: ninety-six percent of people opted out of targeted tracking when Apple gave them the option to do so.[160] People later told what they agreed to in EULAs regretted having accepted the terms.[161] Other surveys show

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156. *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 548 (2014); Bakos, Marotta-Wurgler & Trossen, *supra* note 123, at 3.

157. *See, e.g.*, Schwartz, *supra* note 125 ("Georgia high school teacher Donelan Andrews won a $10,000 reward after she closely read the terms and conditions that came with a travel insurance policy she purchased for a trip to England. Squaremouth, a Florida insurance company, had inserted language promising a reward to the first person who emailed the company."); *see also Tennessee Professor Hid a Cash Prize on Campus. The Clue Was in the Syllabus*, NPR (Dec. 20, 2021, 5:45 AM), https://www.npr.org/2021/12/20/1065723014/tennessee-professor-hid-a-cash-prize-on-campus-the-clue-was-in-the-syllabus [https://perma.cc/XJH9-3RPB] (documenting a professor who hid a cash prize on campus, told people where it was in the syllabus, and found that no one claimed it all semester). There may be more examples. By definition, we wouldn't know about them unless people read the text and found them.

158. Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2288, 2295 (2019); Goldman, *supra* note 120.

159. Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 713 (2007). Colin Marks, by contrast, finds that in the online world terms and conditions differ from terms provided by the same store in the physical world. Marks, *supra* note 74, at 38.

160. Margot E. Kaminski, *The Case for Data Privacy Rights (Or, Please, a Little Optimism)*, 97 NOTRE DAME L. REV. REFLECTION 385, 399 (2022).

161. Nathaniel Good, Rachna Dhamija, Jens Grossklags, David Thaw, Steven Aronowitz, Deirdre Mulligan & Joseph Konstan, *Stopping Spyware at the Gate: A User Study of Privacy, Notice and Spyware*, SYMPOSIUM ON USABLE PRIV. & SEC. at 1 (2005), http://law.berkeley.edu/files/Spyware_at_the_Gate.pdf [https://perma.cc/RD2C-5R59]

that people told about their agreement to assign or license their content to social media companies object to those terms and would reject them if they could.[162]

To the contrary, Marotta-Wurgler's finding likely means that everyone involved understands that no one is reading any of these terms, even when they nominally have the option to do so. From this perspective, there is a twisted sort of logic to doing away with the fiction of assent. Once the term became a standard form you had to accept and couldn't alter, it didn't really matter whether we obtained the fiction of consent. Nothing was going to change.

For this reason, even more aggressive interventions like having people initial or click "I accept" to individual terms rather than to the contract as a whole aren't likely to change the prevailing dynamic. People have come to understand that they have no choice even when presented with what looks like a choice. The only choice is "take it or leave it," and that remains true no matter how many times we force someone to click "I accept." Indeed, repeatedly forcing someone to acknowledge their powerlessness in the face of an outcome they don't like probably does more harm than good.

That's not what contract law means by a bargain. Worse, because people believe that contracts have a moral component even if law doesn't,[163] flashing legalese in front of them may deter them from challenging corporate behavior even when the law allows them to do so.[164] Indeed, people have become so conditioned to terms and conditions that the younger generation not only believes they are enforceable but is

("When users were informed of the actual contents of the EULAs to which they agreed, we found that users often regret their installation decisions."); Goldman, *supra* note 120; *see also* Laura Cicirelli, *Online Shopping: Buy One, Lose Legal Rights for Free*, 46 SETON HALL L. REV. 991 (2016).

162. Hacohen, Elazari & Schwartz-Maor, *supra* note 122, at 568–76.

163. *See* Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 508–09 (2020).

164. *See, e.g.*, Colin Marks, *Online Terms as* In Terrorem *Devices*, 78 MD. L. REV. 247, 285 (2019); Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. & ECON. ORG. 633 (2020); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 139–44 (2017); Kim, *supra* note 89, at 88 ("[P]eople may assume that a contract is enforceable even when it is not. Consequently, contract formation often means submission to the terms even if the terms could be successfully challenged.").

dubious of any contract that *doesn't* come with terms and conditions.[165] And it is the most powerless in our society who suffer the most.[166]

2. CAN IT REALLY WORK?

Is it really feasible to give consumers the option to choose between different contracts? It is true that it seems like a radical change to a world that has grown used to being offered an illusory "choice" to take or leave whatever the company provides. But in fact, we have a recent example of how my system might work—cookies. Europe's General Data Protection Regulation (GDPR) and California's new privacy statute both require many websites to offer users a choice on the home page whether to accept all cookies or to limit particular categories of cookies.[167] Notably for our purposes, someone who chooses to reject cookies is *not* prevented from accessing the website. Nor is the functionality of the website artificially limited (though of course any personalization that comes from cookies won't be present if the user rejects cookies). So, it's not just possible to offer consumers an effective choice—websites are already doing it in an important class of cases.

One useful lesson from the GDPR experience is that the sky hasn't fallen. Before the GDPR was passed, companies and many scholars warned that the model of the Internet depended on access to personal data, and allowing people to freely opt out of providing that data would blow up the whole system.[168] That hasn't happened. Internet companies seem to be doing just fine despite people's ability to turn off a feature that has in theory been a key driver of their profitability.[169]

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165. *See* David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595 (2016) (demonstrating this result empirically). Poorer and less educated people are also more likely to believe themselves bound to unreasonable terms. *Cf.* Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 421–42 (2008).

166. Kim, *supra* note 89, at 88 ("Oppressive terms harm most those who lack market power, media savvy, language fluency, or time to interact with or maneuver around legal departments and customer service representatives.").

167. Council Directive 2009/136, art. 20, 2009 O.J. (L 337) (EC), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF [https://perma.cc/RUA5-W2GM]; Cal. Civ. Code § 1798.135(a) (West 2023).

168. *See, e.g.*, W. Kuan Hon, *GDPR: Killing cloud quickly?*, IAPP (Mar. 17, 2016), https://iapp.org/news/a/gdpr-killing-cloud-quickly/ [https://perma.cc/9LG3-DLS5]; Sarah Spiekermann, Alessandro Acquisti, Rainer Böhme & Kai-Lung Hui, *The Challenges of Personal Data Markets and Privacy*, 25 ELECTRON MKTS. 161, 161–63 (2015).

169. Chinchih Chen, Carl Benedikt Frey & Giorgio Presidente, Privacy Regulation and Firm Performance: Estimating the GDPR Effect Globally 2–3 (Working Paper, Paper No. 2022-1, Jan. 6, 2022),

It is possible that, despite the option to do so, people don't turn off cookies.[170] That wouldn't be too surprising; while the GDPR does offer consumers an actual choice, consumers have become so conditioned to seeing accept versus reject "choices" that actually require you to click accept that it may never occur to them that this time it's a real choice. Or maybe they realize that they have a choice but they like cookies and the personalization they offer. In either case, it may be that the GDPR works (or at least, doesn't cause the sky to fall) because people don't use it.

But even if that's true, the GDPR example provides a useful model for how we could design a broader right to choose the contract terms that apply to consumer deals—and also some cautionary notes about how to do it. It applies across many websites, and most of those sites have coalesced around a standard place to put the question and how to ask it. It doesn't default consumers to the company's preferred outcome; indeed, if you choose "manage cookies" most (but not all) companies have each category of cookies turned off as a default.

One design flaw is that the implementation of the GDPR generally gives consumers a choice between "accept all" and "manage cookies."[171] If you click manage cookies, you then go to a page giving you further choices for particular types of cookies.[172] That means that it's more work to reject cookies than it is to accept them.[173] That is still better than not

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https://www.oxfordmartin.ox.ac.uk/downloads/Privacy-Regulation-and-Firm-Performance-Giorgio-WP-Upload-2022-1.pdf [https://perma.cc/BB3G-Z6S6] (finding that the GDPR had "no statistically significant impacts on either profits or sales" for large internet companies; however, the data shows an eight percent reduction in profits for companies, suggesting that "the main burden of the GDPR has fallen on smaller companies"). *Contra* Kif Leswing, *Facebook Says Apple iOS Privacy Change Will Result in $10 Billion Revenue Hit This Year*, CNBC (Feb. 2, 2022), https://www.cnbc.com/2022/02/02/facebook-says-apple-ios-privacy-change-will-cost-10-billion-this-year.html [https://perma.cc/H2C7-MZY7].

170. *See* Joe Nocera, *How Cookie Banners Backfired*, N.Y. TIMES (Jan 30, 2022), https://www.nytimes.com/2022/01/29/business/dealbook/how-cookie-banners-backfired.html (noting that people hit accept because they "don't feel that they can do anything about it" and "hitting the 'accept' button is not actually indicative of consent"). Scholars are looking into this empirical question now. *See* Yutang Hsiao, Data Privacy on Marketplace Platforms: Privacy Policy and Consumers' Dilemma between Efficiency and Autonomy (working paper 2023) (on file with author).

171. *See, e.g.*, Midas Nouwens, Ilaria Liccardi, Michael Veale, David Karger & Lalana Kagal, *Dark Patterns after the GDPR: Scraping Consent Pop-ups and Demonstrating their Influence*, *in* CHI. '20: PROCEEDINGS CHI CONF. ON HUM. FACTORS COMP. SYS. 3 (2020), https://people.csail.mit.edu/ilaria/papers/Midas-MITCHI2020.pdf [https://perma.cc/2G5P-842P].

172. *Id.*

173. The situation is even worse on some U.S. websites, which only offer an "accept" button or a link to their privacy policy. Although California law requires them to offer a "Do Not Sell or Share My Personal Information" option in a "clear and

having a choice, but it may well bias consumer choices, particularly if they don't particularly care about cookies or just don't want to be bothered to think about the issue. The EU is currently investigating whether the failure to present the accept and reject options equally violates the GDPR.[174]

The question of consumer time and interest becomes even more significant if it is not just one issue (cookies) that consumers must decide but a constellation of those issues. One risk is that consumers won't understand the choices they are being given. Another risk is that they won't care enough to spend the time figuring out which contract they want to choose. That latter possibility seems quite likely. Consumers are often busy people. They generally aren't lawyers, and legal terms may make their eyes glaze over. And many of the terms in consumer contracts involve low-probability events like litigation that companies care about because they are repeat players but that consumers may rationally decide to ignore. And especially if they don't care, making them choose may just waste everyone's time and energy.[175]

These are legitimate worries. The right way to respond to them is to treat the default rules of contract law as just that—defaults. So, the law should not just police the way companies offer a choice between contract terms to make sure they don't make their preferred terms the easiest choice. We should require the opposite: that the contract with default legal terms governs unless consumers affirmatively opt into the non-standard terms. That means that the company who wants to get its customers to agree to those terms will have to persuade them to do so.[176] This too is feasible. Indeed, a variant of my proposal is already the law in Germany, which provides that standard-form terms don't become part

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conspicuous link," Consumer Privacy Act, 2018 Cal. Stat. § 1798.135(a)(1) (West 2023), but not all companies comply, Nocera, *supra* note 170 (explaining that internet companies hire firms called "consent management platforms" to teach them how to hide or downplay such options).

174. Elisa Braun, *Google, Facebook Face Big Privacy Fines in France*, POLITICO (Jan. 5, 2022, 9:12 PM), https://www.politico.eu/article/google-facebook-face-big-privacy-fines-in-france/ [https://perma.cc/7SAH-4Y86]. *See also* Nouwens, Liccardi, Veale, Karger & Kagal, *supra* note 171, at 2.

175. *See* Avery Katz, *Your Terms or Mine? The Duty to Read the Fine Print in Contracts*, 21 RAND J. ECON. 518, 520 (1990); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 832 (2006) (arguing that consumers are rational in not reading the terms).

176. Empirical evidence suggests people naturally treat default rules as "endowments," demonstrating an "irrational" preference for retaining them. *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998). If this is right, it matters what default rules are selected. On the design of default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

of a contract unless they are explicitly provided to the consumer and the consumer agrees to them.[177]

Persuading consumers who have the choice of legal defaults to choose the company's terms instead will require both writing terms that on balance look attractive to consumers and conveying quickly and clearly to consumers what those terms are. There are companies and technologies working on this problem, from the development of "computable contracts" that automatically generate contract terms to implement plain-language ideas[178] to the creation of icons to explain particular contract terms[179] to efforts to "gamify" the process of agreement to make it more attractive to users.[180]

The corollary is that companies do not need to persuade consumers to opt into each non-standard term. They can offer a single contract with a package of custom terms that the consumer can choose over the default rules. Thus, a company that wants to include something that changes the legal defaults in a way consumers might not like—say, an arbitration clause or a choice of a distant forum—can balance that term with more consumer-favorable provisions. And they will have an incentive to do so to persuade consumers to choose their contract.

Finally, I emphasize that this rule applies only to contract terms that change the normal default rules of contract law. Plenty of terms—*e.g.*, price, quantity, precise nature of goods—don't have automatic legal default rules, so contracts are free to specify them without triggering this

177. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 305 (Ger.), https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0915 [https://perma.cc/M2HP-37LC]. Terms that are unusual or surprising are not included; instead, the default rules of contract law govern. *Id.* §§ 309–10.

178. OLIVER R. GOODENOUGH, SUSAN SALKIND & HARRY SURDEN, COMPUTABLE CONTRACTS PROJECT: EXECUTIVE SUMMARY (2017), https://ssrn.com/abstract=3007048. For a discussion of the benefits and pitfalls of machine-readable contracts, see Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83 (2022); Goldman, *supra* note 120, at 13; Andrew M. Hinkes, *The Limits of Code Deference*, 46 J. CORP. L. 869 (2021).

Of course, the plain language versions need to be consistent with the legal boilerplate. Increasingly they aren't. *See* Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOL. L. REV. 1, 15–20 (2021) (finding that tech platform privacy policies are increasingly at odds with the companies' own terms of use).

179. *About CC Licenses*, CREATIVE COMMONS, https://creativecommons.org/about/cclicenses/ [https://perma.cc/NP6J-B9SK] (last visited Feb. 20, 2023); *cf.* Omri Ben-Shahar & Adam Chilton, *Simplification of Privacy Disclosures: An Experimental Test*, 45 J. LEGAL. STUD. S41, S42–43 (2016) (proposing and testing simplified contract terms).

180. Nahmias, Feldman, Richter & Raban, *supra* note 96, at 421–32.

obligation.[181] It is only if a company wants to contract around the existing rules that it needs affirmative assent.

Setting the default this way means that companies will (and should) often decide the game isn't worth the candle—that the costs of drafting attractive contracts and persuading consumers to opt into them isn't worth it.[182] That too is a good thing. The reason we have blundered into a world governed by standard form agreements is in large part the fact that they seem costless to implement. Making them costly for companies (because they demand attention from consumers) may actually be healthy because it will limit the adoption of terms that would never have been part of a contract in a prior age.[183] And the law has a long and distinguished history of reading in terms when the parties don't specify them. As Robert Scott has noted, "[a]ll contracts are incomplete."[184] But courts nonetheless enforce them.[185] Both consumers and companies will often benefit from short, simple agreements coupled with the default terms of the general law.[186]

Perhaps it will turn out that there are legal default rules no one likes. It might be, for instance, that no one wants an implied warranty of fitness for a particular purpose even when given a real option to have one.[187] I

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181. There are certain rules, like the U.C.C. rule that a court will imply a reasonable price if the contract doesn't specify one, that I don't think constitute default rules in the sense I am using the term. Parties should be free to contract for price or quantity, except as I note in Subsection 3, below. *Cf.* U.C.C. § 2-306 (AM. L. INST. & UNIF. L. COMM'N 2020) (setting the quantity as zero unless otherwise specified).

182. *See Hill v. Gateway 2000*, 105 F.3d 1147, 1149 (7th Cir. 1997) (discussing how costly and frustrating it would be if people had to read terms before entering into contracts); Kar & Radin, *supra* note 108, at 1161–62 (noting Judge Easterbrook's observation but pointing out that he drew the wrong conclusion from the ridiculousness of expecting people to actually have to encounter the terms in a standard-form contract).

183. For similar ideas in other contexts, see Jonathan Masur, *Costly Screens and Patent Examination*, 2 J. LEGAL ANALYSIS 687 (2010); Jonathan Masur & David Fagundes, *Costly Intellectual Property*, 64 VAND. L. REV. 677 (2012).

184. Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1641 (2003).

185. *See Heyman Cohen & Sons v. M. Lurie Woolen Co.*, 133 N.E. 370, 371 (N.Y. 1921) (stating contracts are enforced unless "indefiniteness . . . reach[es] the point where construction becomes futile"); Karen E. Sandrik, *Distinctly Claiming an Invention*, 73 SMU L. REV. 541, 567 (2020) ("In modern practice, and despite the fact that contracts are incomplete, there are very few instances where a contract is unenforceable.").

186. *See* Steven Weatherley, *Pathclearer: A More Commercial Approach to Drafting Commercial Contracts*, L. DEP'T QUART., Oct.–Dec. 2005, at 39, https://www.oncontracts.com/docs/Pathclearer_article_reduced_size.pdf [https://perma.cc/ABH6-DF2J].

187. For a debate over whether the zero-quantity default rule qualifies, compare Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95–96 (1992) (yes), with Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006) (no).

am skeptical that will be true very often, but if it is, the proper course is to change the substantive law, which, if almost all parties want to contract around it, is not serving the public interest.

3. WON'T COMPANIES JUST FIND WAYS AROUND IT?

The companies that currently benefit from the ability to draft and enforce unilateral statements of their interest will do everything in their power to hold onto that right. Assuming they can't prevent courts or legislatures from requiring them to offer a choice, they may seek to undermine the effectiveness of that choice.

I've already mentioned one way to do so: make it easier to accept the company's preferred terms and hard to pick the default rules. As noted above, this is arguably a problem with the implementation of the GDPR and can be solved by either giving both choices parity or, preferably, by making the default legal rules the default contract.

A more challenging problem is whether and to what extent companies can condition some or all the substantive benefits of the deal on agreement to its preferred terms. If we don't limit their power to do so, every company will simply say "sure, you can choose the default form rather than our option, but then you can't use our product," and we're right back to where we started.[188] So a right to effective choice must include some right to enjoy the benefits of the deal regardless of which set of terms the consumer chooses.

But at what price? If the company can charge different prices for different contracts, what is to prevent it from offering a product for $50 if the consumer picks the preferred contract and $1 million if they don't? If there is no price parity requirement, it is trivial for companies to render the choice of contract completely impractical.

A related version of this problem involves companies that hobble access to the product—slowing Internet service, for instance, or moving the buyer to the back of the line for product allocations, shipping, or service calls if they didn't agree to the company's favored contract. This too seems problematic, in part because it's a slippery slope that can easily turn into a de facto refusal to deal with those who pick the disfavored contract, and in part because companies may strategically change their products to manipulate the choice of contracts. Offering perks only to those who pick the favored contract presents similar issues. While it

188. Indeed, programmers write code that won't let people click on a button to complete a sale until they have made the choice the company wants. *How to handle rejected Terms and Conditions?*, STACKEXCHANGE (Apr. 21, 2016), https://ux.stackexchange.com/questions/93065/how-to-handle-rejected-terms-and-conditions [https://perma.cc/5DEK-4YJJ].

might feel different than hobbling the product for the disfavored group, as an economic matter the two are equivalent.

This is a difficult problem. The right answer is likely the one the GDPR chooses: companies cannot change their products or their prices depending on which contract terms the consumer chooses, except where the circumstances require it. For example, under the GDPR companies can't refuse to provide service or change the product they provide to anyone who rejects cookies.[189] But they can—indeed, they must—change the content they deliver if they use cookies to personalize that content.

I recognize that imposing these restrictions won't sit well with those who care about freedom of contract. It is a fairly paternalistic approach.[190] And some of the term changes, like elimination of warranties, probably should have price consequences. But once we have decided that we want to give consumers an effective choice whether to agree to nonstandard contract terms we have to put some limitation on the ability of companies to evade that requirement. The easiest and simplest is just to prohibit that manipulation. If companies feel the need to manipulate the choice, it is precisely because they understand that they aren't offering consumers something those consumers would voluntarily choose. That's precisely what I want to stop.

It may make sense to make exceptions in certain commercial contexts. For instance, people may want to sell their used cars "as is" with no warranties. But the law can (and indeed does) respond to such special cases by making exceptions to the general rules of contract law. Even if we decide that taking the GDPR approach is undesirable or it proves politically infeasible, there may be lesser steps that would restrict the ability of companies to undo the benefits of choice.

As for price, one thing we could do short of preventing the company from charging different prices would be to use the tax system to influence that decision. Take the example I gave above in which a company offers a product for $50 with one contract and $1 million with the other contract. From an economic perspective, what the company is saying is that it values a consumer agreeing to its preferred terms at $999,950. That's how much it demands to give those terms up. We should tax that value. So, in that example, the company should have to pay taxes on $1 million in income, since by hypothesis it got $1 million worth of value

189. Some news websites won't load certain content embedded in a story unless the reader enables targeting cookies. *See* Luke Irwin, *How the GDPR Affects Cookie Policies*, IT GOVERNANCE (Apr. 12, 2022), https://www.itgovernance.eu/blog/en/how-the-gdpr-affects-cookie-policies [https://perma.cc/P9SP-6EB4]. This may be a violation of the GDPR. Or perhaps it is necessitated by the fact that third parties serve those embedded links, though presumably the third parties also ought to be bound to the GDPR.

190. *See* Jody S. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323 (2020) (objecting to paternalism in contract law, in part by assuming that contracts are freely and fairly entered into).

from the transaction. This may discourage extreme price variation like the one in my example, though the ease with which companies avoid paying taxes[191] may blunt the effectiveness of this instrument. And it may not do much to prevent smaller price disparities that would have limited tax consequences but might still move consumers. But it would be better than nothing.

A second possible compromise would be to limit the promises or consequences to those that are connected and proportionate to the contract term in question. We might permit only offers that are reasonably related to the particular terms the company seeks. For instance, if a company wants to impose an arbitration clause on the grounds that arbitration is cheaper,[192] it might be permitted to offer to pay the consumer's attorney's fees in arbitration but not in litigation, or to pay the costs of litigation travel in exchange for a forum selection clause. This would be a more significant burden on the courts, which would have to decide proportionality but again it might be better than nothing.

Finally, the law could set standards that define and limit the circumstances in which companies could vary the price in exchange for giving up particular rights and specifying the means for doing so. We already do that in some sectors, regulating what promises car dealers can and can't make and how they can signal the changes (like as-is sales) they are permitted to offer or the things companies can say, must say, and can't say in making consumer loans.[193] The law can't do that for every term, of course,[194] but it could set a default that restricts alterations of certain key terms and permits certain others.

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191. Matthew Gardner & Steve Wamhoff, *55 Corporations Paid $0 in Federal Taxes on 2020 Profits*, INST. ON TAX'N & ECON. POL'Y (Apr. 2, 2021), https://itep.org/55-profitable-corporations-zero-corporate-tax/ [https://perma.cc/H9R7-Y7EZ].

192. It isn't obvious that it is. Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 815 (2008) ("[T]he upfront costs of arbitration will in many cases be higher than, and at best be the same as, the upfront costs in litigation. Whether arbitration is less costly than litigation thus depends on how attorneys' fees and other costs compare, and the evidence here is inconclusive."); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 9 ("[A]rbitration has supposedly been 'captured' by litigation counsel who, for reasons of their own, prefer to agree with their counterparts to run arbitration proceedings in the same, expensive and time-consuming ways as they're familiar with in court.").

193. For a discussion, see Danielle D'Onfro, *Error-Resilient Consumer Contracts*, 71 DUKE L.J. 541, 589–91 (2021).

194. Goldman, *supra* note 120, at 14–15.

C. Implementation

In this final Section, I consider how the law might change to implement my proposal. The answer differs depending on whether contract law is common law or statutory law.

1. COMMON LAW CONTRACTS

For many contracts, implementing the actual choice idea is something courts can do. It doesn't require new legislation. First, many contracts, particularly those involving services (including many internet sites), are governed by the common law of contracts, not by statute. The common law of contracts has historically been based on the benefit of the bargain and required offer, acceptance, and consideration. And the Restatement prevents the enforcement of hidden terms that are "unfair or surprising."[195] While many courts have essentially read those requirements out of modern contract law,[196] there is no reason they couldn't return to an era when courts took those requirements seriously.[197]

The idea of common law development is out of vogue in many circles; people often suggest that the job of a judge is just to "call balls and strikes" and not to think about the development of legal doctrine.[198] That's nonsense, particularly when it comes to the common law, where

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195. RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM L. INST. 1981).

196. Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 736 (2016) ("Section 211 was an elegantly designed, thoughtful solution by impressive contract theorists to address the problem of assent to standardized contracts [but it is] rarely cited with respect to any standardized contract dispute, and even where cited, it rarely provides relief to the non-drafting party.").

197. *See* Nancy S. Kim, *Revisiting the License v. Sale Conundrum*, 54 LOY. (L.A.) L. REV. 99, 143–44 (2020); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 231 (2007).

There is some risk, however, that the new Restatement of Consumer Contracts, which ratified these changes, will cement the elimination of assent from contract law. For a discussion, see Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of Consumer Contracts*, 32 LOY. CONSUMER L. REV. 456 (2020); Nancy S. Kim, Adam J. Levitin, Christina L. Kunz, Peter Linzer, Patricia McCoy, Juliet M. Moringiello, Elizabeth Renuart & Lauren Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. REG. 447 (2019).

198. Chief Justice Roberts famously said at his confirmation hearing that his job was simply to "call balls and strikes." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on Judiciary U.S.S.*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

the doctrines courts apply are ones their predecessors created.[199] And indeed the enforcement of shrinkwraps, clickwraps, and browsewraps represents a very recent and quite dramatic form of common law development (though not a good one). Courts certainly have the power to apply the common law of contracts in a way consistent with its purpose, though they have neglected to do so in recent years.[200]

Alternatively, if the common law really is dead, an administrative agency like the Federal Trade Commission or state regulators could impose restrictions on contractual terms as unfair trade practices. The FTC has recently cracked down on one abusive contractual term—noncompete agreements.[201] And federal law already prohibits others, a prohibition enforced by the FTC.[202] This wouldn't be a complete solution, but it could target particular terms.

2. THE U.C.C. AND THE FAA

Other contracts, including those for the sale or lease of goods and financing contracts, are governed by the U.C.C. Because the code has been adopted as a statute in nearly all states, implementing actual choice will require that the approach be consistent with the statutory language.

For the most part, it is. The U.C.C. provides that the rules of contract law itself can generally be changed by agreement, with some basic exceptions.[203] Some provisions expressly provide that the parties can change the rule. Thus, U.C.C. Section 2-719 gives parties the power to modify the remedies the U.C.C. provides unless doing so makes a

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199. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022) ("Juries might 'call balls and strikes'—that is, decide the particular facts before them in accordance with set rules. Judges do more, and the Supreme Court does much more. A closer analogy might be the Commissioner of Baseball, setting the rules of the game."); *see also* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014); *cf.* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012) (analyzing the metaphor).

200. *See* CATHERINE MITCHELL, VANISHING CONTRACT LAW: COMMON LAW IN THE AGE OF CONTRACTS 1–2 (2022) ("Perhaps counterintuitively, the growth of contract and private ordering in society since the latter half of the twentieth century has not led to the emergence of a reinvigorated common law. Instead, the common law has largely retired from the field as general regulator of agreements, . . . perceiving its primary purpose as to enforce the express terms of the contract . . . .").

201. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/B2H7-LFXJ].

202. *Consumer Review Fairness Act: What Businesses Need to Know*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/consumer-review-fairness-act-what-businesses-need-know [https://perma.cc/4XSB-TQ7K] (last visited Mar. 4, 2023) (discussing the Consumer Review Fairness Act, which prohibits businesses from banning customers from writing negative reviews).

203. U.C.C. § 1-302 (AM. L. INST. & UNIF. L. COMM'N 2020).

remedy fail of its essential purpose.[204] And U.C.C. Section 2-316 provides that the seller can disclaim warranties if it uses certain language and meets certain tests.[205]

Other provisions expressly provide that they can't be changed by agreement. A liquidated damages clause that isn't tied to expected actual damages is void as a penalty, for example.[206] U.C.C. Section 2-616(3) provides that the provisions governing a claim of excuse from performance can only be changed to increase rather than decrease seller obligations. And courts may refuse to enforce unconscionable terms whether or not the parties agreed to them.[207] Other laws also may prevent provisions from being altered by contract.[208] But the U.C.C. is largely silent on how one changes its provisions.

Courts have the power to require actual choice before modifying most U.C.C. provisions. U.C.C. Article 2 indicates that a contract is formed based on acts by the parties which show agreement, and not by the presence or absence of any formal category.[209] If the parties act as though they have come to terms, the presence of a form somewhere on a website shouldn't operate to vary those terms, and particularly not to vary the legal rules that govern how we interpret those terms. Nonetheless, given the recent history of courts permitting such modifications, it would be desirable to clarify the law by adding a provision to the U.C.C. stating that "except as otherwise provided herein, the provisions of this code may be changed by agreement only if both parties freely consent to doing so after having been provided an effective option to abide by the provisions of this code."

Even if such a provision is adopted into the U.C.C., it will not override the provisions that expressly permit limitation of warranties or remedies unless it says so. It would be desirable to require important limits like those to be made under conditions of actual choice too, but I acknowledge that doing so will require changing the current contract law and may upset settled expectations. Changing arbitration clauses may be even harder. They are governed by the 1925 Federal Arbitration Act (FAA), so requiring actual choice before agreeing to arbitration may require changing federal law. The FAA doesn't actually embody a strong preference for arbitration of consumer disputes, and it seems unlikely that Congress intended any such thing a century ago.[210] Arguably we

204. *Id.* § 2-719.

205. *Id.* § 2-316.

206. *Id.* § 2-718.

207. *Id.* § 2-202.

208. For examples from intellectual property (IP) law, see Lemley, *supra* note 104.

209. U.C.C. § 2-204.

210. For more details on the Supreme Court's modern misreading of the FAA, see Lemley & Leslie, *supra* note 82.

should be rid of it altogether.[211] But the Supreme Court has been increasingly aggressive in reading into the FAA a preference for arbitration over everything else,[212] so it may preempt any state contract law that requires actual consent to arbitration.

Finally, there is a risk that if default rules start to matter, companies will lobby to change the law to make those default rules less consumer friendly. That is certainly a possibility; the unfortunate terms of the new Restatement of Consumer Contracts offer an example of the potential for such lobbying. But the U.C.C. is established law throughout the country. Changing it would be a lot of work. More to the point, it is work companies should have to do if they want to unilaterally rewrite the law in their favor.

3. WHY ONLY CONSUMERS?

Should we limit the actual choice principle to consumer contracts? This is a fair question. As markets have become more and more concentrated,[213] being a business is no guarantee of bargaining power. Small businesses may not have access to legal counsel, and even if they did, they may find themselves no more able to negotiate contracts against behemoths like Amazon or Wal-Mart than consumers are. For a small business confronted with terms of use on a website they must use, the benefit of the bargain seems just as elusive as it does for modern consumers.

In an ideal world, businesses would benefit from my actual choice proposal too. But things are a bit more complicated than with consumers.[214] It is (relatively) easy to identify consumers as a class, so we know who should benefit from the rule. It will be somewhat harder to decide which businesses lack bargaining power. Perhaps we could set a bright line rule based on relative size, but power imbalance between corporations is likely to vary both with the size of the business and with how important the transaction is to each party.

Business contracts are also more likely to be custom deals for which we might want to vary the standard default rules made for normal sales.

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211. *See* Ronald G. Aronovsky, *Starting Over: Letting States Regulate Adhesion Arbitration Agreements*, 71 SYR. L. REV. 1019, 1059 (2021) (making this argument).

212. *Id.* Unfortunately, that tendency has only continued. *See Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1924 (2022) (FAA preempts California labor law). *But cf. Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1712–14 (2022) (holding that the FAA does not require showing of prejudice to show the right was waived).

213. Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FINANCE 697, 698 (2019) (seventy-five percent of U.S. industries have grown more concentrated in recent decades).

214. *See* Mootz, *supra* note 25, at 303.

That won't always be true, of course; a small accounting firm that wants to buy binder clips isn't really in a different position than a consumer who wants the same binder clips. And a major new study shows that even sophisticated companies often end up using standard terms generated by path dependence rather than negotiating those terms.[215] But again, there is likely to be variation in the bespoke nature of the transaction, and some business deals may justify variation from the default legal rules.

Finally, businesses are on average more sophisticated contractors than consumers are. That might not help a business that knows it's being screwed over by a term in a contract it has no choice but to accept. But the case for enforcing a take-it-or-leave-it term is at least somewhat stronger if the buyer is at least aware of what they're getting into.

4. WOULDN'T IT BE EASIER TO JUST BAN STANDARD FORM CONTRACTS ALTOGETHER?

Yes. And it would probably be a good idea, though there is a case to be made that some standard forms are beneficial.[216] But it's never going to happen.[217] At least my proposal will offer consumers an actual choice in an important subset of standard form contracts.

CONCLUSION

Contracts are supposed to represent the agreement between parties—a meeting of the minds. Increasingly, they don't. A mutually beneficial bargain has been replaced by companies that insert nonnegotiable and often unreviewable standard form terms at various stages in the process, sometimes after the deal itself has long been concluded. Those terms of use don't reflect the actual choice of parties to adopt their terms. And so, they shouldn't benefit from the thing that makes contract law unique—the ability of the parties to choose to change the rules that bind them. Companies that want to change the law to serve their own ends should have to offer consumers an actual choice between the default rules the

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215. Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1 (2021).

216. *See, e.g.*, Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 331–32 (2010) (noting they decrease transaction costs and increase standardization, which can help consumers, in some cases); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (noting that in efficient markets, "the operation of the market usually will provide drafting parties with an incentive to include only efficient terms in form contracts.").

217. Though, as noted above, some courts, particularly in California, have refused to enforce some of the more extreme forms of purported agreement, such as browsewrap licenses. *See supra* note 85.

law has set and the alternative package the company proposes. Doing so will ensure that both sides to a contract actually get the benefit of the bargain.