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## **Fiduciary Boilerplate: Locating Fiduciary Relationships in Information Age Consumer Transactions**

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# **Fiduciary Boilerplate: Locating Fiduciary Relationships in Information Age Consumer Transactions**

Lauren Henry Scholz\*

*The result of applying general contract principles to consumer boilerplate has been a mass transfer of unrestricted rights to use and sell personal information from consumers to companies. This has enriched companies and enhanced their ability to manipulate consumers. It has also contributed to the modern data insecurity crisis. Information age consumer transactions should create fiduciary relationships between firm and consumer as a matter of law. Recognizing this fiduciary relationship at law honors the existence of consumer agreements while also putting adaptable, context-sensitive limits on opportunistic behavior by firms. In a world of ubiquitous, interconnected, and mutable contracts, consumers must trust the companies with which they transact not to expose them to economic exploitation and undue security risks: the very essence of a fiduciary relationship. Firms owe fiduciary duties of loyalty and care to their customers that cannot be displaced by assent to boilerplate. History, doctrine, and pragmatism all support this position.*

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I. INTRODUCTION .....	144
II. CONSUMER-FIRM ENGAGEMENT IN THE INFORMATION ECONOMY .....	147
A. <i>Reconceptualizing Consumer Transactions as Fiduciary Relationships</i> .....	147
B. <i>Consumer Contracts as Pervasive and Networked</i> .....	151
C. <i>Widespread Deviation from Mutable Boilerplate Terms</i> .....	157
III. FROM CONTRACT LAW TO FIDUCIARY LAW .....	164
A. <i>The Consent Debate and the Battle for the Soul of Contract Law</i> .....	165
B. <i>Beyond Consent: The Turn to Obligations Implied in Law</i> .....	175
i. <i>Reinforcing Unconscionability</i> .....	176
ii. <i>Relational Contracting and Reasonable Expectations</i> .....	179
iii. <i>Unconscionability and Relational Contracting as Precedents for Finding Consumer-Firm Fiduciary Relationships</i> .....	184
IV. JUSTIFYING FIDUCIARY RELATIONSHIPS IN CONSUMER LAW .....	186
A. <i>Mandatory Terms for Mandatory Transactions</i> .....	187
B. <i>Fiduciary Duties for Ongoing Relationships of Trust</i> .....	191
C. <i>Implementation</i> .....	194
V. CONCLUSION .....	198

## I. INTRODUCTION

Many consumer-firm relationships in the information age have come to resemble fiduciary relationships, yet American law has failed to recognize this new reality, leaving the consumer vulnerable to loss of privacy and elevated cybersecurity risks.

In fiduciary relationships, one party (the fiduciary), has discretionary power over another party's (the entrustor) important practical interests.<sup>1</sup> There are many types of fiduciaries recognized at law, as disparate as clergy, medical professionals, and corporate officers.<sup>2</sup> What unites all fiduciaries is the fiduciary's potential to misuse the power granted to her by the entrustor for her own benefit and the entrustor's detriment.<sup>3</sup> To prevent abuse of power, fiduciary law imposes duties upon the fiduciary, the core purpose of which is to hold the fiduciary to loyalty toward the entrustor and her interests.<sup>4</sup> Enforcing fiduciary loyalty at law has both moral and utilitarian justifications.<sup>5</sup>

This Article argues that consumer transactions in the information age should create fiduciary relationships between consumer and company. This means companies would

1. See Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 261–62 (2011).

2. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 (1983).

3. *Id.* at 808–16.

4. Kenneth M. Rosen, *Meador Lecture Series 2005–2006: Fiduciaries*, 58 ALA. L. REV. 1041, 1041 (2007).

5. Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 72–86 (2018) (describing moral and amoral justifications for fiduciary loyalty and suggesting the two paths may be less disparate than they may appear).

have fiduciary duties to consumers that consumers cannot waive, regardless of boilerplate's text. In a fiduciary law framework, the role and significance of consumer boilerplate would be as follows. The offer of a consumer boilerplate contract by a company signals its intent to enter an ongoing fiduciary relationship with consumers in the provision of services. A consumer's assent to the boilerplate signals a consumer's intention to participate in a fiduciary relationship with the company. The effect of fiduciary duties in this context is to create technology-neutral protections for consumers against exploitation. Fiduciary duties would mean expanded liability for data protection failures for companies.<sup>6</sup>

Industry practices<sup>7</sup> and court rulings<sup>8</sup> support recognizing a fiduciary relationship between firms and consumers in many information age transactions. The consumer needs to do little more than switch on any media device to see advertising and other representations by companies asserting "your privacy is important to us" or "we will not sell your data to any third party."<sup>9</sup> Trust is a powerful currency in the internet age, and companies promote an image consistent with responsible stewardship of individual data and other consumer interests. These representations are not mere puffery.<sup>10</sup> Observers have documented that companies offer more services and protections than the consumer boilerplate's text suggests they are obligated to do.<sup>11</sup>

Contemporary doctrinal and legislative trends suggest an emerging recognition of the fiduciary relationship between consumers and firms arising from information age consumer transactions. In recent years, several courts have held that companies can be bound to take action that protects consumer data protection interests, even if the contract between the two parties does not impose any such obligation.<sup>12</sup> The source of the obligation, for these courts, comes from comfort language in communications and policies outside the contract, including privacy policies.<sup>13</sup> Comfort language includes statements representing that the company will protect and prioritize the particular interests of the consumer. In line with this trend in the courts, Congress has recently proposed a bill that would create a duty of loyalty for companies to consumers concerning data protection.<sup>14</sup> While neither these courts nor the proposed legislation

6. See discussion *infra* Section IV.C.

7. See discussion *infra* Part II.

8. See discussion *infra* Part III.

9. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 602 (9th Cir. 2020) (including statements such as these contributes to a conclusion that a consumer has a reasonable expectation of privacy); Joseph Turow et. al., *The Federal Trade Commission and Consumer Privacy in the Coming Decade*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 723, 746 (2008) ("While many websites begin their privacy policies with the claim that 'your privacy is important to us,' many of these same policies disclose further down that the websites collect quite a bit of the information from their users and often do share the information with affiliates, marketers, or other entities.").

10. Generally speaking, puffery refers to non-specific and non-measurable statements of opinion. This term lacks a specific definition, but it is a defense to enforcement of warranties in many areas of law. See David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1396 (2006).

11. See discussion *infra* Section II.B.

12. See, e.g., *In re VTech Data Breach Litig.*, No. 15 CV 10889, 2017 WL 2880102, at \*8 (N.D. Ill. July 5, 2017) (holding that claims based on data privacy representations by firms may go forward notwithstanding contract's silence on the matter).

13. See *id.*

14. Jessica Corbett, *Expert Says Senate Democrats' Sweeping Online Privacy Bill Answers Public*

explicitly state that consumer transactions create fiduciary relationships, I suggest that a fiduciary relationship is consistent with the duties recognized and the best way to make sense of why companies would have these duties to consumers.

I make three novel contributions to the consumer law literature in this Article. First, I establish that information-age consumer-company relationships have the characteristics of fiduciary relationships. Second, I explain how a fiduciary relationship in consumer contracting can be derived from existing common law history and current doctrine. Finally, I make the normative argument that implying fiduciary relationships into consumer contracts is feasible and desirable.

My argument in this Article builds upon my earlier work on information privacy, where I argue that privacy is not property, but rather a strong power to limit another actor's behavior in a relationship between two actors.<sup>15</sup> In a fiduciary relationship, an entrustor has just such an interest in the fiduciary's continued performance of her duties, a power frequently compared in its effect to a property interest (though, unlike property interests, not good against all persons, only the fiduciary).<sup>16</sup> I have also argued that, in many cases, the measurement of privacy remedies should be restitution, or relief measured in gain to defendant rather than by loss by plaintiff.<sup>17</sup> Restitution is often the measure of damages for breach of fiduciary duties. This serves to minimize opportunistic behavior in these relationships through providing remedies for a broader range of activities than compensation.<sup>18</sup>

The Article will proceed as follows. In Part II, I will show how common business practices are consistent with the fiduciary framing the consumer boilerplate's role. Then, in Part III, I describe existing approaches to consumer boilerplate and develop and contrast the fiduciary approach to consumer transactions. Finally, in Part IV, I build a normative argument for understanding consumer transactions as fiduciary relationships and demonstrate this proposal's feasibility and limits.

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*Demand for 'Transformative Shift',* COMMON DREAMS (Nov. 26, 2019), <https://www.commondreams.org/news/2019/11/26/expert-says-senate-democrats-sweeping-online-privacy-bill-answers-public-demand> [<https://perma.cc/TJ7T-756T>]. Similar bills have been proposed in the past. *See, e.g.,* Devin Coldewey, *Senators Aim to Give Internet Companies Doctor-Like Duties to Protect Our Data*, TECHCRUNCH (Dec. 12, 2018, 2:23 PM), <https://techcrunch.com/2018/12/12/senators-aim-to-give-internet-companies-doctor-like-duties-to-protect-our-data/> [<https://perma.cc/TKB7-24M9>].

15. *See generally* Lauren Henry Scholz, *Privacy as Quasi-Property*, 101 IOWA L. REV. 1113 (2016).

16. *See, e.g.,* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1405-06 (2002) ("Even if the beneficiary can bring an action against the fiduciary in tort or contract, the best that the beneficiary can expect in most cases is *compensation* for actual harm done. If the fiduciary's expected benefits from opportunism exceed the beneficiary's expected harm, compensatory remedies will not deter the opportunistic behavior. In these instances, fiduciary duty improves deterrence by providing *restitution* rather than compensation. The important lesson is that fiduciary duty performs roughly the same economic function as ownership.").

17. *See generally* Lauren Henry Scholz, *Privacy Remedies*, 94 IND. L.J. 653 (2019).

18. Richard S. Saver, *Medical Research and Intangible Harm*, 74 U. CIN. L. REV. 941, 991 (2006) ("The restitutionary remedy helps to strengthen the bonds between fiduciaries and their principals by providing remedies for a broader range of activity than ordinary compensatory damages. Such restitution awards reinforce fiduciary ties by indicating that damage to the fiduciary relationship itself, through opportunistic conduct, causes harm as a recognizable, intrinsic wrong.").

## II. CONSUMER-FIRM ENGAGEMENT IN THE INFORMATION ECONOMY

The structure of the information economy forces consumers to trust companies with control of their data protection interests to obtain services. Companies routinely treat their customers' data with more solicitude than their contractual boilerplate and background law requires, suggesting an obligation that extends beyond these terms.<sup>19</sup> Furthermore, the contract text itself changes over time as the service and industry practice changes. Taken together, these factors suggest a fiduciary relationship in many information age consumer transactions. In fiduciary relationships, one party (the fiduciary) has discretionary power over important practical interests of another party (the entrustor), and the combination of delegation and complexity creates the potential for opportunistic behavior by the fiduciary. When they participate in the information economy, consumers grant companies control over selecting and implementing data protection. The risks and opportunities presented by data processing in the information economy are too specialized, complex, and dynamic for consumers to monitor. What exists between firm and consumer in the average ongoing consumer relationship is not just a contractual relationship, but an ongoing fiduciary relationship of trust. In this Part, I first define a fiduciary relationship and provide a general description of fiduciary duties. Then, I will illustrate the specific sense in which the term may be applied in the consumer contracting context.

### A. *Reconceptualizing Consumer Transactions as Fiduciary Relationships*

A fiduciary relationship is one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the entrustor).<sup>20</sup> One party to the relationship is dependent on the other for the provision of a service.<sup>21</sup> The service can only be performed if the fiduciary is so entrusted. As a result of this discretionary power in the context of a relationship of trust, the fiduciary has a series of duties to the entrustor.<sup>22</sup>

There are two types of fiduciary relationships: relationships based on status and ad hoc fiduciary relationships.<sup>23</sup> The difference between the two is that status fiduciary relationships are based on the finding that a relationship of a certain type exists, such as lawyer-client, doctor-patient, or trustee-beneficiary.<sup>24</sup> No further inquiry beyond finding the status is necessary to find the fiduciary relationship, as the law assumes,

19. DEIRDRE K. MULLIGAN & KENNETH A. BAMBERGER, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE*, 59–89, 183–89 (2015).

20. Miller, *supra* note 1, at 261–62.

21. Frankel, *supra* note 2, at 800.

22. *Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014). A fiduciary duty is “a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent’s principal or the beneficiaries of the trust); a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer’s client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).” *Id.*

23. See generally Andrew S. Gold, *Trust and Advice*, in *FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW 35* (Paul B. Miller & Matthew Harding eds., 2020) (discussing the types of fiduciary relationships).

24. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

prophylactically, that a relationship of dependence exists between fiduciary and entrustor.<sup>25</sup> Ad hoc fiduciary relationships, by contrast, are the result of a fact-based inquiry in which courts establish that a fiduciary relationship was formed between the parties, based on finding a relationship of trust and a granting of discretion from one individual to another.<sup>26</sup>

There has been a resurgence in academic interest in fiduciary law in recent years, as the prominence of fiduciary duties in society grows.<sup>27</sup> Fiduciary relationships have long and deep roots in the common law.<sup>28</sup> Fiduciary duties have evolved and changed over time, based on social and economic contexts, as more relationships have been found to have fiduciary status over time because of the changing nature of relationships in business and society.<sup>29</sup>

As this historical narrative shows, status-based fiduciary relationships are a growing group, and these relationships are not fixed. Fiduciary law allows the law the freedom to recognize new relationships that have the core characteristics of fiduciary duties.<sup>30</sup> I argue here that many information age consumer-firm relationships are fiduciary relationships. They should be a new category of status fiduciary relationship.

The two key features of any fiduciary duties are the duty of loyalty and the duty of care.<sup>31</sup> These two duties entitle the entrustor to rely on the fiduciary's honesty and exists regardless of whether or not the entrustor actually does so trust the fiduciary.<sup>32</sup> Fiduciary duties are occasionally described as requiring altruism from the fiduciary, but this is

25. Gold, *supra* note 23, at 35.

26. See generally Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315 (2000) (explaining confidential relationships). Ad hoc fiduciary relationships are also called confidential relationships, which is the term Anderson uses in this article. Some have questioned the distinctness of the two categories. See, e.g., Lionel Smith, *Contract, Consent, and Fiduciary Relationships*, in CONTRACT, STATUS, AND FIDUCIARY LAW 117 (Paul B Miller & Andrew S. Gold eds., 2016).

27. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516 (2015) ("Fiduciary theory is undergoing a renaissance."); see Kenneth M. Rosen, *Introduction to the Meador Lectures on Fiduciaries*, 58 ALA. L. REV. 1041, 1042 (2007) (explaining that we are witnessing the emergence of a society predominantly based on fiduciary relations "[n]otions of fiduciaries and their duties continue to permeate the law. Their importance only continues to grow.").

28. See generally ERNEST VINTER, *A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIPS AND RESULTING TRUSTS: TOGETHER WITH A SELECTION OF SELECTED CASES* (3d ed. 1955).

29. See generally David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011 (2011) (describing the development of fiduciary obligations in the English common law). See Frankel, *supra* note 2, at 795–96 ("Trustees, administrators, and bailees are of ancient origin, whereas agents appeared only at the end of the eighteenth century. In the business realm, the fiduciary duties of partners, corporate directors, and officers originated with the formation of partnerships and corporations, but majority shareholders, were not subjected to fiduciary duties until this century. Union leaders were cast in the fiduciary role at a still later date, when they acquired the statutory power to represent workers in negotiations with management. The twentieth century is witnessing an unprecedented expansion and development of the fiduciary law. For example, physicians and psychiatrists have recently become members of the fiduciary group[.]" ).

30. See Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 672 (2009) ("[N]o typology of the fiduciary could be complete without recognizing a few central features: the concept is self-consciously open, flexible, and adaptable to new kinds of relationships—and those relationships trade upon high levels of trust and leave one party in a position of domination, inferiority, or vulnerability." ).

31. Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1226–27 (1995).

32. *Id.* at 1227–28.

misleading.<sup>33</sup> Insofar as it is so, “altruism” is at most a term of art.<sup>34</sup> It refers to limiting the fiduciary’s right to use what was allocated to them by the entrustor for the defined, agreed-upon purpose. It is, in this specific sense, reducible to a duty of honesty, leaving most all avenues of self-interested corporate behavior open to the fiduciary.<sup>35</sup>

The relationship between contract law and fiduciary law is straightforward. They run parallel to one another, and each may govern the same transaction, much like both contract law and property law are in play in a real estate transfer. However, when they are in conflict, fiduciary law prevails. Contracts do not automatically create fiduciary relationships between their parties.<sup>36</sup> Rather, a fiduciary relationship results from entrustment of power or property in connection with the allocation of services in an ongoing relationship.<sup>37</sup> A contract or transaction is but one indication that an entrustment has occurred. The question courts consider when analyzing whether a fiduciary relationship is present concerns the economic and social realities of the relationship between fiduciary and entrustor. The factual analysis of the rest of this Part shows that such conditions exist in the majority of information-age consumer transactions.<sup>38</sup> A fiduciary duty by itself cannot ordinarily be created by contract; a contract cannot ordinarily waive a fiduciary duty.<sup>39</sup>

The impact of my analysis is to change how courts must justify consumer transactions. Under a neo-classical contract regime,<sup>40</sup> a court need go no further than to define consent in a thin manner and use it to declare that consumers by that standard have chosen the consequences of any possible future implication associated with their engagement with the digital world at the moment of initial contracting, regardless of how the technology or the relationship between firm and consumer evolves. This approach, which had its heyday in the late 20<sup>th</sup> century, is giving way to a more contextual and realistic approach, both in case law and in the academy, in light of its increasing anachronism within the interconnected, complex information economy.<sup>41</sup> Under a fiduciary standard, in the case of a dispute, courts must consider whether, in a given consumer transaction, the company has fulfilled its duty of care and its duty of loyalty to the consumer. The evaluation must concern the substantive terms of the relationship, rather than the procedure by which it was initiated. Reasonable minds can differ about

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33. *Id.* at 1228.

34. *Id.*

35. *Id.* at 1230; see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 657 (1995) (“A crucial consideration in understanding why trustees, especially expert professional trustees such as corporate fiduciaries, willingly accept the potential liability of trust fiduciary law with every trust deal is that compliance with trust fiduciary law is ordinarily not onerous. The prudent investor rule is profoundly protective of trustees who have followed common investment-industry standards. The duty of loyalty, though it threatens draconian prophylactic liabilities for breach, is also easy enough to obey in ordinary cases. It says to the trustee, ‘You are left with the entire universe of investment possibilities as outlets for your entrepreneurial impulses; you are required only to stay away from the trust assets when you seek your own fortune.’”).

36. *E.g.*, *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So.2d 990, 994 (Miss. 2006).

37. Frankel, *supra* note 31, at 1224.

38. See *supra* Part II.

39. Frankel, *supra* note 31, at 1231–54 (outlining conditions for the possibility of waiver of fiduciary duties but conceding that in many cases the law has good reasons for disallowing waiver of fiduciary duties, including when fiduciary duties are of a “public” nature).

40. See discussion of contract theory *infra* Section III.C.

41. See discussion of trends *infra* Section III.B.



what the substance of the duty of care and duty of loyalty may be in the context of a consumer transaction.<sup>42</sup> This is the battleground on which the rules of play governing boilerplate in consumer transactions should be waged.

I am not the first to suggest that a fiduciary relationship may be proper in information-age consumer transactions.<sup>43</sup> I am, however, the first to describe the fiduciary duties as arising from consumer transactions and to specifically justify why the consumer-firm relationships can and should be understood as a category of status fiduciary relationship from a private law.<sup>44</sup> The relevant status is an ongoing relationship between a consumer and a firm. A status fiduciary relationship in this context would mean a finding that the individuals in the relationship are a consumer and a merchant would be sufficient to show that a fiduciary relationship exists. Due to our always-on information age environment, consumer transactions are moving from the generally episodic to the generally ongoing. The limiting principle would be to exclude transactions where the defendant could overcome the presumption that the relationship was intended to be an ongoing one.<sup>45</sup> The following Sections describe the general characteristics of the

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42. See discussion of implementation *infra* Section IV.C.

43. Jack Balkin has described a concept of "information fiduciaries" in the context of the First Amendment. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1186 (2016). As he writes "[b]ecause of their special power over others and their special relationships to others, information fiduciaries have special duties to act in ways that do not harm the interests of the people whose information they collect, analyze, use, sell, and distribute. These duties place them in a different position from other businesses and people who obtain and use digital information. And because of their different position, the First Amendment permits somewhat greater regulation of information fiduciaries than it does for other people and entities." *Id.* Balkin argues that the fiduciary duty arises from the amount or type of information that an actor has about a human. *Id.* at 1187. While I think that Balkin is correct to trace the duty to control to information about consumers, I add to that argument for fiduciary duty in the particular context of algorithmic contracts the categorical difference in processing capability between a consumer and an algorithmic agent acting on behalf of a business. Furthermore, my argument considers fiduciary duties outside the First Amendment context. Contract and fiduciary law are not usually understood as a forum where the First Amendment is relevant. Contracts are considered legal acts, rather than speech. Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 687 (2016); Benito Arruñada, *Institutional Support of the Firm: A Theory of Business Registries*, 2 J. LEGAL ANALYSIS 525, 537 (2010). Lindsey Barett has extended Balkin's concept to the information privacy context. Lindsey Barrett, *Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries*, 42 SEATTLE U. L. REV. 1057, 1060 (2019). Even earlier, Daniel Solove suggested that a fiduciary relationship between consumers who provide personal data and the companies to which they provide information would be desirable from a public law perspective but did not develop the argument further. DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 103 (2004). Taken together, one can observe that constitutional law experts have found that a fiduciary framework for consumer transactions would be permissible, and public law experts have signaled it would be desirable. My Article contributes the essential doctrinal grounding for the perspective, how fiduciary duties in consumer transactions actually fits in with doctrine and history.

44. Clayton Gillette has argued that corporations act as agents for consumers in forming. Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680. This thesis is distinguishable from my own because I contend there is an ongoing relationship between the consumer and the company where Gillette argued that the company represents the consumer once for the purpose of enabling the consumer to form the contract.

45. Another limit is that the proposed status fiduciary relationship only extends to consumers and firms in ongoing relationships. This excludes business-to-business ongoing relationships. Some business-to-business relationships may be fiduciary relationships, but they would require a *de facto* showing of facts to support a fiduciary relationship. As the following sections indicate, the interests protected are particular to individuals and

ongoing consumer-firm relationships, showing the need for consumers to trust their important interests to information-age companies, and describing behaviors that suggest a nascent, shared understanding that the fiduciary firm should refrain from opportunistic behaviors that interfere with consumers' important interests.

### B. Consumer Contracts as Pervasive and Networked

Contracts are an essential part of the physical and digital infrastructure in which individuals live, work, and play in the information age.<sup>46</sup> The web of contracts each individual is a party to is not confined to isolated, episodic transactions. Rather, individuals participate in a technosocial system in which participating in a critical mass of contracts is a precondition.

Nearly all individuals have access to the internet and go online daily.<sup>47</sup> Most people rely on email to communicate with family, friends, and coworkers. Most Americans likely send at least one email a month.<sup>48</sup> More than two-thirds of Americans do their banking primarily online.<sup>49</sup>

Most individuals not accessing the internet or emailing consider themselves too old to learn or are among the most impoverished members of society.<sup>50</sup> Internet non-users are, as a whole, not so much unwilling to use the internet as effectively unable to. Lower-income people have lower levels of technology adoption, and a disproportionate percent rely solely on mobile phones to access the internet.<sup>51</sup>

individuals are less able to protect their interests in general than firms. Solicitude to the unique needs of consumers motivates consumer law as a distinct area in American law. A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANSNAT'L L. 1219, 1227–28 (2001) (describing rationales for consumer law including creating efficient markets and ethical imperatives).

46. See Monica Anderson et al., *10% of Americans Don't Use the Internet. Who are They?*, PEW RSCH. CTR. (Apr. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/> [<https://perma.cc/5Y95-7CSU>] (“For many Americans, going online is an important way to connect with friends and family, shop, get news and search for information.”).

47. Andrew Perrin & Madhu Kumar, *About Three-in-Ten U.S. Adults Say They Are ‘Almost Constantly’ Online*, PEW RSCH. CTR. (July 25, 2019), <https://www.pewresearch.org/fact-tank/2019/07/25/americans-going-online-almost-constantly/> [<https://perma.cc/CH92-8896>] (“Overall, 81% of Americans say they go online on a daily basis. That figure includes the 28% who go online almost constantly, as well as 45% who say they go online several times a day and 9% who go online about once a day.”); *83% of U.S. Households Get an Internet Service at Home*, LEICHTMAN RSCH. GRP. (Dec. 21, 2018), <https://www.leichtmanresearch.com/83-of-u-s-households-get-an-internet-service-at-home/> [<https://perma.cc/VD7B-QTVT>] (“92% of all households access the Internet either at home and/or on a smartphone—compared to 86% in 2013”).

48. *Number of E-mail Users in the United States from 2013 to 2020 (in millions)*, STATISTA (Feb. 29, 2016), <https://www.statista.com/statistics/253790/number-of-e-mail-users-in-the-united-states/> [<https://perma.cc/NQ2E-ATT2>] (“In 2015, 232.8 million internet users sent an e-mail at least once per month. In 2019, the number of monthly U.S. internet users is projected to grow to 251.8 million monthly users.”).

49. *ABA Survey: Two-Thirds of Americans Use Digital Banking Channels Most Often*, ABA BANKING J. (Sept. 21, 2017), <https://bankingjournal.aba.com/2017/09/aba-survey-two-thirds-of-americans-use-digital-banking-channels-most-often/> [<https://perma.cc/3MZT-XUHJ>].

50. Anderson et al., *supra* note 46; see also LEICHTMAN RSCH. GRP., *supra* note 47.

51. Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RSCH. CTR. (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/> [<https://perma.cc/KR3E-VTDT>].

Most Americans use at least one content-streaming service<sup>52</sup> or cloud computing devices to store their data,<sup>53</sup> and the vast majority have mobile smartphones.<sup>54</sup> Mobile cellphone use correlates with using the internet more often.<sup>55</sup> The use of social media is widespread; seven in ten Americans use Facebook, and nearly one in four use YouTube.<sup>56</sup>

The average American can accomplish little without becoming a party to contracts.<sup>57</sup> Consumers, especially younger people, view this as a fact of life and consider the frequent contracts they see as valid as non-online contracts, although they are more likely to renege on such contracts than older people.<sup>58</sup> Nancy Kim has termed this “[c]onsumer habituation to ubiquitous contracts.”<sup>59</sup> David Hoffman and Zev Eigen have observed, in discussing the results of an empirical study that showed no effect in consumer behavior from reciting the content of contracts, that “[c]ontracts are now

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52. Steve Liesman, *Nearly 60% of Americans are Streaming and Most with Netflix: CNBC Survey*, CNBC (Mar. 29, 2018), <https://www.cnbc.com/2018/03/29/nearly-60-percent-of-americans-are-streaming-and-most-with-netflix-cnbc-survey.html> [<https://perma.cc/W742-DPWG>].

53. More than half of Americans used cloud services as of over ten years from this writing, so currently the percentage could be far higher. John B. Horrigan, *Use of Cloud Computing Applications and Services*, PEW RSCH. CTR. (Sept. 12, 2008), <https://www.pewresearch.org/internet/2008/09/12/use-of-cloud-computing-applications-and-services/> [<https://perma.cc/GR4P-NWFB>] (finding 69% of all internet users have either stored data online or used a web-based software application). Given the rise of software-as-a-service applications, the percentage of Americans using cloud applications is likely close to coterminous with the number of Americans who use the internet.

54. *Mobile Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewinternet.org/fact-sheet/mobile/> [<https://perma.cc/ZK97-LZ6Q>] (finding that 81% of Americans own smartphones and 96% of Americans own a cellphone).

55. *See id.* (discussing increased smartphone use and dependency, while also showing a decreased dependency on home broadband use).

56. Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, is Mostly Unchanged Since 2018*, PEW RSCH. CTR. (Apr. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> [<https://perma.cc/G4R2-B7TE>].

57. I am not the first to observe that the average American consumer becomes party to a dense web of contracts in their day-to-day life. *E.g.*, NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS & RAMIFICATIONS I (2013) (“If you are like me, you have agreed to the terms of a contract several times today. I entered into a contract with my bank when I went online to pay a bill. I entered into a contract with my email service provided when I sent an e-mail to a friend. I entered into a contract when I purchased a song from a digital music retailer. I entered into all of these contracts without even uncapping a pen.”). *See also* Andrew L. Berrier, Vernor v. Autodesk, Inc.: *The Last First Sale?*, 46 WAKE FOREST L. REV. 867, 867 (2011) (“Given the sheer number of software applications and other digital content that many people interact with on a daily basis, an average person may be a party to an untold number of these sorts of agreements for items he uses every day.”); Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 345 (2008) (“[E]ven the Marginal Consumer will find reading and evaluating SFCs inefficient. Consumers in the offline world reach this rational conclusion when considering the high transaction costs of this task, namely evaluating a long and complex SFC. Rational consumers will reach a similar conclusion online. Furthermore, transaction costs online are bound to rise. Online users confront more contracts every day, and at every virtual juncture.”).

58. *See* David A. Hoffman & Zev J. Eigen, *Contract Consideration and Behavior*, 85 GEO. WASH. L. REV. 351, 382 (2017) (finding that younger consumers respect online contracts but also are willing to back out of them at a higher rate than older consumers).

59. Nancy S. Kim, *Two Alternate Visions of Contract Law in 2025*, 52 DUQ. L. REV. 303, 315 (2014).

ubiquitous, and, as such, have lost their power to awe.”<sup>60</sup>

Contracts are everywhere because of the online environment. Courts and commentators have observed that website and application design features make contracting online easier than contracting in person.<sup>61</sup> Consumers may also feel less gravity in the transaction when it is a simple click rather than going on location and signing documents, so they may have less resistance.<sup>62</sup> Application and website design are crafted to gain particular results from consumers generally.<sup>63</sup> Inducing consumers to agree to terms that can add legal protections beneficial to the drafting company is easy.<sup>64</sup> It makes sense for the drafting party to add terms advantageous to itself if it can get consumers to agree cheaply, and this is exactly what the online context provides.

Consumers can become party to contracts without even clicking. Browsewrap contracts, or contracts from merely browsing a webpage, are already commonplace.<sup>65</sup>

Network effects and social norms play an important role in what individuals choose to do.<sup>66</sup> In a world with increasing demands on individual time and productivity, self-surveillance tools, such as budget monitoring applications, computer or cellphone productivity applications, and health trackers, can offer benefits to individuals.<sup>67</sup> These self-surveillance applications present privacy concerns, but as a group of scholars writing on the phenomenon put it, “as such practice becomes more popular, routine, and expected, both social norms and network effects will materially increase an individual’s

60. Hoffman & Eigen, *supra* note 58, at 386–87 (provocatively noting that “[m]ost parties experience contract terms as adhesive lists that get in the way of the desired product or service, rather than as a dickered for memorialization of bilateral promises. It is not merely that no one reads contracts, it is that everyone knows that no one reads contracts. That is, the idea that particular terms in a contract might connote the mystery of law seems increasingly like a joke.” (footnotes omitted)).

61. See Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1636–37 (2011) (noting Facebook’s privacy settings as an example of this concept).

62. See Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 270 (2014) (“The nontangible, digital essence of electronic contracts has important consequences. Electronic terms are intangible and weightless, which affects consumer awareness. Contracts communicate with their words, but also through their form. A thick stack of documents signals something very different from a ticket stub with wording on one side. The length of a document, the quality of the paper, and its presentation all communicate something about the nature of the transaction. The heft of a document tends to correspond to the onerousness of the obligations agreed to by the consumer. Those signaling effects are often lost with electronic contracts.”).

63. Daniel Susser et al., *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1 (2019). See also Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1003–15, 1020–24 (2014) (describing the ways in which the digital environment allows companies to influence consumer choices).

64. See Hartzog, *supra* note 61, at 1664–70.

65. See KIM, *supra* note 57, at 2–3 (defining shrinkwrap, browsewrap, and clickwrap contracts).

66. See Ari Ezra Waldman, *Durkheim’s Internet: Social and Political Theory in Online Society*, 7 N.Y.U. J.L. & LIBERTY 345, 409 (2013) (providing a political theory framework for understanding the conclusion that “[s]imilarly, many of us find that we must join the virtual world, lest we be left behind in social, professional, and political circles. And yet the concept of the free and autonomous online anonym is anathema to involuntariness. There are voluntary, involuntary, and constructively involuntary Internet users, whose fate cannot be understood by reference to the online anonym.”).

67. Jerry Kang et al., *Self-Surveillance Privacy*, 97 IOWA L. REV. 809, 813–15, 818–19 (2012) (defining self-surveillance, providing examples of self-surveillance methods, and describing the benefits to individuals from using them).

opportunity cost of maintaining her current level of privacy.”<sup>68</sup> What’s more, there is growing industry expertise in “dark patterns,” user experience design adopted to influence consumer choices.<sup>69</sup> A recent empirical study has shown a dramatic effect of these practices on consumer decisions.<sup>70</sup>

Even if a person resists, due to privacy concerns, social and economic pressure to participate in the information economy, they remain subjected to data collection and processing. Companies retain “shadow profiles” of people who are not (yet) their customers, based on information that people in their network may have shared about them.<sup>71</sup> Companies track and collect information about people with whom they are not in contract, leaving notice and control theories of privacy sorely lacking.<sup>72</sup>

As an American consumer, resistance to being party to a large portfolio of contracts is futile. The average consumer has little choice about the specific companies with which they contract. Five companies in particular—Amazon, Apple, Facebook, Google, and Microsoft—are virtually impossible for the average American consumer to avoid. Antitrust scholars have described the particular competition issues presented by the rise of the tech giants.<sup>73</sup> Technology journalist, Kashmir Hill illustrated Americans’ collective dependence on the big five technology companies in a series of articles for Slate, describing her experience avoiding the technology giants for six weeks.<sup>74</sup> It proved difficult to do, even given her far-above average resources in terms of time and information, and it put substantial limitations on her ability to conduct her work and communicate with her friends and family.<sup>75</sup> Daniel Kahn Gillmor, a technologist at ACLU, has observed that a modicum of social privilege is necessary to avoid using such technologies.<sup>76</sup>

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68. *Id.* at 823.

69. See Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns* 1 (UNIV. OF CHI., Pub. L. Working Paper No. 719, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3431205](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431205) [<https://perma.cc/XME7-Q96K>] (defining dark patterns and describing approaches to them in the legal and behavioral economics literature).

70. See *id.* (finding that whereas only 11% of subjects accepted a given identity theft protection plan in no dark patterns condition, 26% accepted it after exposure to mild dark patterns, and 42% accepted it after exposure to aggressive dark patterns. The study also found that less-educated consumers would more likely be affected by dark patterns.).

71. See, e.g., Kurt Wagner, *This is How Facebook Collects Data on You Even if You Don't Have an Account*, VOX (Apr. 20, 2018, 1:02 PM), <https://www.vox.com/2018/4/20/17254312/facebook-shadow-profiles-data-collection-non-users-mark-zuckerberg> (describing Facebook’s collection of non-user data); Russell Brandom, *Shadow Profiles Are the Biggest Flaw in Facebook's Privacy Defense*, THE VERGE (Apr. 11, 2018, 3:53 PM), <https://www.theverge.com/2018/4/11/17225482/facebook-shadow-profiles-zuckerberg-congress-data-privacy>.

72. See generally Roger Allan Ford, *Unilateral Invasions of Privacy*, 91 NOTRE DAME L. REV. 1075 (2015) (arguing that many common invasions of privacy are between consumers and companies with no direct contractual relationship with them).

73. E.g., Lina M. Kahn, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (stating that online markets have incentivized growth instead of profits and are dominated by online platforms, like Amazon, which controls the commercial infrastructure crucial to competition).

74. Kashmir Hill, *I Cut the 'Big Five' Tech Giants from My Life. It Was Hell*, GIZMODO (Feb. 7, 2019, 12:00 PM), <https://gizmodo.com/i-cut-the-big-five-tech-giants-from-my-life-it-was-hel-1831304194> [<https://perma.cc/BAA3-5D4H>].

75. *Id.*

76. See Daniel Kahn Gillmor, *Facebook Is Tracking Me Even Though I'm Not on Facebook*, ACLU (Apr.

Significantly for contract law, defendants of the enforceability of boilerplate against consumers argue the boilerplate reflects the business's assessment of competitive market terms, which approximates the bargain a hypothetical consumer would make with the company.<sup>77</sup> However, when the terms are written by a company with market power, the assumption that the terms reflect a bargain made in a competitive market no longer proves true.<sup>78</sup> The economics literature is clear on the point that monopolists and near-monopolists provide no terms comparable to such terms a free market would produce.<sup>79</sup> Due to their market power, monopolists have no reason to compete, so price, quantity, and other terms need not naturally reach an "efficient" equilibrium.<sup>80</sup> Market power enables monopolists to accrue unearned rents onto themselves and keep out competitors.<sup>81</sup> Courts have interpreted that federal antitrust law exists to protect small businesses and the American economy against the poor economic impact of monopolists.<sup>82</sup> However, legislative and judicial hesitance to interfere with innovation, paired with the digital market's unique characteristics, has led to a sharp decline in antitrust enforcement in recent decades.<sup>83</sup>

The contracting environment's pervasiveness has moved beyond cyberspace and into the physical world. The Internet of Things "refers to the ability of everyday objects to connect to the Internet and to send and receive data."<sup>84</sup> So, whereas the online environment was previously limited to computers, phones, and tablets, IoT allows every item to be connected, always-on, and listening. There is a web of contracts associated with each device, including a contract for sale of the physical object, licensing for the software on the device, and other contracts the any third-party applications the IoT device

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5, 2018, 6:00 PM), <https://www.aclu.org/blog/privacy-technology/internet-privacy/facebook-tracking-me-even-though-im-not-facebook> [<https://perma.cc/33CD-6QMS>] ("My ability to avoid Facebook comes from privilege—I have existing social contacts with whom I know how to stay in touch without using Facebook's network. My job does not require that I use Facebook. I can afford the time and expense to communicate with my electoral representatives and political allies via other channels. Many people do not have these privileges and are compelled to 'opt in' on Facebook's non-negotiable terms.").

77. See discussion *infra* Part IV.

78. See David Gilo & Ariel Porat, *Viewing Unconscionability Through a Market Lens*, 52 WM. & MARY L. REV. 133, 133 (2010) (arguing that courts should embrace a more capacious interpretation of unconscionability than the current law and economics dispensation allows by taking questions of market power into consideration).

79. See N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 311–31 (5th ed. 2009) (describing market inefficiencies that result from monopoly).

80. *Id.*

81. *Id.*

82. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (arguing that the Sherman Act was meant to protect American small business). *But see* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) (noting that "the policy the courts were intend[ing] to apply is the maximization of wealth or consumer want satisfaction").

83. John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 51 (2016) ("But despite the critical role that zero-price products now play in modern economies, analysts have failed to adequately account for the unique attributes of zero-price markets, leaving the antitrust enterprise woefully unprepared to play its traditional role of safeguarding marketplace competition. This failure has already caused substantial harm to consumer welfare; left unchecked, it will continue to do so.").

84. FED. TRADE COMM'N, *INTERNET OF THINGS: PRIVACY & SECURITY IN A CONNECTED WORLD* i (2015). The definition itself is contested but "[w]hat all definitions of IoT have in common is that they focus on how computers, sensors, and objects interact with one another and process data." *Id.* at 5.

runs.<sup>85</sup> It makes little sense to understand each consumer's interaction with each object as separate when neither the consumer nor the provider looks at the transaction this way. Interoperability means that devices are interconnected and share information with each other, sometimes even across different providers.<sup>86</sup>

IoT technology has opened up a whole new vista for consumer-business relationships, above and beyond the concerns presented by the internet of computers, tablets, and cellphones. Sensor technology allows the physical environment to be at least as susceptible to low-friction contracting as the digital environment. Several scholars have written about the unique concerns presented by consumer contracting in the IoT.<sup>87</sup> Stacy-Ann Elvy has argued the IoT contracting environment differs from the traditional digital contracting environment because it is "automatic" and "interface free."<sup>88</sup> IoT makes signaling assent to terms easier and more bundled in day-to-day actions than ever before.<sup>89</sup>

Being a guest in the home of a person with a smart device may subject an individual to whatever data protection practices are in the contract to which the host agreed.<sup>90</sup> In this way, even individuals not in contract with firms with poor data protection practices may be made worse off in any privacy claims because others in their social network have relationships with such firms.<sup>91</sup>

The ubiquity of contractual relationships and the potential for individuals to contract away the privacy interests of non-parties to the contract is relevant for determining how they should be interpreted.<sup>92</sup> Form contracts are not new. Nor is it new that individuals

85. See Guido Noto La Diega & Ian Walden, *Contracting for the 'Internet of Things': Looking into the Nest*, 7 EUR. J.L. & TECH. 1, 2 (2016) (discussing the process of how consumers contract with Google for the smarthome device, Nest).

86. See Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 845 (2016) (enumerating the reasons various sectors of the corporate economy—from manufacturers to retailers, from Ford to Amazon—plan to share consumer data with each other).

87. E.g., Noto La Diega & Walden, *supra* note 85, at 2 (doing a deep dive case study into the terms and context of Nest, a smarthome device, and suggesting a broader concept of a product that is more protective of consumers); Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85, 98–117 (2014) (describing the internet of things as including health and fitness sensors, automobile sensors, home and electricity sensors, employee sensors, and smartphone sensors and describing the functioning of each in detail).

88. Elvy, *supra* note 86, at 910.

89. *Id.*

90. Alexander H. Tran, *The Internet of Things and Potential Remedies in Privacy Tort Law*, 50 COLUM. J.L. & SOC. PROBS. 263, 266–74 (2017) (surveying the privacy issues created by the internet of things and discussing how such claims may sound in tort and contract law); Alex B. Lipton, *Privacy Protections for Secondary Users of Communications-Capturing Technologies*, 91 N.Y.U. L. REV. 396, 401–03 (2016) (defining primary and secondary users of IoT technologies and outlining the potential for exposure of secondary users to harm).

91. See generally Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REGUL. 211 (2015) (arguing that individuals should be protected from the poor negative impacts on their lives of contracts to which they are not party). See also Paul MacMahon, *Contract Law's Transferability Bias*, 95 IND. L.J. 485, 519–21 (2020) (discussing protecting transferee rights).

92. See Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 43, 49 (2011) (critiquing methodological individualism due to the limits placed upon it by factors including social norms, network externalities, and coordination games; while focusing on the individual provides methodological ease in theoretical analysis of human behavior, it does so at the expense of accuracy when analyzing problems where

rarely read fine print. What is novel, however, is the contracts' extensiveness and ubiquity in the lives of the average consumer in the developed world. More and more terms circumscribe the practical rights and responsibilities possessed by every person in the information society.<sup>93</sup> Simply existing in the room with ordinary devices may subject individuals to having their movements and data governed by contract.

Being party to digital boilerplate agreements reflects the reality of being a human in a developed economy, rather than an active choice to participate in any given agreement. Clicking "I agree" to such agreement reflects, at most, bare voluntariness.<sup>94</sup> In the book *Re-Engineering Humanity*, Brett Frischmann and Evan Selinger argued, the digital environment encourages humans to act like simple, response-driven machines.<sup>95</sup> To the extent that we value individual control,<sup>96</sup> the degree to which it is possible and, thus, the degree to which individual control would be thwarted on the consumer end in the event of introducing mandatory terms, would be minimal.

As a result, if courts or legislatures choose to alter, or refuse to enforce some terms in such boilerplate as a matter of law, counterarguments from undermining the autonomy or welfare-maximizing functions of contract law are relatively weak. The voluntariness demonstrated by the consumer in agreeing to any individual contract is only a weak indicator of her autonomy and preferences. Voluntary participation in an existing, effectively mandatory technosocial system is more akin to theoretical consent to the social contract than to a traditional, negotiated contract.<sup>97</sup> That is to say, it is a relatively weak justification of the exercise of power absent other justifications.<sup>98</sup> By contrast, if we understand consumer transactions as signifying consumer consent to a fiduciary relationship, this maps on more effectively to what is occurring.

### C. Widespread Deviation from Mutable Boilerplate Terms

In this Section, I show that the rules of engagement between consumers and digital merchants are liable to evolve after the initial agreement to terms in two ways. First, the boilerplate itself is subject to unilateral change by the drafting party. Second, when disputes arise between consumers and firms, firms frequently provide concessions to consumers that contradict the contract's text. Taken together, these two characteristics of

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these external features loom large.)

93. See generally JOSHUA FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM (2017); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).

94. See Kim, *supra* note 62, at 266 (2014) (suggesting that consumers who accept these kinds of contracts do so under "situational duress," which carries with it the conclusion of non-enforceability—a conclusion I do not draw from this set of circumstances.)

95. BRETT FRISCHMANN & EVAN SELINGER, RE-ENGINEERING HUMANITY 45–60 (2018).

96. Woodrow Hartzog has argued that the emphasis on control in the context of data protection is misplaced. Woodrow Hartzog, *The Case Against Idealising Control*, 4 EUR. DATA PROT. L. REV. 423 (2018).

97. Cf. June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 1025–28 (2017) (arguing for a need for a new social contract in light of the expansion and reinterpretation of the role of the firm in modern jurisprudence). The obligations the social contract places upon the sovereign changes in light of the powers and immunities of its participants.

98. Modern proponents of the social contract concept consider it "founded on a weak or fictional form of consent, such as tacit or hypothetical agreement, or on concepts such as fairness." Bailey H. Kuklin, *Private Requisites*, 64 CLEV. ST. L. REV. 965, 968 (2016). See discussion *infra* Part IV.



the consumer-firm relationship show that the consumer-firm relationship has two key features of fiduciary relationships: flexibility of purpose and potential for opportunism.

The typical information age consumer-firm relationship is designed to be ongoing<sup>99</sup> and is governed by terms of service that are subject to change. Firms include a clause in the initial contract consumers assent to, which reserves the right to change the terms of the contract at any time. The purpose of this practice is to manage their risk profile based on changing circumstances.<sup>100</sup> Due to the fast-moving nature of the digital economy, many firms alter their terms of service for their digital services and products frequently. Twitter, for example, alters their terms of service once or twice a year on average.<sup>101</sup>

Courts have found unilateral changes to the terms of service without notice to the consumer unenforceable, even where the contract's terms give the firm the ability to do so, on the theory that consumers cannot agree to terms that do not yet exist.<sup>102</sup> Yet language purporting to give the firm the ability to change their terms at any time, with or without notice, remains common.<sup>103</sup> Several law articles have described unilateral consumer contract modifications in detail and have suggested the practice as it stands has negative results for consumers, even if notice is given.<sup>104</sup> Oren Bar-Gill and Kevin Davis have summarized three major concerns with the practice:

First, many consumers will fail to appreciate the risk that sellers will impose self-serving modifications. Thus, consumers may enter into welfare-reducing contracts (that is to say, contracts that leave them worse off than if they had not

99. Oren Bar-Gill & Kevin E. Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 45 (2010) (noting that many consumer contracts are designed to govern long term relationships).

100. Shola Mos-Shogbamimu, *Why Do Companies Continuously Update Their Terms & Conditions?*, LAW. MONTHLY, <https://www.lawyer-monthly.com/2017/02/why-do-companies-continuously-update-their-terms-conditions/> [https://perma.cc/35UE-J62S] (Jan. 31, 2017).

101. See Previous Terms of Service, TWITTER, <https://twitter.com/en/tos/previous> (last visited Sept. 14, 2020).

102. *E.g.*, *Rodman v. Safeway Inc.*, 125 F. Supp.3d 922, (N.D. Cal. 2015), *aff'd*, 694 F. App'x 612 (9th Cir. 2017); *Douglas v. U.S. Dist. Court for Cent. Dist. of California*, 495 F.3d 1062, 1066 (9th Cir. 2007) ("Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side. Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so." (footnote omitted)); *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396, 399–400 (N.D. Tex. 2009).

103. Logan Koepke, "*We Can Change These Terms at Anytime*": *The Detritus of Terms of Service Agreements*, MEDIUM (Jan. 18, 2015), <https://medium.com/@jikoepke/we-can-change-these-terms-at-anytime-the-detritus-of-terms-of-service-agreements-712409e2d0f1> [https://perma.cc/6DRQ-3228]. Koepke provides examples of what these clauses look like. One, from Best Buy's e-commerce website, reads in relevant part: "We may make changes to the Site and the Condition of Use. It is your responsibility to review the Conditions of Use for updates or changes." *Id.* Another, from Wal-Mart's website, reads in relevant part: "We may change the terms of this Agreement from time to time. By continuing to use any of the Walmart sites after we post any such changes, you accept the Agreement, as modified." *Id.*

104. *E.g.*, Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099 (2010); Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879 (2008); Curtis Bridgeman & Karen Sandrik, *Bullshit Promises*, 76 TENN. L. REV. 379 (2009); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010); Eric Andrew Horwitz, *An Analysis of Change-of-Terms Provisions as Used in Consumer Service Contracts of Adhesion*, 15 U. MIA. BUS. L. REV. 75 (2006); Daniel Watkins, Note, *Terms Subject to Change: Assent and Unconscionability in Contracts that Contemplate Amendment*, 31 CARDOZO L. REV. 545 (2009).

contracted at all). Second, even if the contracts they sign are not welfare reducing (that is, contracting is still better for the consumer than not contracting), consumers in many cases would be better off if sellers offered contracts that set some constraints on unilateral modification. Third, sellers' unchecked power to modify contracts prevents the efficient operation of markets for consumer products. Comparison shopping becomes meaningless when the product or contract can be changed easily soon after the purchase is complete. This fact in turn undermines competition.<sup>105</sup>

Information age consumers are not only presented with contracts at every turn in the first instance but continue to be party to contracts in their ongoing relationships with firms. The contract terms are subject to change and frequently do change. It is routinely said that negotiations happen in the shadow of contract.<sup>106</sup> But as the text of the contract varies, the contours of the shadow itself vary as well. So, changing terms means the consumer's underlying negotiation position, in the case of a dispute, is also in a state of flux.<sup>107</sup>

It has been long posited by scholarly observers, based on qualitative evidence, that corporations often vary from the boilerplate contract terms in negotiating disputes.<sup>108</sup> Commentators have referred to this as a systemic "gap" between contract terms and the real agreement as enforced.<sup>109</sup> There is some consciousness of this among savvy consumers, memorialized on discussion boards throughout the internet, as to how to make the most of existing relationships with providers.<sup>110</sup> Even in contracts between two or more sophisticated corporate entities, there are documented gaps between actual practice and the boilerplate text in agreements.<sup>111</sup>

105. Bar-Gill & Davis, *supra* note 99, at 6.

106. E.g., Jason Scott Johnston, *Cooperative Negotiation in the Shadow of Boilerplate*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 12, 14 (2013).

107. Meirav Furth-Matzkin, *The "Paper Deal-Real Deal" Gap in Consumer Markets: Evidence from a Field Experiment* 23 (Sept. 25, 2019) (draft, on file with author) (reporting the results of an empirical study finding "the formal terms of the contract had a strong and significant effect on testers' initial return outcomes. Stores with lenient return policies (formally allowing non-receipted returns for store credits or exchanges) were significantly more likely to accept non-receipted returns (for exchange or store credit) than stores with moderate return policies, and the latter were marginally significantly more likely to accept such returns than were stores with harsh return policies.").

108. E.g., Shmuel I. Becher & Tal. Z. Zarsky, *Minding the Gap*, 51 *CONN. L. REV.* 69 (2019) (showing the gap between boilerplate consumer contracts and actual praxis between firms and consumers may occasionally have surprising and harmful qualities); Jason Scott Johnston, *The Return of the Bargain: An Economic Theory of How Standard Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 *MICH. L. REV.* 857 (2006) (arguing that standard-form contracts facilitate bargaining and are crucial in facilitating cooperative relationships between firms and their customers); Gillette, *supra* note 44, at 704–12 (applying game theory to contract formation); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 *MICH. L. REV.* 215, 281 (1990) (showing that reputation issues cause corporations to vary from boilerplate contracts).

109. Becher & Zarsky, *supra* note 108; Furth-Matzkin, *supra* note 107.

110. See, e.g., landmanpgh, *Don't Forget to Lower Your Bills by Simply Asking!*, REDDIT (Dec. 22, 2017, 10:46 AM), [https://www.reddit.com/r/personalfinance/comments/7h11s/dont\\_forget\\_to\\_lower\\_your\\_bills\\_by\\_simply\\_asking/](https://www.reddit.com/r/personalfinance/comments/7h11s/dont_forget_to_lower_your_bills_by_simply_asking/) [[https://www.reddit.com/r/personalfinance/comments/7h11s/dont\\_forget\\_to\\_lower\\_your\\_bills\\_by\\_simply\\_asking/](https://www.reddit.com/r/personalfinance/comments/7h11s/dont_forget_to_lower_your_bills_by_simply_asking/)] (discussing reducing recurring bills by calling to ask for a lower rate).

111. See generally Stephen J. Choi et al., *The Black Hole Problem in Commercial Boilerplate*, 67 *DUKE L.J.* 1, 6–7 (2017) ("The extent of rote usage and encrustation in commonly used boilerplate remains an open

Meirav Furth-Matzkin recently conducted a field experiment confirming the existence of a gap between the contract text and the deal as enforced by companies.<sup>112</sup> She used the case of firm policy for refunds at physical branches of retail stores.<sup>113</sup> She found substantial evidence of a pro-consumer gap between the contract's textual return policy and the return policy experienced by customers attempting to make returns.<sup>114</sup> The pro-consumer gap intensified when the customers complained after an initial refusal for a concession, and intensified more dramatically for firms that had started with moderate or harsh return policies in the contract's text.<sup>115</sup> These findings are in line with the hypothesis already in the literature: that firms may choose to deviate from the boilerplate for consumers who, through complaining, reveal themselves to be savvy, high-value customers.<sup>116</sup> However, an invisible, systematic bias in favor of more insistent consumers may in the end distribute benefits unfairly across society.<sup>117</sup>

Writing in the early 2000s, some scholars were optimistic that the reputational concerns from actually hemming to the boilerplate's harsh terms will mean that there is only a limited need for regulators to intervene on behalf of consumers, as firms will police themselves to prevent reputational harms.<sup>118</sup> However, later research has argued that reputational effects have quite limited impact on firm behavior.<sup>119</sup> Clayton Gillette has suggested that firms have strict terms, only to vary from them to grant themselves "discretion to treat buyers who appear to be acting in good faith differently from those who appear to be acting opportunistically."<sup>120</sup> Like modifying the contract to limit risk to the company based on changing circumstances, the reasons why firms deviate from the contract are designed to benefit the company, with no necessary correlative benefit to the

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question because the issue is only now beginning to be examined by legal and economic scholars. But preliminary evidence from other markets where standard form contracts are ubiquitous suggests that the *pari passu* saga is representative of a larger phenomenon, extending beyond sovereign bond contracts to other contexts where boilerplate is commonly used, including insurance and merger and acquisition agreements. To the extent this problem exists more broadly, it argues for a shift in contract doctrine away from the futile and ultimately costly effort to discover a shared meaning that no longer exists." Far from intending to be governed by the contract's terms in this case, neither party understands what this long-used boilerplate text is supposed to mean. *Id.*

112. Furth-Matzkin, *supra* note 107.

113. *Id.* at 4 (reporting "results of an original, large-scale field experiment covering approximately one hundred retail stores in Chicago").

114. *Id.* at 24.

115. *Id.* at 28.

116. *E.g.*, Gillette, *supra* note 44, at 707 (2004) (revealing the willingness of firms to deviate from boilerplate contract terms for customers, with or without merit, who are persistent).

117. Furth-Matzkin, *supra* note 107, at 46 ("gaps might lead to regressive distributional outcomes, . . . because insistence and assertiveness are correlated with higher socio-economic status, gender, and race").

118. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 830 (2006) (suggesting that "reputational considerations" may "induce the seller to treat the buyer fairly even when such treatment is not contractually required").

119. Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239 (2019). See also Yonathan A. Arbel & Roy Shapira, *Theory of The Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929 (2020) (noting with disapproval market trends limiting the ability of sticklers to push for change that may positively influence all consumers).

120. Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 977 (2005) (footnotes omitted).

consumer.<sup>121</sup> Empirical studies have shown that weaker bargaining power is associated with receiving less beneficial terms, whether the weaker party is a business or a consumer.<sup>122</sup> Furthermore, deviations from the boilerplate text are not always to the consumer's benefit.<sup>123</sup>

Furth-Matzkin argues that her work casts doubt on the idea that consumer-friendly deviations from contract text are a substitute for regulation. She bases this on the simple principle that it is difficult for consumers to know when these consumer-beneficial deviations will occur. She writes:

[E]ven when sellers exercise tailored forgiveness, the discrepancies between the standardized terms and their actual implementation might generate distortions and regressive distributive effects.

As the findings reveal, stores vary significantly in the extent to which they are willing to depart from their standardized policies in practice. While more luxurious, experienced, and chain stores are more likely to exhibit tailored forgiveness *ex post*, substantial unexplained variation remains even after controlling for store characteristics. This unexplained variation might harm consumers' ability to distinguish between stores that strictly adhere to their formal return policies and those that offer better terms in practice. Consequently, consumers might make poor return decisions. They might be discouraged from trying to make returns to stores that would likely depart from their unconditional paper policies in their favor, or inefficiently attempt to make returns to stores that would not budge.<sup>124</sup>

Her findings align with other scholars who have written on the subject. Shmuel Bacher and Tal Zarkasy argued in a recent paper that the gap between the text deal and the real deal allows firms to deceive consumers, and in this way undermine competition in the market.<sup>125</sup> James Fallows Tierney has warned that both the substance of consumer

121. See Becher & Zarsky, *supra* note 108 (describing the gap between what standardized consumer contracts say and how businesses and consumers interact with one another, and that this lenient approach may have surprising and harmful qualities).

122. See Theodore Eisenberg et al., *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 118 (2008) (finding as the mainline result in an empirical study that "Mandatory arbitration clauses appeared in more than three-quarters of consumer contracts examined but in less than one-tenth of non-consumer contracts negotiated by the same firms, suggesting that the firms' faith in arbitration is considerably weaker than they have claimed."); Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 970–72 (2006) (finding that in the "long-term relationships" between suppliers in the auto-manufacturing supply chain terms were more one-sided where one party had more economic power, either because they are powerful companies like Exxon or General electric, or because of their wide supplier base allows them to pass on automotive contracts. Specifically, economic power was more determinative of how one-sided the boilerplate than was the company's position in the supply chain.).

123. Furth-Matzkin, *supra* note 107, at 25 ("Unexpectedly, a small subset of the lenient policy stores (8%) departed from their return policies to the consumers' detriment. Store clerks in these stores not only refused to refund the testers. They also refused to accept the non-receipted item for store credit or exchange, even though they were contractually required to do so.").

124. *Id.* at 6.

125. See Becher & Zarsky, *supra* note 108, at 116 ("[S]elf-interested firms can manipulate information flow by utilizing the Gap. In such cases, information flow can aggravate the problem of information asymmetry,

contracts and how they are enforced may be crafted with an eye to the audience of regulators in a bid to illustrate the wisdom of avoiding direct regulation from government.<sup>126</sup>

Consumer-firm dispute resolution has evolved to match the ubiquity and complexity of contract formation. The extensiveness of most boilerplate agreements belies the fact that they fail to contain the most salient elements of the deal between the consumer and merchant. Companies and consumers regularly resolve their differences in informal dispute resolution.<sup>127</sup> Since many consumer disputes are for relatively low sums, this is likely the preferred form of dispute resolution for both parties in most cases.<sup>128</sup> In practice, the actual points that matter between consumer and merchant are resolved by internal procedures. These are knowable rules, but they are not publicly available and are subject to change. The internal rules for dispute resolution are generally standardized and automated, whether in a computer program or a list of policies given to human employees and applied whenever a customer contacts the firm with a dispute.<sup>129</sup>

The law reinforces these norms by strongly favoring arbitration clauses<sup>130</sup> and procedural disfavoring of class action lawsuits.<sup>131</sup> Arbitration is a standard term in consumer contract agreements,<sup>132</sup> and most consumer contracts state that only binding

rather than cure it. It can lead consumers to form a distorted perspective, which in turn will result in sub-optimal decision making. The traditional concern of asymmetric information relates to consumer form *contracts*. We, however, suggest that paying close attention to asymmetric information in firms' *behavior* is frequently a crucial point not to be missed.”).

126. James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 NEB. L. REV. 874, 918–19 (2020) (“Firms adopt contract terms with many audiences in mind, including the policymakers responsible for assessing and adopting legal rules governing their contracts. Scholars have long been concerned with how actors can manipulate other actors’ strategic choices under uncertainty to favor outcomes close to their own preferred policies. Firms may be particularly effective at shaping policymakers’ preferences by making predictive claims that proposed policies will not generate social gains that are worth the costs of reform, and by encouraging their audience—policymakers—to rely on schema and heuristics to corroborate those claims. Firms’ efforts will be relatively unmatched if, because other constituents are subject to their own cognitive biases, constituents are less effective at detecting firms’ efforts to manipulate policymakers’ preferences or at sharing this information with other voters.”).

127. See generally Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REGUL. 547, 554–55 (2016) (describing the quasi-judicial role firms play in consumer dispute resolution).

128. *Id.* at 571–78 (describing in detail the advantages of internal dispute resolution as including low-cost access to redress, greater value for those who complain, and direct accountability, all while promoting community and collaboration more than an explicitly antagonistic adversarial court process).

129. *Id.* at 564–67 (“Corporate complaint processing is now often highly automated. This automation can significantly reduce the costs of dispute resolution. Perhaps more importantly from a dispute design perspective, it enables tailored decision-making.”).

130. *E.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1423 (2019) (Breyer, J., dissenting) (stating that Congress requires the FAA to require interpretations of arbitration clauses in a way that “favors arbitration”).

131. See *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 588 (2007) (Stevens, J., dissenting); Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. 1295, 1296 (2016) (“Class actions are under attack. Once lauded as powerful mechanisms to deter predatory business behavior and supplement regulatory enforcement, they are now targets for tort reformers and conservative jurists. From the 2005 Class Action Fairness Act to a string of recent Supreme Court decisions, the trend is towards increasingly restrictive interpretations of Federal Rule of Civil Procedure 23(b)(3), the rule governing class certification of monetary claims.”).

132. James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692, 1706 (2017) (“In recent years, it has become

arbitration is available to consumers where informal dispute resolution fails.<sup>133</sup> The possibility of public review or even public knowledge of how a company actually resolves disputes with consumers is precluded by the modern practice of extra-judicial dispute resolution.<sup>134</sup> Though the empirical evidence is mixed,<sup>135</sup> many argue that removing these disputes from a public institution's resolution is less costly to society than judicial review, all other factors held constant. I will presume this is true, given that the federal government has accepted this conclusion as a matter of policy.<sup>136</sup>

Contract differs from property insofar as parties can craft a limitless number of forms to suit their needs, as opposed to the limited menu of property forms.<sup>137</sup> Several default rules within contract law have an information-forcing function, aiming to encourage parties to reveal more about their deals and thus better enable parties to satisfy their preferences.<sup>138</sup> More information is good from the perspective of enabling parties to know their preferences, and bargain better through advantages in guessing the other party's position. This enables contracts to be more perfect instruments of autonomy or, more likely, to indicate a deal that is welfare-maximizing for both parties.

However, the gulf between the real deal and the text deal, paired with the obscurity of dispute results to the public, created by arbitration terms and their interpretation, renders consumer dispute practice a black box. This leads to the privatization of law, where corporations are unaccountable to the public and need not hold to any precedent, and the compression of public knowledge and discussion about how disputes are being

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common for consumer contracts to include mandatory arbitration clauses.”); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 439 (2011) (“Arbitration has become ‘the new litigation,’ increasingly resembling a parallel judicial system. Arbitration clauses appear in hundreds of millions of consumer and employment contracts. Businesses do not merely use these provisions to funnel cases away from the courts; rather, they seize the opportunity to redefine the parameters of the dispute resolution process—from the scope of discovery, to the right to bring a class action, to the payment of fees and costs.”).

133. Eisenberg et al., *supra* note 122 (showing that most consumer contracts include mandatory arbitration clauses).

134. See Van Loo, *supra* note 127, at 578 (citing lack of transparency as a downside of the current corporate-operated consumer dispute regime).

135. See generally Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115 (2010) (arguing that the effects of removing disputes from alternative dispute resolution are varied).

136. In an influential Supreme Court case interpreting the FAA, Chief Justice Warren Burger declared that the FAA constituted “a liberal federal policy favoring arbitration agreements” and explained that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). It is not apparent that a pro-arbitration policy mandates an anti-litigation policy stance for the courts, but that is the reading many courts have favored. See generally Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119 (2019).

137. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1175 (2006).

138. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989) (showing how penalty default rules can be used to encourage parties to reveal information); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 609–11 (1990) (giving examples of information-forcing rules); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1299–1300 (1980) (explaining the information-forcing interpretation of foreseeability rule in contract damages); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985) (outlining the role of the information-forcing rule when a sophisticated party contracts with an unsophisticated party).

resolved.<sup>139</sup> Boilerplate in consumer agreements is available, to some extent, for public examination. But a gap lies between the text of the boilerplate agreement and the real deal between the parties. This makes it impossible for other firms, policymakers, scholars, or anyone else to have a good empirical sense of how consumers are resolving disputes, and thus to understand the deal's final form. This gap results from the most salient features of the real deal not being publicly available. There is no way for a consumer to tell between a firm with a fair dispute resolution process and one with an unfair dispute resolution process. Rory Van Loo has described the potential for this issue to lead to market failure and thus, to poor results for consumers:

The risk is that these market failures undermine all of the potential advantages of private ordering. Rather than offering low-cost access to redress, consumers are made to pay in subtle ways, such as by spending excessive time complaining or by having deserved redress denied. Reputation-based sanctions no longer hold consumers accountable because information available is inaccurate. The perception of procedural justice is used to mask what is, in fact, an absence of meaningful participation. In short, when markets fail, the risk is that the private consumer legal system fails with it.<sup>140</sup>

There is no incentive from the market or law in the status quo to prevent extensive opportunistic behavior by firms.

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In this Part, I have shown there is a pervasive and networked consumer contracting environment in which flexible, mutable contracts are the norm. While some commentators have discussed the implications of each of these phenomena, no previous article or court opinion has brought them together. Most modern consumer-firm interactions take place within evolving, ongoing relationships of trust. They are not episodic transactions between strangers. The consumer is compelled to trust corporations as arbiters of disputes. This is in addition to trusting a firm to determine what privacy and cybersecurity protections are needful and appropriate as technology practices evolve. The relationship evolves over time to suit the needs of both parties, yet one party, the corporation, is in a position of dominance and may opportunistically take rents from the consumer. The next Part will explore the doctrinal implications of these findings.

### III. FROM CONTRACT LAW TO FIDUCIARY LAW

In this Part, I will explain the common law roots of the fiduciary approach to consumer-firm relationships in the information age and why contract law must be supplemented by fiduciary law in this area. Contract law is currently the dominant paradigm for understanding consumer transactions. Fiduciary law enforces consensual transactional relationships that limit the party's ability to control the other's interests to neglect or harm the other with the control so granted. The discussion of contract law that follows shows the limits of contract law for a just and healthy consumer economy in the

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139. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016); John Gardner, *The Twilight of Legality*, 43 AUSTRALASIAN J. LEGAL PHIL. 1 (2019); Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600 (2020).

140. Van Loo, *supra* note 127, at 584.

information age. Contract law as it is currently understood is not equipped to address the flexible, ongoing relationships of trust that characterize most consumer-firm transactions. Understanding these limitations shows the need for the introduction of fiduciary law principles in consumer law. I begin Section III.A by outlining the purpose of contract law, and then I go on to describe the debate in the scholarly literature about the scope of consent. In Section III.B, I show that a shift has occurred in both doctrine and scholarship towards finding obligations as a matter of law in consumer contracts, manifested assent notwithstanding. I argue that my fiduciary approach is the logical next step to this interpretational trend in consumer contracts.

#### A. *The Consent Debate and the Battle for the Soul of Contract Law*

Understanding contract law will help us the extent to which it is capable of regulating information age consumer relationships in its current form. A good way to outline the purpose of contract law is to describe what it does; then we might consider why a society would want a law that enforces contracts.<sup>141</sup> Contracts allow individuals to create legally binding future obligations of their own design.<sup>142</sup> This is in contrast with the contract's private-law cousins in tort, property, and unjust enrichment. The distinctions underscore the unique role contract law plays in our legal system. Tort imposes general obligations not to harm others not chosen by individuals.<sup>143</sup> Property facilitates transfer of resources between individuals,<sup>144</sup> but property is limited in the forms it can take.<sup>145</sup> Unjust enrichment imposes obligations on individuals based on what they have taken from other individuals and is thus fundamentally backward-looking.<sup>146</sup>

There are two broad reasons why we have contract law: enhancing individual autonomy and improving overall well-being.<sup>147</sup> Some theorists have embraced one to the exclusion of the other.

141. One might call this a normative account of contract as opposed to an analytic account, which would simply describe contract law works the way that it does. See STEPHEN A. SMITH, *CONTRACT THEORY* 6 (2004) (distinguishing between types of theories of contract law).

142. BRIAN H. BIX, *CONTRACT LAW RULES, THEORY AND CONTEXT* 3 (2012).

143. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 919 (2010) (“Looked at through the lens of daily life, Torts is about which duties of noninjury owed to others are counted as legal duties and what sorts of remedial obligations one will incur for failing to conduct oneself in accordance with those duties.”).

144. See Henry E. Smith, *Property as the Law of Things*, 125 *HARV. L. REV.* 1691, 1700 (2012) (arguing that property's modularity allows it to manage complexity and contain third party information costs).

145. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 9–24 (2000) (describing and outlining the common law *numerus clausus* principle, noting “[p]erhaps the best characterization of the status of the *numerus clausus* in American common law is that it is simply a fact about the way in which the system of property rights operates”).

146. Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 *TEX. L. REV.* 1927, 1927, 1931–33 (2001) (defining unjust enrichment and comparing it to torts and contracts).

147. See Alan Schwartz & Daniel Markovits, *Function and Form in Contract Law*, *OXFORD HANDBOOK OF THE NEW PRIVATE LAW* (forthcoming Oct. 2020) (manuscript at 2–3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3392999](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392999) [<https://perma.cc/S46K-6KD4>] (noting welfare and autonomy as two goals of contract law). Scholars have described this distinction between types of goals for contract law using different terms. E.g., KIM, *supra* note 57, at 9–10 (2013) (distinguished between “individualistic/deontic” and “consequentialist” theories of contract law); Gergen, *supra* note 146, at 1934 (distinguishing between “utilitarian” and “non-utilitarian” justifications for contract law).



Autonomy theorists have grounded contract's moral authority in the exercise of human will.<sup>148</sup> While theorists differ in this category, they agree, broadly, that there is inherent value in the state enabling individuals to shape their world through their independent choices.<sup>149</sup> The principle critique of autonomy theories is that, while they are intuitively appealing to explain the advantages of having contract law at all, they ultimately fail to explain convincingly the specific rules of contract law we actually have.<sup>150</sup>

Welfarists, by contrast, see contract law as a mere tool to maximize society's welfare.<sup>151</sup> Some theorists, particularly those of the law and economics school, measure welfare purely by monetary wealth.<sup>152</sup> However, some welfarists also view contract's purpose in managing and improving relationships between individuals and firms, benefits that may not be captured by considering the individual's autonomy interest.<sup>153</sup> Other welfarists see the role of contract law as an agent for improving inequities in society.<sup>154</sup> Welfarism as a justification of contract law is as diverse as possible definitions of "welfare," with some definitions of welfare leading to substantial convergence with some autonomy-based conceptions.<sup>155</sup> The very flexibility of welfarism is cause for skepticism

148. See SMITH, *supra* note 141 (autonomy theory based on promising); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981) (discussing an autonomy theory based on promising); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 713 (2007) (discussing an autonomy theory based on developing individuals as moral agents); Randy E. Barnett, *A Consent Theory of Contracts*, 86 COLUM. L. REV. 269, 300–09 (1986) (discussing an autonomy theory based on consent).

149. JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 158 (1980) (stating that the law's "normative function . . . is to provide individuals with facilities for realizing their wishes").

150. See generally Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989) (critiquing such a theory).

151. Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 468 (1979) (defining "welfarism" as the view that "[t]he judgment of the relative goodness of alternative states of affairs must be based exclusively on, and taken as an increasing function of, the respective collections of individual utilities in these states"); Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241, 313 (2000) ("[W]elfarism refers to the family of moral theories that make overall well-being morally relevant, not necessarily morally conclusive. Welfarism, thus defined, includes but is not limited to utilitarianism."); Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657, 707 (2010) ("[W]elfarism can be defined in various ways. Welfare might refer to positive subjective experience or mental states; the satisfaction of desires (or of certain desires); or objective goods (such as education).").

152. Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 627–31 (Jules Coleman & Scott Shapiro eds., 2002). *E.g.*, RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 356–57 (1990).

153. See, e.g., Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 341 (2009) (describing "contracts as plans designed to solve a particular coordination problem better accounts for how we are able to make exchanges over time, even in situations where the parties involved might otherwise not be able to trust one another"); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1456–58 (2004) (contending that contracts are for protecting and encouraging relationships between individuals); Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881–83, 887, 900 (2000) (describing contracts as inherently relational, contrasting his view with "discretists," who focus on individual parties within the transactions).

154. See, e.g., Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 474 (1980) ("defend[ing] the view that rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive.").

155. See generally Oren Bar-Gill, *Choice Theory and the Economic Analysis of Contracts: Comments on*

from its critics who argue that its conclusions are malleable and often based on assumptions about facts about the world that proponents cannot show to be true.<sup>156</sup>

Finally, some theorists have embraced a pluralistic account of contract law; that is, they consider both autonomy and welfarism as values contract law promotes.<sup>157</sup> Pluralism can be critiqued for compounding the potential for complexity because of the need for a principle for ordering when the plural values are in conflict.<sup>158</sup>

Modern courts tend to be value pluralists when it comes to normatively justifying contract law.<sup>159</sup> That is, they take from both autonomy and welfare theories of contract as they construct the theory of the individual case before them.<sup>160</sup> They see both promoting autonomy and maximizing welfare as goods.<sup>161</sup>

These high-minded concepts about the purpose of contract law find their application in the debate about the scope and nature of consent in consumer contract law. This debate has dominated the consumer contract law literature for the past several decades. I evaluate here the limitations of this debate, whether one aims to justify the status quo or to create a more consumer-protective consumer environment.

In law and life, consent is transformative. It allows people to change their legal and

*Dagan and Heller's*, *The Choice Theory of Contracts*, 20 JERUSALEM REV. L. STUD. 79 (2017) (reviewing a Choice Theory-based critique of welfare economics).

156. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206–07 (2003).

157. See, e.g., Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1773–83 (2008); Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1745 (2000).

158. Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 688 (Jules Coleman & Scott Shapiro eds., 2002) (“challenge for [pluralist contract] theories, like the challenge for pluralistic normative theories in general, is to explain how their explanations and justifications can be defended in the absence of a master principle for ordering the competing values they invoke.”); see also Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1499 (2005) (exploring how autonomy and efficiency can be tiered, with both having value but autonomy taking priority).

159. Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1033–34 (2010) (“Pluralist theories of contracting do not endorse a ‘super’ value, but instead acknowledge a plurality of values that are commensurable or incommensurable with one another according to the contractual context. Decision agents—typically courts—use that pluralism to identify and rank the intensity of plural preferences and apply them through a process of practical reason in order to reach prudential decisions about the formation of contracts.”); see also Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract*, 29 TOURO L. REV. 659, 679 (2013) (“The attention of scholars and courts to party sophistication embraces value pluralism; it recognizes that contract law serves several competing values and there is no ‘perfect whole.’”).

160. Daniel Markovits & Alan Schwartz, *Plural Values in Contract Law: Theory and Implementation*, 20 THEORETICAL INQUIRIES L. 571 (2019) (defining value pluralism in contract law, finding it to be inevitable to some degree, and discussing its implications); JOHN GRAY, *GRAY’S ANATOMY: SELECTED WRITINGS* 32 (2009) (“In recent liberal writings, the fact of pluralism refers to diversity of personal ideals whose place is in the realm of voluntary association. The background idea here is that of the autonomous individual selecting a particular style of life. This type of diversity resembles the diversity of ethnic cuisines that can be found in some cities. Like the choice of an ethnic restaurant, the adoption of a personal ideal occurs in private life. But the fact of pluralism is not the trivial and banal truth that individuals hold two different personal ideals. It is the coexistence of different ways of life. Conventional liberal thought contrives to misunderstand this fact, because it takes for granted a consensus on liberal values.”).

161. KIM, *supra* note 57, at 15 (citing Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1745 (2000) and Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 510 (1998)).

social relations with others. Consent is moral magic. As Heidi Hurd influentially remarked, “consent turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party.”<sup>162</sup> In the examples Hurd cites, not only does the law recognize this change in relationship between individuals, it broadly tracks what common sense morality would find fair and proper.

The source of consent’s moral and legal power is its relationship with voluntariness.<sup>163</sup> What one does voluntarily is an expression of one’s values. That actions be voluntary is important whether one thinks it is inherently valuable for individuals in a liberal society to make choices, or one thinks that aggregating many individuals’ real preferences are instrumentally useful for allowing the market to maximize the general welfare.<sup>164</sup> While voluntariness is associated with these high concepts, it actually can be constructed as quite a thin concept.<sup>165</sup> It may simply mean doing something.<sup>166</sup> Choosing to eat at any given time, for example, is voluntary, even though if one never ate one would not survive. A lack of other choices does not make an act or decision any less voluntary. Ultimately, a person made the choice, even if that was her only option. And indeed, all choices are constrained to some extent. To find that constraints to a choice menu rendered actions involuntary would effectively make all acts and choices involuntary.<sup>167</sup>

162. Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503, 504 (1996); see also Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996) (“consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography”).

163. *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 57 (2d Cir. 2017); see *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013) (“Under the common law understanding of consent, the basic premise of consent is that it is ‘given voluntarily.’”).

164. See generally Markovits & Schwartz, *supra* note 160 (arguing that despite the differing philosophies of neo-Kantian and welfares contract theorists, judges, scholars, and policymakers from both camps often reach similar doctrinal conclusions).

165. But see Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 184–85 (2005) (arguing that “an action is only voluntary only if the decision to engage in the action is entirely unconstrained and fully understood” and providing examples of scholars who share a similar view).

166. Whether or not an action is voluntary comes down to whether or not the actor has acceptable alternatives. Ben Colborn, *Debate: The Concept of Voluntariness*, 16 J. POL. PHIL. 101, 111 (2008). Acceptability can be defined objectively (rather than what the subject thinks is objective), and the standard for acceptability can be defined in a very thin manner, such as physical possibility. *Id.* at 102.

167. Whether or not there is such a thing as free will as a matter of philosophy is not significant to this Article. This Article assumes that in current American culture, people regard themselves as capable of making choices voluntarily. In light of that culturally situated fact, law either has a duty to give them options to actualize themselves as rational beings who consider themselves to have free will, or to allow themselves to express their preferences in order to maximize welfare. See Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1579 (2000) (“To encompass these facts, economists can postulate ‘tastes’ for fairness, voting, judging, and tax compliance. Or economists can postulate general tastes like ‘self-expression’ and ‘good citizenship’ that encompass these particular tastes. Postulating a taste for morality raises the question, ‘What is the difference between an unselfish desire to treat others fairly and a selfish desire to satisfy a taste for treating others fairly?’ While philosophers puzzle over whether seemingly good people are selfishly satisfying a taste for morality, this question is unimportant for social science. Social scientists should describe the values internalized by people, predict the effects of internalized values on society, and explain why some people internalize values that others do not internalize. In

As thin as voluntariness is, it is the essential piece to the concept of consent.<sup>168</sup> To say a person's consent was involuntary is a contradiction in terms. Voluntariness is necessary for the lofty values we associate with consent, the values that give consent its moral magic, but it is not sufficient. On its own, bare voluntariness does not mean that an act is a good reflection of the individual's values and agency. To illustrate the distinction, even if a person is told that she will be shot unless she signs a document, and she does so sign, she has signed voluntarily.

Consent isn't what it used to be. Consent, traditionally, was "voluntariness-plus."<sup>169</sup> It was narrower than voluntariness, and the basis of that narrowing was moral; the idea was to limit the law's enforcement of terms on the basis of voluntariness.<sup>170</sup> Consent was considered a tool of an individual to build and change her world as she saw fit.<sup>171</sup> So when voluntary actions fail to be an expression of an individual's free will, the law would find such voluntary actions not to be consent.<sup>172</sup> Hence, the law's finding that voluntary assent to terms under duress or as a minor is not consent at all.

As a means of enabling a mass-market economy, consent in contract law has moved increasingly toward meaning bare voluntariness.<sup>173</sup> Yet the word "consent" is still imbued with the sense of moral magic it had as a distinctly thicker concept than voluntariness. Despite the well-documented no-reading problem in consumer contracts, and the one-sided content of the agreement's text, consumers still regard themselves as

brief, social scientists should chart the distribution, effects, and causes of internalized values.").

168. Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433, 443 (2019).

169. See Richard R. W. Brooks, *Response to Robert Ahdieh's Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 379, 380 (2011) (discussing the tension between the traditional notion of individualism and the modern, economic one, noting "[m]oreover, the normative weight placed on the economic individualism notion of consent is not necessarily weaker, just differently focused—a notion grounded less in autonomy than it is in efficiency").

170. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 699–700 (1990) (describing the role of consent in traditional contract versus more recent formalistic approaches that she calls contractarianism). See also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) ("the times in which consumer contracts were anything other than adhesive are long past").

171. This is either an inherent good, if you are a neo-Kantian, or an instrumental good, if you are a welfarist.

172. Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 166–67 (1996).

173. One sign of this is the rise in the use of the alternate term "assent" in court opinions from the mid-1990s onward. Assent arguably has less strict and moralistic linguistic connotations than consent, but the contracts case law largely finds the two to have equivalent meaning. Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373, 404–05 n.201 (2014) ("Radin sees a difference between agreement and the notions of consent or assent. Radin contends that agreement is a bilateral exchange whereas consent and assent are more of a one-sided process where one party proposes and the other side 'says OK.' In point of fact, the concepts are closely linked because an 'agreement' is a 'manifestation of mutual assent by two or more persons.' . . . Radin also argues that consent and assent are different concepts in the law of contracts whereby 'assent' is more passive than 'consent.' Radin further states that assent may require less information than consent regarding whether the assent is valid. . . . To the contrary, as stated by the Mississippi Court of Appeals, the two quoted concepts are 'interchangeable.' . . . Both terms mean 'agreement, approval, or permission.'" (citations omitted)). Most courts and commentators use the two terms interchangeably. The rate of usage of the terms by courts in opinions rise and fall together. Lauren Henry Scholz, *An Empirical Historical Account of Assent* (unpublished manuscript) (on file with author).

bound to the text of contracts of adhesion.<sup>174</sup> The magic still works.

The consumer boilerplate debate asks whether lengthy, substantively one-sided boilerplate contracts with consumers are enforceable as a matter of contract doctrine. Underlying the doctrinal debate are moral questions about whether a system where such contracts are common is desirable.<sup>175</sup> Outside of the realm of contract scholarship, scholars focusing on technology and the law have recounted the negative impacts on personal rights and individual outcomes of an innovating sector regulated only by private contracts.<sup>176</sup>

Evaluating bilateral disputes is the distinctive form of private law analysis,<sup>177</sup> so questions scholars have examined concern the nature of each episode transaction and to what extent the law can justify enforcement of terms. In particular, scholars have focused on the quality of the assent manifested by consumers.

The boilerplate debate began in the 1980s and has continued to the modern day. Boilerplate contracts became an increasing part of the consumer landscape in the 1960s and 1970s. Consumer protection laws were on the rise, as well as the spread of common law doctrines, such as unconscionability<sup>178</sup> and promissory estoppel, to protect consumers in commercial transactions.<sup>179</sup> This period was followed by a period of business-friendliness in courts and legislatures, which has tended to concede with decreased consumer protection.<sup>180</sup>

In an influential 1983 *Harvard Law Review* article, Todd Rakoff argued that consumer contracts of adhesion should be prima facie unenforceable, and instead background legal rules should govern.<sup>181</sup> This is because the goals of contract law would

174. See Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 546 (2020) (finding through empirical study that consumers feel committed to the fine print, even when it strips away explicit promises made to them).

175. See Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 607 (2005) (“Nonetheless, it would be a mistake to dismiss contract law as a viable means to protect the public interest. It is not existing contract doctrine that is hostile to the interests and rights of third parties and the public. Rather the issue is whether the judiciary will ever privilege those parties’ concerns to the same extent they have traditionally done so for commercial players. Even if the predominant modus operandi of contract doctrine has been the protection of economic interests in order to protect the greater market economy, the judiciary has often been at its best when it champions the rights of less powerful parties. Should lay people and scholars perceive contract law as a dead end for the pursuit of noncommercial claims, it will be in danger of becoming obsolete.”).

176. E.g., Calo, *supra* note 63, at 1003–15, 1020–24; FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015); FRISCHMANN & SELINGER, *supra* note 95; FAIRFIELD, *supra* note 93; TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016); Luguri & Strahilevitz, *supra* note 69; Susser et al., *supra* note 63.

177. At least for non-instrumental approaches to justifying private law. See, e.g., Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409–11 (1992) (“Presenting corrective justice as a quantitative equality captures the basic feature of private law: a particular plaintiff sues a particular defendant. Unjust gains and losses are not independent but coincidental changes in the value of the parties’ holdings.”).

178. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

179. Charles Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981).

180. See *infra* Section IV.B.

181. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983). Rakoff works from the assumption that human persons have fundamentally different contract rights from corporate persons. *Id.* at 1235–37.

be frustrated if invisible terms were said to adhere to consumer contracts.<sup>182</sup> Consumer boilerplate, in Rakoff's view, could be enforced but only if companies affirmatively showed it was reasonable to hold consumers to those terms. Margaret Radin has reconstructed the argument against the mass-enforceability of boilerplate terms, contending that, in recent work, consumers and firms lack the mutual understandings of language that make coming to agreements with one another possible.<sup>183</sup> Specifically, she strongly contests the notion that the assent given when consumers are asked to click "I Agree" is sufficiently robust to call down the contract's normative and ultimately doctrinal significance.<sup>184</sup>

Writing with Robin Kar, Radin has referred to the phenomenon of finding "contracts" where there is clearly no shared understanding of terms as "pseudo-contracts."<sup>185</sup> They refer to the shift of the phrase "contract law," from referring to mutual assent to terms to referring to the unilateral creation of rules by private actors for a broad cross section of society in their capacity as consumers, as a "paradigm slip."<sup>186</sup> Their main worry is that use of a language and framework in a contracting environment too far removed from the original context steals legitimacy from one concept and applies it where it does not belong.<sup>187</sup>

Many scholars have argued that if consumer consent is not meaningful, it should not be able to support an enforceable contract.<sup>188</sup> There are many different standards that scholars have devised for defining what meaningful consent constitutes. What these all have in common is extending the inquiry as to what consent means beyond whether the person took an action that would suggest to another that she agreed to the contract. The circumstances must show "something more" about the consumer's position when she consented: she must have had a certain minimum knowledge about the terms, or number

182. *Id.*

183. RADIN, *supra* note 93, at 82–84; Barnett, *supra* note 148 (discussing an autonomy theory based on consent).

184. RADIN, *supra* note 93, at 95–98.

185. Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135 (2019).

186. The appropriation of the term "pseudo-contract" can be questioned. After all, aspects of contract law have altered over time, and the term contract has still applied. A loose comparison to the Ship of Theseus paradox may apply here: reasonable minds might differ as to precisely if and when, after a series of alterations, one thing becomes a different thing. See PLUTARCH, PLUTARCH'S LIVES, Chapter 23 (Bernadotte Perrin trans., Harv. U. Press 1967); Andre Gallois, *Identity over Time*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016 ed.), <https://plato.stanford.edu/entries/identity-time/> [<https://perma.cc/A4GU-BBUJ>]. This terminological question is too dense to parse here. I adopt Kar and Radin's terminology in this article because the paradigm slip phenomenon they describe of the change in function of contract is accurate, and they make a strong argument for why pseudo-contract is categorically different from contract.

187. Kar & Radin, *supra* note 185.

188. *E.g.*, Watkins, *supra* note 104, at 549 (suggesting "a 'heightened assent' rule to resolve the division between assent-based and unconscionability-based approaches to change of terms provisions."); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" As the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 472 (2008) ("Courts should adopt an assent-based analysis for determining whether to enforce disputed standard form contract terms because such an analysis is superior to an unconscionability analysis. As many scholars and some courts have recognized, it is a fiction to characterize what occurs in the formation stage of a standard form contract as a party's assent to all contract terms.").

of options, for example.<sup>189</sup> The problem with meaningful consent is that it may undermine autonomy arguments for contract. Some argue it is paternalistic, because it leaves judges to decide how informed a person should be before contracting.<sup>190</sup> From a prudential perspective, it adds additional complexity and unpredictability to judging.<sup>191</sup>

In contrast to these will-based arguments against the sufficiency of the consent manifested, others have argued that boilerplate presented no unique problem to contract law. Randy Barnett influentially compared contracts of adhesion to promising in advance to do whatever is written inside a sealed envelope.<sup>192</sup> Barnett offered the intuition that if we find it is coherent for a person to agree to whatever a friend or colleague asks, there is no reason to be concerned about enforcing a contract against a person who has not read the agreement to which they agreed to be bound.<sup>193</sup> Barnett, without explanation, extends the trust that a person may have in agreeing to whatever a friend and family member to arm's length transactions. He suggests consumers know they are agreeing to something when they sign on the dotted line or click "I Agree," so the fact that they do not know exactly what they are agreeing to is no bar to enforcement, as long as the terms are not "radically unexpected."<sup>194</sup> It is unclear where the limit of this principle lies. Many behaviors, actions, and signals can be said to constitute a manifestation of assent.<sup>195</sup> What could be understood as denoting consent is potentially as broad as being a member of a society.<sup>196</sup>

While the bulk of the scholarly community tends to favor a thick notion of consent, most courts decline to require anything more than a thin, mechanical manifestation of assent.<sup>197</sup> As a matter of policy, some courts reject the contention that requiring a more robust notion of assent would be better for consumers.<sup>198</sup> If the entire economy is held back by the need for further formalities, such courts intone, are consumers really better

189. This may be seen as of a piece with the traditional notion of consent as "voluntariness-plus." See *supra* Part I (discussing in further detail).

190. *But see* Alan M. White, *Behavior and Contract*, 27 L. & INEQ. 135, 178–79 (2009) ("Paternalism is a false bogeyman. Consumer's choices will be framed either by sellers or by legal rules. Allowing consumers the freedom and autonomy to be manipulated and exploited does not promote autonomy.').

191. *But see generally* Shawn J. Bayern, *Against Certainty*, 41 HOFSTRA L. REV. 53 (2012).

192. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 636 (2002). Barnett framed the hypothetical from the perspective of two individuals with a preexisting relationship. This is of significance to why we understand such contacts to be binding. See *infra* Part IV.

193. *Id.* at 636.

194. Barnett, *supra* note 192, at 639.

195. There is little literature on the limitations of what can be consent or assent from the perspective of individuals who do not advocate for a "meaningful"—that is to say thicker—notion of assent. It is not clear if this notion of consent is distinguishable from the bare voluntariness sketched in the introduction *infra* and if so, what that distinction looks like.

196. See Peter Linzer, *Is Consent the Essence of Contract?—Replying to Four Critics*, 1988 ANN. SURV. OF AM. L. 213, 218 (1988).

197. *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 235–43 (E.D. Pa. 2007) (citing numerous cases where clickwrap contracts are enforced so long as their terms are not so unexpected as to be unconscionable). *But see* *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (leading shrinkwrap case that holds that the consumer is the offeror and the contract is the visible terms plus Uniform Commercial Code defaults).

198. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) ("On Zeidenberg's arguments, these unboxed sales are unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two 'promises' that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.").

off having fewer choices and opportunities? Many courts simply base a doctrinal argument for finding for defendant firms based in contract's law duty to read. Like businesses,<sup>199</sup> consumers will be held to the terms of the agreements they sign.

As an empirical matter, individual consumers simply are not aware of the terms they agree to in form contracts. It is a well-established point in empirical contract law research that individuals do not read form contracts, and that such behavior is rational.<sup>200</sup> To actually read form contracts would be prohibitively time consuming, and ineffective for understanding the terms, even for relatively intelligent individuals. What's more, a consumer cannot alter or reject terms in a form contract in any case. As Tess Wilkinson-Ryan observes in her influential article, "A Psychological Account of Consent to Fine Print," form contracting occupies an unusual position in the American policy psyche.<sup>201</sup> As she writes:

Contracts are understood to be serious moral obligations, and yet everyday commercial activity requires that consumers sign agreements that contain terms they have not read. Most people see consent to boilerplate as less meaningful than consent to negotiated terms, but nonetheless would hold consumers strictly liable for both. This is an area with unclear—if not bipolar—norms, and we do not know how individuals assimilate conflicting preferences and bodies of evidence into judgments of consumer consent.<sup>202</sup>

In her study, Wilkinson-Ryan came to the troubling conclusion that disclosures in consumer contracts have the effect of normatively justifying findings against consumers in cultural legalistic discourse even though it is understood that such disclosures play no function in actually informing consumers.<sup>203</sup> Put another way, disclosures add the veneer of fair transactional process while making no functional improvement on that metric.

Furthermore, in a recent article, James Gibson strikes directly at the underlying concern motivating judges to ignore the strong case for finding nearly any and all boilerplate terms enforceable against consumers.<sup>204</sup> Judges and other stakeholders ignore the overwhelming case against the enforceability of consumer boilerplate due to the perception that the modern consumer economy relies upon boilerplate to function. They prop up the poor argument that boilerplate contracts amount to consent to specific fine print, because, as Gibson provocatively states, "We would rather be naked than dead."<sup>205</sup> But Gibson shows that choosing between the modern consumer economy and boilerplate terms is a false dichotomy.<sup>206</sup> In the article, he performed an empirical study suggesting that mass consumer transactions based on default rules could enable a consumer economy that functions precisely like the current one, except free of boilerplate terms.<sup>207</sup>

199. *Ray v. William G. Eurice & Bros., Inc.* 93 A.2d 272 (Md. 1952).

200. *E.g.*, Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 556–57 (2014).

201. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014).

202. *Id.* at 1747.

203. *Id.* at 1749–50.

204. James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249 (2018).

205. *See generally id.*

206. *Id.* at 249.

207. *See generally id.*



Perhaps the best defense of the substantive legitimacy and fairness of form contracts is the “informed minority” hypothesis, which Wilkinson-Ryan and Gibson’s studies do not directly address. This hypothesis goes as follows: given that form contracts are widely available and standard, vocal sophisticated consumers will call out bad terms and that will encourage businesses to change abusive terms that conflict with reasonable consumer intuitions.<sup>208</sup> This argument has been critiqued extensively on its logical and normative merits in the academic literature. But the most persuasive arguments against the position are empirical.

In a recent influential empirical study, based on the web-browsing behavior of nearly 50,000 subjects, Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen found the myth of the informed minority to be without merit.<sup>209</sup> They also found that the fraction of consumers who read such contracts is so small that it is unlikely an informed minority alone is shaping software license terms. They concluded that the informed minority hypothesis is without empirical support and thus should be rejected.

The classic boilerplate debate is grounded in the question of how to define assent and whether it is reasonable for courts to accept a thin notion of assent as a means of finding boilerplate terms enforceable. The theoretical arguments are expressly along these lines.

Clayton Gillette’s work on form contracts is a notable exception.<sup>210</sup> He has argued that we should not worry about lack of consumer participation in bargaining for consumer form contracts, because of the ability and incentive of companies to represent the interests of the consumers in the development of their terms.<sup>211</sup> He suggests that companies act as agents for non-reading consumers who are only aware of salient terms, like price. I agree with his analysis that assent is “a mechanism by which to ensure that the contract internalizes the interests of the parties to the contract[,] [but] [e]xplicit, personal assent is not the exclusive means of achieving internalization.”<sup>212</sup> Assent is a way of reaching a conclusion that two parties intended to form a binding relationship, bounded in some way as to what they owe to each other. But it is not the only way of reaching that conclusion. Gillette notes that there is a limit to the ability of businesses to serve as proxies for the interests of consumers in contract formation.<sup>213</sup>

The empirical work of recent years has been marshaled to weaken the case for sufficiency of consumer assent to boilerplate terms. For example, the study referenced in the previous paragraph supports the argument that a thin notion of assent should not be accepted as enough to bind consumers. Basing assent on a doctrinal duty to read where a reasonable person would not read boilerplate terms, and where there are no other market mechanisms to simulate the results of the average consumer simulating the duty to read,

208. Gillette, *supra* note 44.

209. Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014).

210. Clayton Gillette’s work on form contracts is a notable exception; he has argued that assent can occur by proxy when companies represent consumers as agents during contracting. This thesis accepts that assent is merely one indication that a contractual arrangement has been reached; alternative avenues may also be sufficient. Gillette, *supra* note 44, at 680.

211. *Id.* at 690.

212. *Id.* at 688.

213. *Id.* at 680.

is both illusory and in contrast to the purpose of the duty to read doctrine.<sup>214</sup>

In the mid-20th century, Article 2 of the Uniform Commercial Code (UCC) jettisoned formalistic offer and acceptance requirements for sales of goods.<sup>215</sup> The framers of the UCC changed the rules for contract formation based on the idea that most industrial buyers and sellers encounter too many forms on a daily basis to be carefully reading and altering each agreement. The duty to read, the justification of the common law mirror image rule, had become unrealistic and unreasonable for many firms in the business of mass-producing and selling goods. So, the UCC framers moved away from reliance on that formalistic fiction and came up with a series of rules to determine what terms made it into the contract between firms when their firms differed, based on the realities of the industrial economy, embodied in UCC 2-207.

A similar revolution has happened in the information economy for consumers. We have reached the limits of mechanical consent for understanding the substance of consumer transactions. In 1980, an average American could go months without signing a boilerplate agreement or experiencing modifications to a boilerplate agreement to which she was already a party. Today, an average American likely cannot make it more than a week without becoming a party to more or different boilerplate terms. So, it requires a new way of looking at when and how consumer boilerplate should be enforced. The duty to read is already modified in certain contexts for businesses where economic realities make it unreasonable for businesses to read forms. It makes sense to give consumers the same privilege. After all, the purpose of contract law is to enforce consensual agreements as they were intended to be executed, not to impose court-made law based on policy preferences. The next Section explores the ways that contract law has already risen to meet this challenge, and how these existing approaches compare to implying a fiduciary relationship between firm and consumer in ongoing consumer-firm relationships.

### B. *Beyond Consent: The Turn to Obligations Implied in Law*

Several scholars have pointed out the limits of consent in understanding how consumer transactions work in practice.<sup>216</sup> The limits of consent are unsurprising when taken in historical context. Consent is not an element of contract formation at all. Rather, in classical contract law, consent is a feature of consideration, which essentially boils down to the notion that each party in a contractual exchange must contribute value in exchange for the other's promise.<sup>217</sup> Consent rose in prominence in the particular debate

214. The provisional study by the author suggests that contract doctrine's reliance upon the concepts of assent and consent is inconsistent and may track periods of uncertainty in technology and society. Lauren Henry Scholz, *An Empirical Historical Account of Assent* (Jan. 19, 2020) (unpublished manuscript on file with author).

215. U.C.C. § 1-103 (AM. L. INST. & UNIF. L. COMM'N 2001); U.C.C. § 2-207 (AM. L. INST. & UNIF. L. COMM'N 2002); Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 340-46 (1995). See also Eisenberg, *supra* note 158, at 1750-54 (contrasting between "modern" contract law, which the UCC typifies, and classical contract law).

216. See Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 140-41 (1988) (describing critiques to the centrality of consent from relational contract theorists, skeptics of the distinction between contract and tort, critical legal theorists, and law and economics theorists).

217. Val Ricks, *Assent Is Not an Element of Contract Formation*, 61 U. KAN. L. REV. 591, 593 (2013) ("[A]ssent is not an element of contract formation. It is duplicative of another, essential part, namely

that has cropped up in the late 20th and early 21st centuries because consideration fell out of favor in scholarly analysis of contract for being too indeterminate.<sup>218</sup> But as the previous section has illustrated, consent is potentially at least as indeterminate as consideration, as a matter of definition, yet without the mooring that consideration has in the notion of fair exchange. While courts do not regularly inquire into the substance of value offered by each party, in rare cases where there is gross inadequacy of consideration, courts will find that there is no contract formed at all.<sup>219</sup> A linguistic move purportedly for clarity has had substantive distortionary effects in neo-classical contract law trends of the late 20th century, as courts increasingly decline to consider consideration a separate element of contract formation.

There are two major existing doctrinal avenues for reintroducing fairness limits as a matter of law in contractual exchange, regardless of manifested assent. One is to emphasize the unconscionability defense to contract enforcement. This approach does not deny that consumers offer consent or that a contract was formed, but rather argues that in an expanded set of procedural or substantive cases, contracts formed may be unenforceable due to unconscionability. The other, more fundamental, move is to understand contracts as relationships and thus deemphasize the role of consent at the time of contract formation in contract theory and interpretation. This way of interpreting consumer contracts may suggest that the relationship created between the consumer and corporation goes beyond the terms in the text of the contract, and therefore provides interpretative room to deny that abusive terms in the paper deal are part of the real deal. This approach looks to the reasonable expectations of consumers to guide the discussion of what the real deal is, which would prevail in the case of a dispute.

In the next subsections, I outline reinforcing unconscionability and relational contracting and then contrast them with my fiduciary law approach.

### *i. Reinforcing Unconscionability*

Several scholars have suggested that the potential for consumer manipulation and exploitation presented by consumer contracts could be improved if the unconscionability defense to contract enforcement were stronger.<sup>220</sup>

The unconscionability defense finds that courts may decline to enforce contracts that

consideration. Consideration exists if the evidence shows that the promise plausibly induced a return promise or performance and that the return promise or performance plausibly induced the promise. Actual inducement is not necessary, though if proved is of course sufficient. The court must at least think it rational that the promise was induced by the thing exchanged, and vice versa.”)

218. See discussion *supra* Sections III.B.

219. *E.g.*, *Dohrmann v. Swaney*, 14 N.E.3d 605 (Ill. App. Ct. 2014) (finding gross inadequacy of consideration to form a contract where an elderly woman signed a contract purporting to exchange \$5.5M for adding a third middle name to the legal name of two minor children).

220. *E.g.*, Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011 (2015); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 5 (2012) (advocating for a consumer proactive “sliding-scale” approach to unconscionability); *Watkins*, *supra* note 104, at 548 (“Robust unconscionability analyses are therefore necessary to avoid unfair surprise and the enforcement of oppressive terms.”); *Korobkin*, *supra* note 156, at 1278–90 (advocating for a modified approach to unconscionability that “create[s] the closest possible fit between the doctrine and either social welfare or buyer welfare”).

shock the conscience.<sup>221</sup> The concept of unconscionability rose to prominence in the mid-20th century, and was enshrined in the Uniform Commercial Code §2-302 and the Restatement (Second) of Contracts §208.<sup>222</sup> Through the unconscionability defense, courts may find arguments unenforceable as a matter of public policy on a case-by-case basis.<sup>223</sup>

The unconscionability defense fits comfortably into the classical conception of contract law.<sup>224</sup> As Anne Fleming wrote:

Unconscionability did not suggest that the classic model of contract formation envisioned by the common law—an arms-length bargain between two parties of equal bargaining power—was defective . . . [I]t did not create new rules for adhesion contracts. Indeed, unconscionability existed comfortably within the centuries-old framework of the common law of contracts. It merely allowed judges to void the most egregious one-sided bargains without throwing the entire system into chaos.<sup>225</sup>

Larry DiMatteo and Bruce Rich have argued, based on an empirical canvass of unconscionability cases, that unconscionability can be reconciled with consent-based theory and that the structure of its elements and how it is used by courts suggest it was intended to do just that.<sup>226</sup> Following the introduction of the unconscionability defense in the 1960s, substantive legislation by state and federal legislatures reinforced consumer rights to provide further reliability in protecting consumer interests.<sup>227</sup> This took some burden off the courts to determine on a case-by-case basis which substantive practices were disallowed.

After its midcentury heyday, the unconscionability doctrine came under fire for being unpredictable and reflecting an inappropriate role for judges.<sup>228</sup> A sea change in American attitudes, with an increased emphasis on individualism over the collective, made unconscionably less appealing to courts and commentators.<sup>229</sup> Many commentators

221. *E.g.*, U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 2002) (stating that a court may refuse to enforce a contract if it is found to be unconscionable); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981) (explaining how a contract can be refused if it is found to be unconscionable). *See also* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 979–84 (2019) (describing recent unconscionability cases).

222. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L.J. 1383, 1399–1405 (2014) (describing the social and political context behind the development of the U.C.C. and Restatement (Second) of Contracts, and the collaboration process that led to their developments and ratification). *See* Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949–1954*, 49 BUFF. L. REV. 359, 398–464 (2001) (describing the history of the development of the U.C.C.).

223. *See generally* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (describing how unconscionability is determined on a case-by-case basis, and public policy violations can result in unconscionability).

224. *See supra* Section III.B. (discussing classical contract theory).

225. Fleming, *supra* note 222, at 1421.

226. Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1100–01 (2006).

227. Fleming, *supra* note 222, 1424–32.

228. *See generally* Leff, *supra* note 223 (offering the first and most influential version of this critique shortly after the watershed *Williams v. Walker-Thomas* case).

229. DANIEL T. RODGERS, *AGE OF FRACTURE* 3 (2011) (“[C]onceptions of human nature that in the post-World War II era had been thick with context, social circumstance, institutions, and history gave way to

have observed the doctrine's relative decline in recent decades,<sup>230</sup> and some have even argued the prevalence of the doctrine even in the 1960s and 1970s could be called into question.<sup>231</sup>

In contrast with the characterization of unconscionability as a historical phenomenon among some scholars,<sup>232</sup> recent empirical work by Jacob Hale Russell has shown that courts have, at least in the period following the 2008 economic crash, returned to using the unconscionability doctrine to invalidate "rotten deals;" that is, substantively unfair and one-sided terms.<sup>233</sup> Russell's findings run contrary to previous empirical work over periods prior to 2008, which found that in the cases when courts did find unconscionability, they confined themselves to unconscionability of procedure, or "access to justice."<sup>234</sup> Russell states that judges "find contracts unconscionable based solely on their view that the prices—including . . . interest rates on loans—are unreasonably high. Consumers prevail in these cases even when a loan is fully legal under other state laws, such as usury caps."<sup>235</sup>

Russell shows there has been a resurgence of rotten-deal unconscionability in the post-recession era.<sup>236</sup> I would add to his observation that the decline of rotten-deal unconscionability may be due to the flurry of legislation dedicated to making tortious or criminal many behaviors that lead to the promulgation of the unconscionability defense to contract formation. As the sociotechnical nature of the contract environment changes and individuals of the modern economy face challenges that their forbears did not, an increased use of the unconscionability defense to fill the gap left by legislators' inaction is rather predictable.

The strongest evidence of unconscionability's resurgence is the proposed Restatement of Consumer Contracts, which delineates a strong role for unconscionability in consumer contract law.<sup>237</sup> The drafters acknowledge the potential for exploitation of consumers via unseen, unread terms.<sup>238</sup> Their aim in the Consumer Contracts

conceptions of human nature that stressed choice, agency, performance, and desire. Strong metaphors of society were supplanted by weaker ones. Imagined collectivities shrank; notions of structure and power thinned out.").

230. *E.g.*, 7 CORBIN ON CONTRACTS § 29.4 (2018) (finding that successful substantive unconscionability claims have failed, and scholarly arguments for how to evaluate such bargains have "had little impact on the courts.").

231. DiMatteo & Rich, *supra* note 226, 1107–10.

232. *See* Russell, *supra* note 221, at 973–78 (describing "premature eulogies" from many commentators, including: E. Allen Farnsworth, Charles Knapp, and Stephen Broome).

233. *See id.* (distinguishing between "rotten deal unconscionability," based on the presence of substantively unfair terms, and the "better known" "access to justice unconscionability").

234. Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 621–23 (2009) (analyzing 750 cases and finding an increase but not an "explosion" of cases, from 16 in 1990 to 155 in 2008, of which the "lion's share of the overall increase," or 115 cases in 2008, related to arbitration clauses).

235. *See* Russell, *supra* note 221, at 977.

236. *See generally id.*

237. RESTATEMENT OF LAW, CONSUMER CONTRACTS, Reporters' Introduction (Am. L. Inst., Tentative Draft Apr. 18, 2019).

238. Skepticism about the ability of disclosure to increase autonomy in consumer contracts is a theme that runs through the scholarship of each of the three drafters. *See generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); *e.g.*, Oren Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets*, 77 MOD. L. REV. 1030 (2012) (describing how unseen terms can cause confusion in consumers); Florencia Marotta-

Restatement is to, echoing Karl Llewellyn, strike a grand bargain between protecting consumers and the freedom of contract for business.<sup>239</sup> The primary tool in their arsenal for achieving the grand bargain is a heightened level of substantive review for unconscionability of “non-salient” terms; that is, terms the average consumer would not be aware of.<sup>240</sup>

The Restatement of Consumer Contracts has been critiqued for not providing an accurate empirical description of the landscape of consumer contracting.<sup>241</sup> Its critics consider it more normative than positive, an aspiration of what consumer contract law should be rather than what it is.<sup>242</sup> This strand of critique is not unusual for a Restatement, however, so it is not necessarily a reason for rejecting the approach out of hand.<sup>243</sup> Restatements often embody current active trends in the common law. The drafters’ empirical work, along with Russell’s, suggests that unconscionability is reaching increasing prominence in consumer contracts.

Many scholars and courts have sought to extend the use of the unconscionability doctrine to protect consumers from contemporary excesses in consumer contract practices. However, it has been critiqued as “an ineffectual tool for consumer protection.”<sup>244</sup> As a policing doctrine for fairness, it tends to, in practice if not in theory, be limited to the most extreme possible cases.

## ii. *Relational Contracting and Reasonable Expectations*

Some commentators have considered a relational approach to contract law in the consumer law context.<sup>245</sup> Here, I first outline the principles of relational contract law,

Wurgler, *Does Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts”*, 78 U. CHI. L. REV. 165, 168 (2011); Florencia Marotta-Wurgler, *Some Realities of Online Contracting*, 19 SUP. CT. ECON. REV. 11 (2011).

239. RESTATEMENT OF LAW, CONSUMER CONTRACTS, Reporters’ Introduction (Am. L. Inst., Tentative Draft Apr. 18, 2019) (seeking a “fairly unrestricted freedom for businesses to draft and affix their terms to the transaction, balanced by a set of substantive boundary restrictions, prohibiting businesses from going too far”).

240. *Id.* § 5. The proposition that non-salient terms in competitive markets should be excluded from this heightened review is highly contested. Russell, *supra* note 221, at 991–92 (2019). See also discussion *infra* Section IV.A. (arguing consumer challenges in data protection justify imposing mandatory terms for consumer protection).

241. E.g., Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REGUL. 45 (2019); Adam J. Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REGUL. 447 (2019) (critiquing the restatement of consumer contracts); see also Martha Ertman, *Properly Restating the Law of Consumer Contracting*, JOTWELL (May 15, 2019), <https://contracts.jotwell.com/properly-restating-the-law-of-consumer-contracting/> [<https://perma.cc/24U3-D5EB>] (summarizing critiques of the Restatement of the Law of Consumer Contracts).

242. See generally Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REGUL. 45 (2019); Levitin et al., *supra* note 241; Ertman, *supra* note 241.

243. Cf. Jay Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U. L. REV. 1, 16 (2015) (discussing the positive-normative controversy in the context of the development of the Restatement of the Law of Liability Insurance).

244. Lonegrass, *supra* note 220, at 4.

245. David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1403 (2018) (“Close inspection of these innovative agreements suggests they might represent a new form of contracting, which I call ‘relational contracts of adhesion.’ Unlike firms deploying typical, adhesive, mass-consumer contracts, these new firms actively try to motivate readership. In so doing, they hope to govern ex ante behavior without recourse to court sanctions, do not inevitably seize every advantage, harmonize the look and feel of the terms

then describe the application to consumer contract law.

Relational contract law grew up as an approach to understanding business-to-business transactions in the mid-20th century. Charles Goetz and Robert Scott defined the field as follows:

A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance . . . . [L]ong-term contracts are more likely than short-term agreements to fit this conceptualization, but temporal extension per se is not the defining characteristic.<sup>246</sup>

Stewart Macaulay first made the descriptive claim that contracts actually worked in this manner in the 1960s. He provided empirical evidence showing that, in most ongoing relationships between businesses, businesses tended to adhere to norms governing the deal that differed from the text of the contracts between them.<sup>247</sup> Relationalist contract scholars contended that there were at least two types of contracts, which varied on a continuum between discrete transactions, such as a cash payment at a tollbooth, to relational transactions, such as a long-term supply relationship between two companies.<sup>248</sup> The early relationalist scholars argued that the difference in quality and expectation created by the relationship motivated consideration in contractual analysis.<sup>249</sup>

Relational contract theory pioneer Ian Macneil laid out the four basic principles of relational contract theory:

First, every transaction is embedded in complex relations. Second, understanding any transaction requires understanding all essential elements of its enveloping relations. Third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly. Fourth, combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.<sup>250</sup>

Relational contract theory has been influential, to an extent. The first two of these

with their larger brands as an aspect of trade dress, and have seemingly succeeded in creating mass-market forms that have some of the attributes of 'real' contracts. They are thus relational."); Ethan J. Leib, *What Is the Relational Theory of Consumer Form Contract?*, in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL* 259, 277–80 (Jean Braucher et al., eds., 2013).

246. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

247. E.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963).

248. E.g., Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 856–57 (1978).

249. *Id.*

250. Macneil, *supra* note 153, at 881–82 (footnote omitted). See also Ian R. Macneil, *Contracting Worlds and Essential Contract Theory*, 9 SOC. & LEGAL STUD. 431 (2000); Macneil, *supra* note 248.

principles are uncontroversial among courts and commentators as a descriptive matter.<sup>251</sup> It is unclear, however, whether and to what extent these theses normatively suggest a departure from classical or modern contract analysis, as suggested by the latter two theses.<sup>252</sup> What is more, it is unclear what the substantive content of proposals that seek to give effect to the latter two theses would look like. A broad prescription of relational contract theory is the decentering of the moment of consent as the definitive source of the content of a contract.<sup>253</sup> Instead, looking at the moment of consent is just one clue among many to determine the substance of the agreement between parties.<sup>254</sup>

The prescriptive content of relational contract theory, as outlined by Macneil, its most influential proponent, is Delphic. William Whitford has noted that “Macneil rarely indicates how courts should decide particular cases before them or expresses support for reasonably particularistic legislation.”<sup>255</sup> Even the broad principles Macneil outlined were often inconclusive. For example, while he suggested that individuals enter contracts in order to preserve relationships, he had no particular answer to the law and economics contention that the goal of preserving relationships could fall under the broad aegis of each individual perusing wealth maximization.<sup>256</sup> Melvin Eisenberg has observed that relational contract theory has had little impact on doctrine. Despite the distinction between discrete and relational contracts in theory, Eisenberg notes that “[i]t has not, however, led to a body of relational contract law: that is, we do not have a body of meaningful and justified contract law rules, either in place or proposed, that apply to, and only to, relational contracts.”<sup>257</sup>

One of the few substantive provisions that proponents of relational contract law theory have posited is deference to party reasonable expectations.<sup>258</sup> To translate this

251. Franklin G. Snyder et al., *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 675 (2005) (“Robert Scott and Randy Barnett have both said that ‘we are all relationists now,’ which is almost certainly true—depending on how we define ‘relationist.’” (citing Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000) (adding that, “[a]ll contracts are relational, complex and subjective.”)); Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract*, 78 VA. L. REV. 1175, 1200 (1992) (noting that, “[t]o a significant degree, we are all ‘relationalists’ now”).

252. Classicists have been largely unresponsive to relational contract law as a critique. Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 744 (2000).

253. E.g., Wallace K. Lightsey, *A Critique of the Promise Model of Contract*, 26 WM. & MARY L. REV. 45, 67 (1984) (arguing that in a relational model consent plays a “diminished role” because it “recognizes that general societal norms of fairness and reciprocity, positive law, and trade custom will qualify and even vitiate obligations assumed by contracting parties, and will impose obligations beyond those assumed by the parties”).

254. *Id.*

255. William C. Whitford, *Ian Macneil’s Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 551–52 (1985).

256. *Id.* at 549–54.

257. Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000).

258. E.g., Carl J. Circo, *The Evolving Role of Relational Contract in Construction Law*, CONSTR. LAW., Fall 2012, at 16, 17 (“[R]elational contract theory could have more gracefully guided the court to the same conclusion simply by assigning primary weight to evidence of industry practices and the reasonable expectations of contractors and subcontractors in the particular context in which the dispute arose.”); Feinman, *supra* note 253, at 744–45 (citing the reasonable expectations doctrine in insurance law as a development that suggests the relevance of relational contract theory). See also Macneil, *supra* note 153, at 904 (calling “reasonable expectations arising from the nature of the relationship” a “relational principle”).



doctrinal approach to relational contract law theory, a strong proxy for the real deal between parties is what a reasonable party would expect in the context of the relationship.

The most significant application of reasonable expectations doctrine is in insurance law.<sup>259</sup> If a reasonable person would have taken the content of the insurance policy to be X, given the totality of the contact between the insurance company and the person, the courts will enforce X, even if it is in conflict with the text of the contract between the parties.<sup>260</sup> Though insurance policies are creatures of contract, they are interpreted in a way that is distinct in principle from other contracts.<sup>261</sup>

The primary policy reasons why insurance policies are interpreted in this way are as follows: insurance policies are hard to understand for a lay reader and there is no opportunity to bargain over the terms.<sup>262</sup> These societal factors are not unique to insurance law. Courts and commentators have pointed for further rationales for its application for insurance, most notably the idea that insurance is a “special relationship” where the consumer must rely upon the provider to protect her from calamity.<sup>263</sup>

While enforcing the reasonable expectations of consumers rather than the text of the contract is squarely the law of most jurisdictions for insurance transactions, it has been applied outside the insurance law context.<sup>264</sup> Courts have taken the view that in order to

259. This doctrine has been somewhat controversial, with some courts and commentators advocating for a more formalist approach. See Peter Nash Swisher, *Symposium Introduction*, 5 CONN. INS. L.J. 1, 8 (1998) (“A majority of American courts today, however, have neither expressly adopted nor expressly rejected the doctrine of reasonable expectations, and a number of these courts arguably apply a ‘middle ground’ interpretive approach to insurance coverage disputes—somewhere between a classical Formalistic contractual approach on one hand, and the doctrine of reasonable expectations on the other hand.”). With many states having adopted the doctrine, and most others having no express position, a prudent insurer would be prepared to have the doctrine apply. Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 828–29 (1990); Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729, 733 (2000).

260. RICHARD A. LORD, 16 WILLISTON ON CONTRACTS § 9:20 (4th ed. 2000). Various courts have described and applied the reasonable expectations doctrine. *E.g.*, *Sunwestern Contractors Inc. v. Cincinnati Indem. Co.*, 390 F. Supp. 3d 1009, 1024 (D. Ariz. 2019); *Allen v. United Servs. Auto. Ass’n*, 907 F.3d 1230, 1232 (10th Cir. 2018); *Damon Key Leong Kupchak Hastert v. Westport Ins. Corp.*, 421 F. Supp. 3d 946 (D. Haw. 2019); *Certain Underwriters at Lloyd’s, London v. Hartford Accident & Indem. Co.*, No. 18-CV-01896-CMA-NYW, 2019 WL 3574445 (D. Colo. Aug. 5, 2019) (recent cases applying and describing the reasonable expectations doctrine).

261. Feinman, *supra* note 252, at 744–45 (“[B]ut it still creates a rule of interpretation and construction in insurance cases that is profoundly different from the rule applied in run-of-the-mill contract cases. The obligation of good faith applies in every contract, but it generally gives rise to a tort cause of action and extracontractual remedies only in insurance cases. Waiver and estoppel are applied more generously against insurance companies than against other contracting parties, while misrepresentations by the insured are often treated more leniently.”).

262. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970).

263. Linzer, *supra* note 216, at 172.

264. *E.g.*, *Underwood v. Chapman Bell Rd. Imps., LLC*, No. CV-12-1835-PHX-DGC, 2013 WL 1289528, at \*2 (D. Ariz. Mar. 15, 2013) (applying reasonable expectations doctrine to contract of adhesion “the reasonable expectations doctrine is more appropriate for determining the enforceability of standardized agreements”); *Taylor v. Deutsche Bank Nat’l Tr. Co.*, No. CV-16-01792-PHX-DLR, 2016 WL 6124233, at \*4 (D. Ariz. Oct. 20, 2016). See also Linzer, *supra* note 216, at 169–81 (surveying and describing cases where courts applied the reasonable expectations framework outside of the insurance context).

apply the reasonable expectations doctrine, there must be a strong analogy between the situation presented and insurance. The reasonable expectations framework has been adopted in circumstances as diverse as employment, partnership, college-student relationships, and franchisee-franchisor relationships, among others.<sup>265</sup>

Ethan Leib has argued that the reasonable expectations approach should be applied in consumer contracts more broadly.<sup>266</sup> He finds support from this in the writings of MacCauley and Macneil.<sup>267</sup> The core features Keeton flagged—complexity and lack of opportunity to bargain—are present in virtually every consumer transaction.<sup>268</sup> As Leib acknowledges in the article, this approach is contingent on establishing empirically what a reasonable consumer would expect.<sup>269</sup> He admits that establishing what a reasonable consumer actually does expect—as opposed to what a court thinks a consumer should expect—is work that the litigation system is not well suited for performing, and that not many legal scholars perform it.<sup>270</sup> The potential for courts to use surveys and empirical research to interpret contracts is getting increased attention and advocacy among law professors.<sup>271</sup> Given the rise of interdisciplinary skill sets among law professors, it is unsurprising that use of these skills is viewed by some as answers to longstanding woes. Generalist judges and lawyers do not possess statistical and survey skills at the same level as law professors, and this presents short-term institutional competency issues. The fact that most lawyers lack these skills is not a bar to such skills being developed in the medium and long run, or even the use of the judiciary of resources produced by law professors. Moreover, specialist skill sets are common in arbitration forums.

But with surveying empirical expectations there is a more fundamental problem than developing institutions with access to the relevant data and skills. Individual expectations are socially constructed.<sup>272</sup> Powerful monopolists and oligopolists—as well as government—can create social standards that are not reflective of what a free market would offer, to say nothing of additional values that some argue are necessary for

265. Leib, *supra* note 245, at 275.

266. *Id.*

267. *Id.* (citing Ian Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOOD HALL L.J. 5 (1984); Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1060–90 (1966).

268. Leib, *supra* note 245, at 275.

269. *Id.*

270. *Id.* at 282–85.

271. *E.g.*, Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753, 1758–60 (2017) (“The survey method advances a particular conception of meaning: attaching to contracts the understanding assigned by those for whom they are written. Surveys that poll a sample of the intended audience capture that meaning more accurately than a judge’s imagination. This goal is achieved when contract language aimed at laypeople (like consumers and most employees) is interpreted by surveys of the general population, and contracts aimed at particular sectors (like specialists, merchants, and investors) are interpreted by surveys of sector members. In so doing, our methodology takes seriously the black letter doctrine that contract formation requires an objective “meeting of the minds,” and uses hard data as evidence of what the parties to the contract actually expected (or would have expected had they read the text). By creating a reliable mechanism to evaluate the objective meaning, courts can be more certain that the terms they are enforcing are the ones to which both parties actually would have assented.” (footnote omitted)).

272. *Cf.* JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM & DEMOCRACY* 261–63 (1942) (describing the nature of popular opinion as such “the will of the people is the product and not the motive power of the political process”).

individuals in a liberal society.<sup>273</sup> So the mere fact that a reasonable person may expect a certain type of treatment from a government agency or a business is not, in itself, a normative argument for justifying that treatment. This is why the reasonable expectations of privacy test in the Fourth Amendment context has been critiqued as ineffective and circular.<sup>274</sup> The actor with power has every incentive to cultivate low expectations among individuals as a means for justifying the treatment under a reasonable expectations standard. Consumer expectations as they exist are not a reliable source of legitimation.

Leib suggests the way out of this problem is to shift to a “normative” reasonable expectations standard, which would examine “what the average consumer is justified in hoping for from a civilized society.”<sup>275</sup> To some extent, normative reasonable expectations may reflect what some judges and commentators actually think judges do when they speak of the reasonable expectations doctrine.<sup>276</sup> He notes that this approach is more controversial than relying on empirical consumer expectations. Courts are hesitant to explicitly impose contract terms that appear to conflict with the terms to which the parties decided to be bound.

### iii. *Unconscionability and Relational Contracting as Precedents for Finding Consumer-Firm Fiduciary Relationships*

The unconscionability defense and relational contracting approach are both functional precedents for the fiduciary law approach. The unconscionability defense sets basic limits of fairness in consumer contractual transactions, and the relational contracting “reasonable expectations” approach finds that the source of obligation between parties should be derived from the totality of the relationship, not determined just at the time of contracting. Fiduciary law can do the same things better for this type of case than these contract law doctrines, while providing a firmer theoretical grounding as to why these rules should be present in these particular transactions. So, instead of

273. See discussion of capabilities approach in the context of mandatory terms *infra* Section IV.A.

274. E.g., Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1523–24 (2010) (“[E]xpectations of privacy depend in part on the law, so judicial decisions about reasonable expectations of privacy would have a bootstrapping effect.”); Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia’s Fourth Amendment*, 79 WASH. U. L.Q. 1013, 1023–24 (2001) (suggesting the reasonable expectations test is not just circular but creates a downward spiral in terms of lowering restrictions on searches and seizures over time); Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 56 (1996) (“[T]he reasonable expectations model is hopelessly circular, both in theory and in practice. In theory, reasonable expectations are founded on perceptions of what the law will protect, so the law’s protections cannot be based on reasonable expectations.”). See also Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1798–99 (2017). Despite the provocative title, Kugler and Strahilevitz do not show the circularity to be a myth. They find that their data set does not support a strong or weak circularity thesis. *Id.* Their study is focused on direct, short-term individual responses to Supreme Court opinions, rather than individual responses to changes in treatment by government agents over the medium to long term. *Id.*

275. Leib, *supra* note 245, at 281; 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, 333–34 (2008) (“The [d]octrine of [r]easonable [e]xpectations might be difficult to deploy in consumer settings, and may be largely duplicative of other doctrinal and statutory protections, but the Doctrine can be deployed in a predictable manner in the commercial setting to fill the void as § 2-207 becomes irrelevant.”).

276. See Leib, *supra* note 245, at 281.

creating a special contract law for this type of transaction with quasi-fiduciary effect,<sup>277</sup> the contract law should acknowledge that fiduciary law governs these transactions. Creating circumstance-specific contract laws, while rhetorically common, has proven difficult for courts to stick to and justify consistently.<sup>278</sup> The power of a slouch toward a uniform contract law has both advantages of predictability and ideological consistency across the field, but one of the disadvantages is the difficulty courts experience sticking to a sector-specific approach to contract law over the medium-to-long run. General contract law's design for business-to-business transactions has always fit awkwardly with federal and state legislation and court opinions promulgating different rules for consumers, which differ in liability profile and average level of resources and expertise from merchants. A fiduciary law for consumer transactions can in this way explicitly and separately allow a consumer-specific set of rules for transactions to grow without the need to worry about consistency with general contract law.

A fiduciary approach to consumer transactions overcomes weaknesses present in these two alternative approaches for enforcing fairness that overrides contractual terms to which both parties explicitly assented. As a defense to enforcement, unconscionability is ultimately an *ex post* solution to already existing inappropriate behavior. It is not a right that consumers have going into transactions, and thus is not a constitutive part of what consumers have a right to unless they are willing and able to begin a dispute. In a legal environment increasingly hostile to consumer litigation,<sup>279</sup> a right that requires a verdict to be useable is too little, too late for vindicating consumer interests. The advantage of the fiduciary relationship model I advocate is that consumers would be entitled to the benefits of fiduciary duties regardless of the outcome of a hypothetical litigation.<sup>280</sup> Perhaps most importantly, for fiduciary duties to govern consumer transaction, there would be no need for a resolution of the consent debate in favor of a thick definition of consent. Thin consent to consumer contracts can stand alongside fiduciary relationships between firm and consumer. The fiduciary duties of the firm put limits on what can be enforced in consumer boilerplate in an ongoing relationship of trust between consumer and firm. So, for example, when a consumer clicks "Register" to join a social networking service, two things happen simultaneously: she becomes party to a contract, and she enters into a fiduciary relationship of trust with the firm.

Understanding consumer transactions as fiduciary relationships makes more sense than conceptualizing company behavior as limited by the reasonable expectations of the consumers, as some courts and commentators have proposed.<sup>281</sup> What is relevant is not what the consumers expect to receive but what the company understands it should be providing to consumers, in the context of providing products and services that the consumer cannot understand. This understanding is analogous to the rationale for why the professions are understood as fiduciaries,<sup>282</sup> and a framework of particular relevance in

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277. Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1280 (2019).

278. See discussion *supra* Section III.B.

279. Bookman, *supra* note 136, at 1142–45 (2019) (“Scholars have identified hostility to litigation as a signature feature in both the Rehnquist and the Roberts Courts.”).

280. See *infra* Section IV.B.

281. See *supra* Section III.B.ii (outlining a relational approach to contract law based on fiduciary relationships).

282. See generally EDMUND D. PELLIGRINO ET. AL., *ETHICS, TRUST AND THE PROFESSIONS*:

the information economy because of the network of complex contracts each consumer is a party to, as well as the underlying environment of rapid technological change.<sup>283</sup> The issue is not relative bargaining power, but rather the statuses of the consumer and the company.

This Article's affirmative proposal suggests the way to understand the relationship between the two parties is not one governed by the unilateral reasonable expectations of the less powerful party.<sup>284</sup> Rather, I argue that the law should understand each consumer contract as creating a fiduciary relationship, voluntarily entered into by both consumer and firm.<sup>285</sup> This fits comfortably with existing law and practice while promoting consumer well-being. While the duties, as with any fiduciary relationship, are exclusively on the fiduciary, we should be unmoved from an autonomy perspective because these obligations were voluntarily undertaken.

Implying a fiduciary relationship into consumer boilerplate transactions can be justified from economic and social realities of contracting. Furthermore, common law doctrine can support this innovation.<sup>286</sup> Boilerplate contracts differ in so many ways from traditional contracts, to the point of creating doctrinal questions as their enforceability.<sup>287</sup> But the contract law has stretched to accommodate them. I argue that so fiduciary duties can evolve to meet the needs of the information society.<sup>288</sup>

#### IV. JUSTIFYING FIDUCIARY RELATIONSHIPS IN CONSUMER LAW

In the previous Part, I described the precedential basis for a fiduciary law model for consumer transactions, illustrating how it fits into the law we currently have. In this Part, I justify the model normatively and describe how it may be implemented by courts and legislatures. First, I address a potential objection to the fiduciary model; namely, that implying a status fiduciary relationship in many consumer transactions is a mandatory term that cannot be justified. In Section A, I argue that the unique challenges presented to consumers in data protection justify the imposition of consumer-protective mandatory terms in many information age transactions. In Section B, I argue that implying a fiduciary relationship is justifiable from both an autonomy-enhancing and a welfarist perspective. Finally, in Section C, I describe the effect of a fiduciary relationship model on the case law. I argue that finding a fiduciary relationship between consumers and firms would be effective in both promoting consumer autonomy and wellbeing and

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PHILOSOPHICAL AND CULTURAL ASPECTS (1991) (collection of articles on the nature of the professions and the role in them of trust and fiduciary obligation).

283. See *supra* Part III (describing how the information economy creates an ongoing fiduciary relationship of trust).

284. See *id.* (addressing the asymmetry of the reasonable expectations doctrine, noting that is implicitly justified by the difference in power structure).

285. See discussion *infra* in Section IV.B (arguing that a fiduciary relationship between consumer and merchant should carry into the digital age as it promotes autonomy and information-forcing functions of contract law).

286. See *supra* Part III (describing how there are more fiduciary duties than ever before because of the changing nature of relationships in business and society).

287. See *supra* Section III.B (discussing arguments against the enforceability of consumer boilerplate).

288. Cf. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.").

enabling ongoing innovation in business.

### A. Mandatory Terms for Mandatory Transactions

Mandatory terms are justifiable in the modern consumer contracting environment. Several commentators have argued for the imposition of mandatory terms on consumers, including pre-approved specialized terms in consumer contracts.<sup>289</sup>

The advantage of mandatory terms is clear. If as a society we worry about consumer exploitation, the law can mandate contract terms that prevent exploitation in consumer contracts. If, for example, we think that each individual should have certain levels of privacy for a liberal democratic society to function,<sup>290</sup> contract terms permitting certain forms of data collection and processing could be prohibited.<sup>291</sup>

There is precedent for mandatory terms in contract law. For every contract enforced by American courts, the rules determining whether specific performance is granted and the measurement of remedies are implemented as a matter of law, and this cannot be changed by the parties.<sup>292</sup> There are several mandatory terms for the sale and lease of goods.<sup>293</sup> The most notable is the limitation of the ability to limit damages for personal injury for sales of goods.<sup>294</sup> Several types of contracts, including contracts for the sale of illegal goods or services, are unenforceable as a matter of public policy.<sup>295</sup> The common presence of mandatory terms in contract law is one of the principle weaknesses of justificatory theories of contracts law stemming from voluntariness.<sup>296</sup>

In the usual case contract law allows parties to choose their terms and will enforce any terms they select. However, contract law occasionally takes a position against enforcing some terms, because they are fundamentally contrary to the values of a liberal

289. *E.g.*, Rakoff, *supra* note 181, at 1190 (1983) (arguing for the “[departure] from the presumption that a signed document is enforceable” as “it threatens to continue to generate undesirable results”).

290. *See generally* NEIL M. RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (2015) (claiming that the leading example of privacy invasions leading to undermining of the democratic process is the Cambridge Analytica Scandal). *See, e.g.*, Scotta Detrow, *What Did Cambridge Analytica Do During the 2016 Election?*, NPR (Mar. 20, 2018, 7:22 PM), <https://www.npr.org/2018/03/20/595338116/what-did-cambridge-analytica-do-during-the-2016-election> [<https://perma.cc/795S-8V33>] (describing the effects of the Cambridge Analytica Scandal on the 2016 U.S. Election).

291. European law has mandatory terms for consumer contracts, both specifically for the information age with the General Data Protection Regulation and more generally with the Unfair Contract Terms Directive. *See generally* Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 *GEO. L.J.* 115 (2017); Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 *CLEV. ST. L. REV.* 175 (2006).

292. This is one of the reasons why many parties settle.

293. *See, e.g.*, *McDabco, Inc. v. Chet Adams Co.*, 548 F. Supp. 456, 461 (D.S.C. 1982) (explaining that the U.C.C.’s mandatory terms take priority over terms that to which parties expressly agree).

294. *See* U.C.C. §2-715(2)(B) (AM. L. INST. & UNIF. L. COMM’N 2002) (detailing that consequential damages include injury to person or property stemming from the seller’s breach of warranty). Other limitations include U.C.C. §1-304 (AM. L. INST. & UNIF. L. COMM’N 2001) (stating the duty of good faith) and U.C.C. §2-306 (AM. L. INST. & UNIF. L. COMM’N 2002) (providing limits on the conduct of exclusive distributor arrangements).

295. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 *WASH. U. L. REV.* 165, 204–13 (2019) (discussing the public policy defense and arguing for its expanded use where appropriate).

296. *See supra* Section III.B (explaining that a key reason for contract law is to enhance individual autonomy).

society. Parties may, of course, still enter into agreements that, by their terms, go contrary to legally mandated terms. There will be moral, economic, and social factors encouraging them to hold to those agreements. Mandatory terms simply provide notice that the state will not be involved in enforcing such contract terms. Mandatory terms are a reminder that contract law is not neutral, but a choice on the part of the state to enforce rights. The state can choose to enforce or not to enforce particular rights.

Mandatory terms would acknowledge the position of the consumer as unable to ensure she is not being scammed in routine consumer transactions. What is more, mandatory terms are compatible with the prevailing theory of why consumer boilerplate is enforceable. As long as both parties know which terms would apply in advance, the objective reliance function will be reliably carried out. Mandatory terms would be specified in advance, so companies and consumer entering consumer transactions would have constructive notice of the terms on which they did business.

There are two principal arguments against introducing mandatory terms in contract law. The first derives from autonomy. Broadly, contractual obligations are often justified as a form of exercise of independent will.<sup>297</sup> But, as I argued in Part II, the modern contracting environment resembles participation in a network.<sup>298</sup> Measuring autonomy purely by an exercise of bare voluntariness in entering a contract, is inapposite to the actual transactions that are occurring in the digital consumer economy.<sup>299</sup> Relationships between consumers and the businesses they are in contract with are ongoing and the contract terms and even the services provided can change in this era of fast-developing digital innovation. Furthermore, there is a web of interdependent relationships between software service providers. Setting transparent, uniform mandatory terms to govern consumer-protective interests may enhance the autonomy of consumers. Several writers have argued that mandatory provisions can enhance autonomy.<sup>300</sup> The capabilities literature suggests that a proper objective of a liberal government is to enhance the capabilities of each individual.<sup>301</sup> If introducing consumer-protective mandatory terms

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297. See discussion *supra* Section III.B (discussing how some theorists conclude that contracting is an exercise of human will as it enhances individual autonomy).

298. See *supra* Part II (contending that individuals who participate in a technosocial system are participating in a mass of contracts).

299. Some have argued that this was the case in the pre-information economy, as well. See generally W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW* 21–23 (1996).

300. E.g., Timothy Endicott, *Objectivity, Subjectivity, and Incomplete Agreements*, in *OXFORD ESSAYS ON JURISPRUDENCE: FOURTH SERIES* (Jeremy Horder ed. 2000); see also Brian Langille & Arthur Ripstein, *Strictly Speaking—It Went Without Saying*, 2 *LEGAL THEORY* 63 (1996) (arguing that gap-filling terms are reflective of autonomy because the party's intent in their written terms should be understood to include some unwritten terms).

301. The capabilities approach, as described by Martha Nussbaum and Amartya Sen, was ably discussed and applied in the private law contest by Gregory S. Alexander.

[A capabilities approach to human flourishing] approach measures a person's well-being not by looking at what they have, but by looking at what they are able to do. The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction, or what Sen calls "functionings," rather than a life characterized merely by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even, without more, the possession of particular negative liberties. Social structures, including distributions of property rights and the definition of the rights that go along with the ownership of property, should be judged, at least in

improves consumer capabilities, their autonomy in the long run will be enhanced by allowing them more options and choices.

The second counterargument to mandatory terms comes from a welfarist perspective. It is more complicated, due to the fundamental room for disagreement as to what constitutes welfare. Some welfarists would not contest that mandatory consumer-protective terms may enhance welfare, for the capabilities-enhancing rationale sketched above. However, much of the law and economics literature contends that promoting efficiency in markets will lead to overall welfare-maximization.<sup>302</sup> This perspective tends to equate welfare with overall wealth level, which has the advantage of simplicity but can be critiqued for myopia with respect to society's values. Assuming that welfare at least tracks wealth levels, the market has relative institutional competence in finding efficient outcomes in the absence of market failure.<sup>303</sup> Market failures are instances where the private sector either cannot, or will not, act as an efficient producer of goods and services, even though society may demand (i.e., be willing to pay for) these goods and services.<sup>304</sup>

The market failure in the market for consumer contract terms is well-established in the literature. There are at least two types of market failure in this context: market failure in performance terms and market failure in non-performance terms. Consumers tend not to pay attention to non-performance terms, or terms that do not relate to the price, nature, and delivery of goods and services.<sup>305</sup> Since consumers do not pay attention to these terms, there is no market incentive for providers to provide terms that are efficient or maximize welfare.<sup>306</sup> This is a market failure, because there is no market process that enables consumer interests to be competed for with respect to terms in the contract. This is a perennial issue in all consumer form contracts.

Mandatory terms can be justified because of the rise of market failure for performance consumer contracting, due to the nature of the digital economy. This

part, by the degree to which they foster the participation by human beings in these objectively valuable patterns of existence and interaction.

Importantly, Nussbaum and Sen distinguish between the first-order patterns that constitute well-lived human lives ("functionings") and the second-order freedom or power to choose to function in particular ways, which they call "capabilities." As Sen explains, "A person's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve." Among the functionings that are necessary for a well-lived life are life, including certain subsidiary values such as health; freedom, understood as including the freedom to make deliberate choices among alternative life horizons; practical reasoning; and sociality. Although the actual achievement of these and other functionings is a necessary component of any plausible conception of the well-lived life, the experience of choosing among a number of possible valuable functionings (perhaps even including the choice not to function in certain ways) is itself an important functioning. Accordingly, a proper concern for human autonomy requires looking beyond mere functionings to include the capabilities that various social matrices generate for their members.

Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 781 (2009).

302. James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 169-71 (2013) (describing the law and economics argument that in the absence of market failure, no regulation is justified).

303. *Id.*

304. *Id.*

305. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 240 (1995).

306. Korobkin, *supra* note 156, at 1203.



includes problems with performance terms in services provided, such as cybersecurity concerns with a software or device. These are issues that consumers have little or no technical expertise to understand in detail when choosing a service. Therefore, providers have no incentive to provide these services: consumers cannot tell the difference between, for example, a baby monitor with substantial hacking vulnerability and a baby monitor with no such defect. Many scholars have compared this phenomenon in the market of technology service to the market for faulty cars, or “lemons.”<sup>307</sup> Importantly, lemon laws preventing the knowing sale of faulty cars are on the books in every US state.<sup>308</sup> By analogy, the introduction of mandatory terms is appropriate in cases of consumer contracting where similar issues arise.

Market failure can justify mandatory terms. While the market may be good at maximizing wealth levels in the absence of market failure, it cannot do so when market failure exists. This justifies government intervention from a welfarist perspective, because the market will not assure efficient allocation of resources. One way the government may intervene is attempting to fix the market failure, but sometimes fixing market failure is not possible, or is prohibitively expensive and complicated. Attempts to merely make consumers more informed have failed to substantively address the problems described above.<sup>309</sup> There are limits to the processing capability of individual humans even if they are exposed to all relevant information.<sup>310</sup> Direct regulation through mandatory terms is thus a justifiable option.

My discussion has, so far, evaded the question of what terms to impose. It has merely justified the imposition of mandatory terms in the consumer contracting context in general. Even if we are convinced that mandatory terms are justifiable, not every mandatory term will be advisable as a matter of policy. But more significantly, not every mandatory term is justifiable as a matter of contract law’s existing formal content or its background values of autonomy and welfare. The strength of both counterarguments described above are dependent not only on the background contracting environment, which I have suggested undermines its strength, but also the affirmative proposal for what kinds of terms are imposed.<sup>311</sup>

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307. Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907, 952 (2013) (“Privacy seems to be a market for lemons where promises are easy to make and quality is difficult to inspect. As with all such markets, there seems to be little incentive to compete for privacy.”); Tony Vila et al., *Why We Can’t Be Bothered to Read Privacy Policies: Models of Privacy Economics as a Lemons Market*, in *ECONOMICS OF INFORMATION SECURITY AND PRIVACY* 143, 143–44 (L. Jean Camp & Stephen Lewis eds., 2004); Edward J. Janger, *Muddy Property: Generating and Protecting Information Privacy Norms in Bankruptcy*, 44 WM. & MARY L. REV. 1801, 1848–54 (2003). See generally George A. Akerlof, *The Market for “Lemons”: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (discussing the problem of lemons).

308. Philip R. Nowicki, *State Lemon Law Coverage Terms: Dissecting the Differences*, 11 LOY. CONSUMER L. REV. 39, 39 (1999).

309. Omri Ben Shohar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. CONT. L. 1, 4–6 (2009).

310. See Gibson, *supra* note 302, at 169–71, 190–99 (describing and providing empirical evidence for processing limitations of individuals, including studies that providing more information can occasionally lead to humans making worse decisions).

311. Due to the concerns raised in this section, several countries limited the terms that can appear in consumer contracts by designating some terms as always forbidden and others as subject to increased scrutiny. E.g., BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §308, <https://www.gesetze-im->

In the following section I do not argue that fiduciary relationships are mandatory terms. Rather, I argue that if mandatory terms are justifiable to protect consumers in the information age contracting environment, then *a fortiori* fiduciary relationships in information age consumer transactions are justifiable.

### B. *Fiduciary Duties for Ongoing Relationships of Trust*

Fiduciary duties should mediate the contractual relationship between consumer and merchant in information-age boilerplate mass transactions. A fiduciary model for consumer transactions reflects the empirical reality reflected in the behaviors of consumers and merchants. Recognizing business realities over formalism for its own sake has been the policy of contract law since the start of the twentieth century, uniting both classical and modern approaches.<sup>312</sup>

Implying fiduciary duties into information age consumer transactions addresses both the autonomy and information-forcing functions of contract law. Fiduciary duties can also serve as an approximation for the terms a non-monopolist firm operating in a non-failed market would have chosen to offer to consumers.<sup>313</sup>

As Part I showed, consumer transactions have the basic characteristics of fiduciary relationships as outlined above. Consumers depend on each company they contract with over the course of their relationship to provide terms that update for the relationship's needs over time.<sup>314</sup> The companies have full discretion over what those terms are and may change them over time.<sup>315</sup> They can even make independent decisions as to what to do with the consumer's personal information after the relationship has ended.<sup>316</sup> What is more, a fiduciary relationship is reflective of the presentation companies make to consumers as trustworthy.<sup>317</sup> It is reflective of the consumer culture of brand loyalty and

internet.de/englisch\_bgb/ [https://perma.cc/ETF3-27A6] (Ger.) (prohibiting clauses with the possibility of evaluation); *id.* § 309 (prohibiting clauses without the possibility of evaluation).

312. See *supra* Section III.B (discussing recent contract law history). See also MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 151–54 (1988) (discussing the concept of justification and the content of law); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–44 (1982) (describing the evolution of statutory interpretation and the common law).

313. This framing is reflective of the contractarian framing of fiduciary law. *E.g.*, Kelli Alces, *The Fiduciary Gap*, 40 J. CORP. L. 351, 375 (2015) (“To determine the hypothetical bargain, we must reach a conclusion about what the parties would have agreed given their requirements and expectations of the relationship.”); Stephen A. Smith, *The Deed, Not the Motive: Fiduciary Law Without Loyalty*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 213 (Paul B. Miller & Andrew S. Gold eds., 2016).

314. See *supra* Part II (discussing consumer-firm engagement in the information economy in both the nature of contracts and deviation).

315. See *supra* Part II.

316. See *supra* Part II; see generally Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. REV. 423 (2018) (describing how secured transactions law facilitates the transfer of personal information).

317. See, *e.g.*, Stefan Markovic et al., *How Does the Perceived Ethicality of Corporate Services Brands Influence Loyalty and Positive Word-of-Mouth? Analyzing the Roles of Empathy, Affective Commitment, and Perceived Quality*, 148 J. BUS. ETHICS 721, 722–23 (2015) (describing the impact of consumer perceived ethicality); David Foggin, *Trust Builds Brand Loyalty*, *GUARDIAN* (Oct. 1, 2014, 11:30 AM), <http://www.theguardian.com/media-network/media-network-blog/2014/oct/01/trust-brand-loyalty-naked-wines-debenhams> [https://perma.cc/7WSC-PDDG] (discussing trust as a major contributing factor to brand loyalty).

its relationship with consumer trust in the companies they patronize.<sup>318</sup> Given the nature of digital communication, the relationship between each consumer and each company is becoming increasingly individualized. Companies emphasize that consumers can trust them with features consumers are not good at measuring or verifying, such as privacy.<sup>319</sup> In the particular context of the information economy, many commentators have made analogies between influential technology companies and their outsized influence on the economy, making them similar to state actors.<sup>320</sup> This also suggests a fiduciary relationship because the relationships between government and citizens can be understood as fiduciary in nature, an approach with a long history and growing modern relevance.<sup>321</sup>

Fiduciary duties vary, based on the nature of the relationship between the fiduciary and entrustor.<sup>322</sup> They may include duty of loyalty, duty of care, duty of disclosure and honesty, duty of confidentiality, and a heightened duty of good faith.<sup>323</sup> I will not here fully describe a theory of which fiduciary duties exist in customer-firm fiduciary relationships.<sup>324</sup> My contention is that consumer transactions in themselves create fiduciary relationships. The content of those fiduciary duties is the battleground upon which debates on the substance of consumer law should take place, rather than questions

318. See generally Michael D. Johnson & Seigyoung Auh, *Customer Satisfaction, Loyalty, and the Trust Environment*, 25 ADVANCES IN CONSUMER RSCH. 15 (1998) (describing the “trust environment” of customers, with trust being “the attainment of a level of satisfaction and resulting loyalty” where customers “are comfortable forgoing problem solving behavior” and “repurchase . . . in a routinized or habitual fashion . . .”).

319. See Monica Nickelsberg, *Privacy Becomes a Selling Point for Tech, with Apple and Microsoft Leading the Way*, GEEKWIRE (Mar. 26, 2019, 10:41 AM), <https://www.geekwire.com/2019/privacy-becomes-selling-point-tech-companies-apple-microsoft-leading-way/> [<https://perma.cc/YS3P-6JA9>] (pointing to Apple’s use of privacy as a differentiating factor amidst their competitors). See, e.g., Mike Wuerthele, *‘Privacy. That’s iPhone’ Ad Campaign Launches, Highlights Apple’s Stance on User Protection*, APPLE INSIDER (March 14, 2019), <https://appleinsider.com/articles/19/03/14/privacy-thats-iphone-ad-campaign-launches-highlights-apples-stance-on-user-protection#:~:text=That's%20iPhone'%20ad%20campaign%20launches%2C%20highlights%20Apple's%20stance%20on%20user%20protection,-By%20Mike%20Wuerthele&text=The%20new%20Apple%20%22Privacy.&text=It%20culminates%20in%20the%20tagline,phone%20your%20life%20is%20on.%22> [<https://perma.cc/E69V-7NTV>] (describing an iPhone ad campaign emphasizing privacy); Joseph Davis, *Data Privacy is About More Than Compliance—It’s About Being a Good World Citizen*, MICROSOFT (Jan. 28, 2020), <https://www.microsoft.com/security/blog/2020/01/28/data-privacy-compliance-being-good-world-citizen/> [<https://perma.cc/5H7M-6XYL>] (showing Microsoft marketing its privacy protections).

320. E.g., Nancy S. Kim & D. A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 744–45 (2015).

321. See Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 (2016) (describing fiduciary theories of government). John Locke’s theory of the social contract is often understood as an example of government as fiduciary. *Id.*

322. See Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 50–53 (2008) (describing three levels of the duty of obedience: minimal, default, and optimal); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (1988) (“Although one can identify common core principles of fiduciary obligation, these principles apply with greater or lesser force in different contexts involving different types of parties and relationships.”). See also Hanoch Dagan, *Fiduciary Law and Pluralism*, in OXFORD HANDBOOK OF FIDUCIARY LAW (2019) (arguing that fiduciary law as a coherent category even though it reflects a plurality of principles in its implementation in different fiduciary relationships).

323. Leib, *supra* note 30, at 673–78 (providing a list of general characteristics of fiduciary duties).

324. I intend to do so in other work. See Lauren Henry Scholz, *The Internet of Fiduciaries* (Mar. 30, 2020) (unpublished manuscript) (on file with author).

of consent.

Fiduciary relationships promote autonomy by holding parties to the basis of the relationship the parties have chosen.<sup>325</sup> Fiduciary law puts limits on the ability of the fiduciary's ability to engage in opportunistic behavior to accrete rents to herself.<sup>326</sup> Fiduciary law's core goal of preventing opportunistic behavior<sup>327</sup> explains why prevention of opportunistic behavior accounts for fiduciary law's close relationship with restitution, or remedies measured by the basis of benefit to defendant.<sup>328</sup> A fiduciary relationship comes from the law's recognition that certain types of relationships are such that both parties understand that one party is entitled to expect that the other will act to her benefit.<sup>329</sup> So, even if one allows recognizing a breach of fiduciary duty limits the number of choice-options the fiduciary has in attempts to undermine the entrustor, it does so in recognition of the autonomy of the entrustor, and indeed, the autonomy of the fiduciary herself, in choosing to enter into a fiduciary relationship. From a welfarist perspective, fiduciary relationships reduce the cost of administering agency relationships by removing the expensive burden placed upon beneficiaries of monitoring and preventing opportunistic behavior.<sup>330</sup> This makes it more likely that parties will choose to be in this highly productive type of relationship.

Implying a fiduciary relationship has the advantage of enabling courts and the justice system to allow and enforce expectations as they are situated in concrete relationships. The advantage of this approach, over creating specific regulations that companies must conform to, is in its promotion of a "race-to-the-top" corporate regulatory incentive rather than a culture of merely attempting the bare minimum to

325. See Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 995 (2017) ("[T]he fiduciary duty of loyalty comes into clearest focus when viewed through the lens of republican legal theory. The central message of republican legal theory is that legal norms and institutions are necessary to safeguard individuals from 'domination,' understood as subjection to another's alien control (*arbitrium*)."). See also Richard Delgado & Helen Leskovic, *Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice*, 34 UCLA L. REV. 67, 107 (1986) ("Fiduciary law protects the autonomy of persons who entrust their power to act for themselves to others: fiduciaries who possess greater skill, expertise, capacity, or who merely have more time. Fiduciary rules serve to discourage abuse of this delegated power and to reveal abuse when it occurs. These rules help prevent conflicts of interest and conflicts of value by discouraging self-dealing. Remedies for violations of fiduciary duties are among the strongest the law provides because they are meant not only to compensate the betrayed entrustor but also to punish the offending fiduciary.").

326. See Henry E. Smith, *Why Fiduciary Law is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261, 273 (Andrew S. Gold & Paul B. Miller eds. 2014).

327. See Smith, *supra* note 16, at 1404.

328. E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1356 (1985) ("[T]he disgorgement principle applies to breach of a fiduciary obligation while the expectation principle applies to a breach of contractual obligation."). Cf. Scholz, *supra* note 15 (arguing for restitutionary remedies in the context of privacy and data security harms, an area where lack of care and loyalty may amount to a breach of fiduciary duty).

329. Paul Finn, *Fiduciary Reflections*, 88 A.L.J. 127, 143 (2014) ("the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his or her interests in and for the purposes of the relationship").

330. Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1045 (2011) (arguing that "the nature of fiduciary governance as a system of deterrence [is] meant to minimize agency costs").

comply with the regulations on the books.<sup>331</sup> It allows the law to adapt more freely to preventing opportunistic behavior as it appears in changing business models and technology than express command-and-control legislation, as other areas of fiduciary law have been able to do. There is no need to change the basic fiduciary principles behind the doctor-patient fiduciary relationship in response to changes in medical technology and distribution. While legislatures and courts may need to intervene for guidance at points, the basic principles endure to limit corporate opportunistic behavior.

The degree of impact on outcomes would depend on how substantial the fiduciary duties are interpreted to be. To clarify such interpretation, content could be added to what the fiduciary duties constitute by courts and legislatures. But the expressive affirmation that the relationship is a fiduciary one could lead to more consumer-friendly outcomes outside of the courtroom in information negotiations, where most consumer rights and responsibilities are determined.<sup>332</sup> The next section will turn to briefly considering how this proposal may be implemented.

### *C. Implementation*

The previous two sections have provided normative justifications for why the law should find fiduciary relationships in consumer transactions. In this section I will discuss how the law should implement this proposal and address potential obstacles.

Implying fiduciary relationships in consumer contracts would change the analysis in contemporary consumer contract cases. Instead of focusing on what the consumer knew when they agreed to the contract, the court's inquiry would center around whether the company had breached its fiduciary duties. The court would find a thin expression of consent sufficient to bind the consumer to the contract, but also would find the parties agreed to create a fiduciary relationship between consumer and the firm. There would be no need for a fact-based inquiry into whether the company and the consumer were in a fiduciary relationship, as I have argued that this is a status fiduciary relationship.<sup>333</sup> The law would deem that the consumer and the firm understand (or should understand) that the transaction is governed by fiduciary law. Like other status-based fiduciary relationships, the firm's fiduciary duties would be mandatory and non-disclaimable. The limit on this principle would be if the firm could dispute that it was in this status category. That is, if the firm could rebut the presumption that the economic realities indicated that the consumer transaction was intended by both parties to be an ongoing relationship, the firm could make the case that there was no fiduciary relationship between it and the consumer.

For example, consider the effect on the outcome and rationale of this approach in a fact pattern that has appeared in a series of recent data protection cases. A federal district court in Illinois found that privacy and cybersecurity claims based on data privacy and security representations made by a company could go forward notwithstanding "fine

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331. *Cf.* DEIRDRE K. MULLIGAN & KENNETH A. BAMBERGER, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE* (2015) (coming to this conclusion in the context of privacy regulation based on a comparative study across several European countries and the United States).

332. *See* discussion *supra* Section II.B (discussing expressive function of law).

333. *Supra* Section III.A.

print” that disclaimed and limited liability.<sup>334</sup> A California court held, on a similar rationale, that data breach claims could go forward based on a privacy policy statement by Yahoo!.<sup>335</sup> By contrast, other courts have held that such claims by companies should be read narrowly, to preclude any claims for privacy and security protections beyond what is expressly provided in the terms of service.<sup>336</sup>

My approach would lead to the outcome in the first set of cases, but for a different rationale. Under a fiduciary approach, the actual comfort language by the firm to the customer would be supporting evidence that a fiduciary relationship existed, but ultimately not determinative of the outcome. The question would be whether the economic realities of the transactions required that the consumer rely on the company to make decisions about how to keep the consumer’s data reasonably secure and conserve the consumer’s privacy.

This would not be based on what the consumer actually knew or relied upon, but what it would be reasonable for a consumer to expect from a company, given this relationship. In many consumer transactions that lead to ongoing relationships, consumers must so entrust their privacy and data security interest.<sup>337</sup> So, under my approach, the question moves from procedural to substantive: what duty of care and duty of loyalty does the firm owe the client? Courts would need to address whether this was addressed, rather than dismiss the case as outside the bounds of what is contractually owed by the firm.

Addressing this substantive question is possible by analogy to existing doctrine on fiduciary relationships in other contexts, but to hasten the adoption of predictable rules, the common law process could be supported by legislation. Each state could legislate, formally recognizing that consumer transactions that initiate ongoing relationships between firm and consumer constitute fiduciary relationships and providing basic guidance defining how a duty of loyalty and care might look on the ground (providing, for example, example cases of what would definitely be a breach, and what common behaviors may not necessarily be a breach). The process of common law development could be formalized through American Law Institute guidance documents, and incorporated into, for example, the Restatement on Consumer Contracts or an update to the Uniform Commercial Code Article 2.

Dispute resolution procedures could also begin to read fiduciary relationships into their analysis of consumer contracts. This would primarily occur outside courts, in internal dispute resolution procedures or arbitration. Merchants and consumers would resolve their disputes in the shadow of the merchant’s fiduciary obligations to the consumer. If any such dispute were to make it to a court, the company’s internal

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334. *In re Vtech Data Breach Litig.*, No. 15 CV 10889, 2017 WL 2880102, at \*6 (N.D. Ill. July 5, 2017).

335. *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2017 WL 3727318, at \*44 (N.D. Cal. Aug. 30, 2017).

336. *E.g.*, *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 717 (8th Cir. 2017); *Dolmage v. Combined Ins. Co. of Am.*, No. 14 C 3809, 2017 WL 5178792, at \*7–9 (N.D. Ill. Nov. 8, 2017).

337. Not all consumer transactions create status fiduciary relationships. For example, purchasing a candy bar from a gas station in cash does not accord the firm any power over a substantial interest of the consumer, and is not intended by either party to be the start of an ongoing relationship.

On the other hand, while this Article has described privacy and data protection as important interests that are under the control of firms, I do not mean to suggest fiduciary duties of loyalty and care are not limited to those subjects.

procedures addressing and analyzing its own duty of loyalty would be used in interpreting and defining whether a breach of fiduciary duty had occurred.

Most consumer contracts require resolution of all disputes by arbitration, which has had the impact of hamstringing the development of the common law.<sup>338</sup> Yet breaches of fiduciary duty are not creatures of contract, so even if there is an arbitration clause in a consumer contract, disputes relating to breach of fiduciary duty would need to be resolved in court. As the Delaware Supreme Court put it “When contracting parties provide for the arbitration of claims in their agreement, the arbitration provision, no matter how broadly drafted, can reach only the claims within the scope of the contract, and the fiduciary duty claims here are beyond that scope.”<sup>339</sup> There are courts that have found that contractual language can force breach of fiduciary claims into arbitration,<sup>340</sup> but the Delaware Supreme Court’s interpretation is the traditional position and the position best supported by the underlying legal concepts.<sup>341</sup>

As a result of the stickiness of breach of fiduciary duty, there is potential for an elevated degree of litigation, because a breach of fiduciary duty lies outside the scope of contract. Therefore, even where a boilerplate contract contains an arbitration clause, a consumer-entrustor may still sue a merchant-fiduciary in court for breach of fiduciary duty. Compounding this potential is some initial ambiguity as to what the duty of loyalty constitutes, which makes it a particularly likely subject for litigation.

But this is a feature of this regime, not a bug. Understanding the actual workings of the private conflict dispute process in order to know what is really being agreed to in consumer contracts. This will also encourage industry study of internal dispute resolution norms and data protection policies. Furthermore, it would create an industry-wide incentive to provide a baseline of date protective and dispute resolution practices, resolving the market-for-lemons issue of bad practices for consumers becoming standard due to the lack of visibility of the problem. After an initial flurry of norm setting and, yes, litigation, practices and case law will become standard with the additional benefit over the status quo.

Courts are not well suited for deciding which business models are too important to question; their job is to apply existing legal principles.<sup>342</sup> If impacted companies find these principles make certain business practices more difficult, they can feel free to seek succor from state and federal legislatures, clearly delineating why and how the fiduciary

338. Gilles, *supra* note 139; Gardner, *supra* note 139; Issacharoff & Marotta-Wurgler, *supra* note 139.

339. Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 151 (Del. 2002).

340. Abbott Labs. v. Takeda Pharm. Co., 476 F.3d 421, 424–25 (7th Cir. 2007) (distinguishing from Parfi based on contractual language finding plaintiffs must arbitrate fiduciary claims); Glacier Park Iron Ore Props., LLC v. U.S. Steel Corp., No. A19-1923, 2020 WL 4280056, at \*6 (Minn. Ct. App. July 27, 2020) (finding that fiduciary duties claims need not be arbitrated due to lack of language in the contract speaking to resolving fiduciary claims in arbitration).

341. Most courts and commentators would trust the Delaware Supreme Court as the foremost authority on corporate law, which necessitates understanding of fiduciary relationships. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law’s Continuing Success*, 2009 U. ILL. L. REV. 1, 2 (2009)

342. See Daniel L. Siegel, *Evaluating Economic Impact in Regulatory Takings Cases*, 19 HASTINGS W.-NW. J. ENV’T L. & POL’Y 373, 377 (2013) (noting that the extreme economic impact requirement prevents the judiciary from violating separation of powers); see Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 440–41 (1988) (explaining the narrowness of economic regulation under the substantive due process analysis).

duties hinder them. Legislatures are better suited for working out broad-based social conflicts regarding values over which reasonable minds can differ. When courts make broad judgments about purpose and function, they should be cabined by legal categories in the manner this Article advocates.

If repeated ambiguity arises in defining the scope of fiduciary duty in consumer transactions, state legislation may be helpful for clarification purposes. But the information-sharing function of introducing a fiduciary relationship between merchant and consumer will ensure that any clarifying regulation is done with awareness of contracting facts on the ground. The fact that fiduciary claims are not subject to arbitration and have elevated measure of relief will make decisions from courts on the substantive propriety of data protection and other information age practices more likely. Samuel Issacharoff and Florencia Marotta-Wurgler have documented that public good of decisional law—which provides guidance to all actors about how the law applies to new situations—has been sorely lacking in the area of consumer law of the information age due to the rise of arbitration clauses and the imposition of procedural hurdles to class actions.<sup>343</sup> By enabling courts to rule on these matters, we could begin to fill in the decisional law gap that has kept the application of law to consumers the information age artificially uncertain and immature. While lawyers may stand to gain most financially from early cases on consumer-firm status fiduciary relationships, all of society will ultimately gain by seeing more examples of the application of law to this type of fact pattern, decreasing overall uncertainty about regulation of consumer markets in the information age.

If public regulation is needed to further protect consumers, as is likely, the information-sharing and norm-sharing function of fiduciary duties, as described above, will aid in the development of appropriate consumer protection laws through the information-forcing described above.<sup>344</sup> Legislation may also be necessary to contend with the problems of a growing centralization in key capabilities and market power for critical information economy function,<sup>345</sup> problems this proposal does not directly address.

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343. Issacharoff & Marotta-Wurgler, *supra* note 139, at 634.

344. David Pozen and Lina Khan's recent article critical of implying fiduciary relationships in consumer transactions focuses on the problems the framework does not solve. Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 526 (2019). This Article, and more specifically this Section, has been an answer to their claim that the benefits of finding a fiduciary relationship are uncertain. More fundamentally, Pozen and Khan suggest that "lawmakers can regulate the leading online platforms as information fiduciaries or target their market dominance and business models, but lawmakers very likely will not do both. To assume otherwise is to overlook the opportunity costs, path dependencies, and expressive effects inherent in creating a new fiduciary regime." *Id.* at 537. I do not choose to speculate on what may or may not motivate state and federal legislators to act. However, an advantage of my proposal, unlike Balkin's proposal, which Pozen and Khan were specifically critiquing, is it derives so straightforwardly from existing law such that that no action by state legislatures is required at all. There is no need for a political capital trade-off between firms as fiduciaries in consumer transactions and other desirable information age reform.

345. *Id.* at 526–29 (describing the limits of fiduciary law to contend with problems of market power).



## V. CONCLUSION

The ideal of the one-off consumer transaction is dead. Instead of selling or licensing goods and services to consumers, firms today seek to build ongoing, evolving relationships with consumers based on constant contact. This trend is likely to continue, as the always-on devices that comprise the Internet of Things proliferate and cover an increasing number of everyday objects. The law should reflect that consumer transactions require entrustment of consumers' data protection interests to companies, so that the companies may provide evolving services over time.

In this Article, I have argued for a new paradigm for understanding information age consumer transactions. Consumer transactions should create fiduciary relationships between firm and consumer as a matter of law. Firms should owe fiduciary duties of loyalty and care to their customers that cannot be displaced by assent to boilerplate. Under this model, the key information-age consumer law question is not what level of assent is required from consumers to make boilerplate terms binding, but rather whether firms have met their fiduciary duties of loyalty and care to the consumers.

A fiduciary model of consumer transactions would force courts and lawmakers to directly address what is required of firms in terms of data entrustment, rather than avoiding substantive inquiry on the basis of procedural notice and assent at the moment of creation of the relationship. Duties of care and loyalty to consumers would entail, at very least, higher data protection standards than currently exist. This normative account can be contested, and I welcome dialogue on how fiduciary duties to consumers should be constructed to best promote their broader interests. This Article establishes the basic framework for a legal regime that acknowledges and enforces the relationships of trust that exist between consumers and firms in the information age.