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ARTICLE

INTUITIVE FORMALISM IN CONTRACT

TESS WILKINSON-RYAN†

INTRODUCTION 2109
I. CONTRACTS OF ADHESION AND THE NEW OLD DOCTRINALISM 2111
II. LAY PERCEPTIONS OF CONTRACT LAW 2114
A. *Social Science as Legal Realism* 2115
1. Social Enforcement 2117
2. Reciprocity and Fairness 2118
3. Promise-keeping 2118
B. *Doctrinalism and Realism in the Age of Boilerplate* 2119
1. Contracting is Signing on the Dotted Line 2120
2. Contract Enforcement is Specific Enforcement of All the Terms 2122
III. VIGNETTE STUDY: EFFECTS OF FORMALITY ON WILLINGNESS TO BREACH 2123
IV. DISCUSSION AND IMPLICATIONS 2126
CONCLUSION 2129

INTRODUCTION

This Article starts with the proposition that most American contracting is consumer contracting, posits that consumer contracting has particular and even peculiar doctrinal features, and concludes that these features dominate the lay understanding of contract law. Contracts of adhesion constitute the bulk of consumer experience with contract law. It is not hard to see that someone discerning the nature of contract law from a sample composed

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almost entirely of boilerplate terms and conditions would come quickly to the conclusion that contract law is highly formal.

Within the realm of potentially enforceable deals (i.e., those that are supported by consideration and not illegal or unconscionable), modern contract doctrine upholds agreements when the parties have objectively manifested assent. This is the contract law of the first-year Contracts course, and it is, more or less, why contracts existed in the cases *Hadley v. Baxendale*,[1] *Hawkins v. McGee*,[2] and *Embry v. Hargadine, McKittrick Dry Goods Co.*[3] These three canonical cases each involve oral manifestations of assent: respectively, the contracts are based on the carrier's promise that the crankshaft would be delivered by noon the next day;[4] the doctor's promise of a one-hundred percent good hand;[5] and the employer's response to his anxious employee, "You're alright. Go get your men out."[6] For everyone who knows the doctrine of assent, these are relatively easy cases for finding contracts, because the evidence suggests that the parties, in fact, communicated to each other their agreement. However, these cases might startle a large percentage of the nonattorney population, for the simple reason that they are oral and not written contracts.

What accounts for this misperception of contract law? Americans are not contract naïfs. On the contrary, most people enter into numerous legally binding agreements every year, if not every month or week. These are the agreements we make with Amazon, PayPal, Comcast, Apple, AT&T, and Visa, to name a few—in other words, these are the contracts we enter into regularly as consumers. Consumer contracts share key features: they are formal, assent is memorialized (either by signature or by clicking "I agree"), parties neither negotiate nor read their terms, and they are almost universally enforceable and, when litigated, enforced. This is the contract law that individuals encounter every day.

As such, perhaps we should not be surprised that this is what most people think that contract law *is*. Emerging evidence indicates that most people think contracting means signing the paperwork and that contract law is about the form of consent rather than the content to which parties are consenting.[7] This "intuitive formalism" deserves our empirical and

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[1] (1854) 156 Eng. Rep. 145 (L.R. Exch.).

[2] 146 A. 641 (N.H. 1929).

[3] 105 S.W. 777 (Mo. Ct. App. 1907).

[4] *Hadley*, 156 Eng. Rep. at 147.

[5] *Hawkins*, 146 A. at 643.

[6] *Embry*, 105 S.W. at 777.

[7] *See, e.g.*, Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. (forthcoming 2015) (manuscript at 2) (conducting questionnaire

normative attention because it has real implications for how consumers behave in their deals and how they interact with their legal system.

This Article proceeds as follows. In Part I, I argue that the doctrines around contracts of adhesion have been impervious to the facts of our changing contractual culture and that we might think of them as a triumph of doctrinalism over realism. In Part II, I lay out the evidence for an intuitive formalism, a set of common assumptions that form contracts are good prototypes for what contract law is about more generally. In Part III, I present a new questionnaire study as part of a larger consideration of how formalist intuitions might affect consumer behavior.

I. CONTRACTS OF ADHESION AND THE NEW OLD DOCTRINALISM

The question of whether or not we are in the midst of a "doctrinal" moment is a complicated one, in part because the answer must first stipulate the doctrine being discussed. For example, the defenses to contract override the doctrinal core of contract formation, but they are, of course, doctrines themselves. If by Doctrinalism we mean rule-boundedness, even rigidity, then the duty to read form contracts is a prototypical case. Many contractual disputes involve tough calls in which the rule is not informative—much less decisive—leaving courts to work through difficult questions of equity. But the duty to read is different: contract doctrine takes the clear position that individuals are bound by the boilerplate terms within their consumer contracts whether they have read them or not.[8]

Like other areas of law, contract law makes assumptions about what its subjects are like—what they could have foreseen, what they probably meant by their terms, and which remedies they would have chosen had they specified. This makes some doctrines frustratingly indeterminate. For example, how can we decide with confidence what people mean by "chicken"[9] or whether they ought to know that a delayed delivery will result in a whole factory shutting down?[10] Perhaps for good reason, these kinds of

studies of commonsense approaches to contract formation to survey intuitions about what the law of formations is and shed light on the relationship between formation and obligation).

[8] *See* SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 70:113 (4th ed. 2003) (articulating the rule that ignorance of a contract's terms is not a defense).

[9] *See generally* Frigaliment Imp. Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (resolving ambiguity in the term "chicken" in favor of the defendants who delivered "stewing chicken" instead of "young chicken").

[10] *See* Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (L.R. Exch.) (holding that the damages incurred when the delayed delivery caused a whole factory to shut down were not foreseeable to the defendant).

reasoning-intensive problems are used to teach contract law, a forum in which the task at hand is largely about developing good legal judgment.

But some of the highest-stakes questions from a policy standpoint are clearly about unread boilerplate. The problem of fine print implicates doctrines that are remarkably resistant to realistic conceptions of human beings and their social worlds. Doctrine—and, indeed, Doctrinalism—is alive and well in the context of adhesive contracts. The enforceability of unread terms is applicable across the board, across contracts contexts, and with almost no exceptions. As Professors Ayres and Schwartz have put it, "The duty to read doctrine is contract law's analog to the assumption of risk doctrine in tort law. A buyer who could have read but did not assumes the risk of being bound by any unfavorable terms."[11] Whether or not a party had the ability to read a contract is essentially a theoretical inquiry, uninformed by evidence of bounded rationality or even the limited number of hours in a day.

Broadly speaking, the upshot for legal scholarship of cognitive psychology research is the realization that human cognition is a limited resource.[12] If this unassailable empirical reality has natural doctrinal implications for any area of private law, it is surely boilerplate. Comprehending fine print requires attention and high-level information processing. It is tempting to think that attention is an easy problem to solve, insofar as it is subject to the conscious will of the individual. Information processing abilities, on the other hand, may be constrained by lack of education or intellectual aptitude, factors not in the control of the reader. In fact, though, comprehensibility is a problem that has largely been addressed or, at the very least, could be addressed with some investment. In many contexts—informed consent, credit contracts, mortgage lending—contract language is calibrated to be readable by consumers with a junior high school education.[13] Generally speaking, the crux of an unexpectedly burdensome term is not a *Williams vs. Walker-Thomas Furniture Co.* situation

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[11] Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 549 (2014).

[12] Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 101 (1955) ("Because of the psychological limits of the organism . . . actual human rationality-striving can at best be an extremely crude and simplified approximation to the kind of global rationality that is implied, for example, by game-theoretical models.").

[13] *See, e.g.*, *Informed Consent Guidance—How to Prepare a Readable Consent Form*, JOHNS HOPKINS MED. (Aug. 2007), http://www.hopkinsmedicine.org/institutional_review_board/guidelines_policies/guidelines/informed_consent_ii.html (recommending that the reading level of a document used for informed consent not exceed an eighth grade level), *archived at* http://perma.cc/4YLZ-BYWH.

of a dense, complicated text.[14] The bigger and more intractable problem in modern consumer contracting is attention.[15] It is usually true that parties could have paid attention to any particular clause or agreement—but it is not true that they could have attended to all of the available boilerplate, or at least not if they also had to conduct other life activities. As Professors Ben-Shahar and Schneider have argued so pointedly, disclosures and fine print confront us at every turn.[16] They are on the physical products we buy, the buildings we enter, the songs we download, the healthcare we consume, and every financial transaction we make.

In the meantime, there is widespread recognition of non-readership even within the doctrinal scholarship and commentary. Empirical studies and common sense tell us that non-readership is the state of the world.[17] The Restatement comments to section 211, for example, defend the duty to read by arguing the (surely empirical) proposition that although "customers do not in fact ordinarily understand or even read the standard terms . . . they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose."[18]

The normative and practical implications of non-readership are deeply contested. A law and economics approach claims that as long as some consumers are attending to terms, firms will compete on terms and thus, terms will not be overly biased toward firms.[19] Even a traditional relational contracts argument would say that the fine print is irrelevant because the parties will be constrained by their preferences to remain on good terms

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[14] *See* 350 F.2d 445, 447 (D.C. Cir. 1965) (providing that due to the obscure provision in question "the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser . . .").

[15] *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 687-89 (2011) (discussing the disclosure overload problem which posits that the availability of too much information can actually impede understanding).

[16] *Id.* at 651.

[17] *See* Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 243 (2013) (explaining that "contracts . . . are rarely read by consumers"); Todd D. Rakoff, Commentary, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1235 (2006) (starting from the presumption that consumers do not play a role in how boilerplate terms are written).

[18] RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

[19] Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979) (arguing that "persons who search [for terms] sometimes protect nonsearchers from overreaching firms"). Of course, in some contexts, there is scant evidence that *any* consumers are reading contracts in a meaningful way. *See, e.g.*, Marotta-Wurgler & Taylor, *supra* note 17, at 243 n.8 (citing research indicating that only about one in one thousand online shoppers read standard terms).

with one another and to avoid negative reputation effects.[20] There are also theoretical justifications for enforcing unread terms in the context of very low-probability readership. Such arguments rest on the notion that as long as there is an opportunity to read, consumers may be understood to have consented to the risk of the terms.[21]

Naturally, this understanding of the consumer's obligation to discover terms has implications for the operation of the unconscionability doctrine—namely, that it rarely offers a solution to aggrieved consumers. Unexpected clauses embedded in lengthy boilerplate are routinely upheld, unless there is a legislative response. Take, for example, three terms: universal default clauses in credit card contracts, flood exclusions in Gulf Coast home insurance policies, and prepayment penalties in subprime mortgage contracts. All of these might seem to be hard cases, both because of the bargaining power asymmetries and because the terms are outside of what the average consumer expects. But as long as the terms were spelled out in plain language in the contract and there is a duty to read, the case for unconscionability is a very hard one.[22] Thus, this appears to be an area of contract law in which the doctrine explicitly rejects the challenge from social science and chooses the bright-line rule instead.

II. LAY PERCEPTIONS OF CONTRACT LAW

Most nonattorneys who participate in contracts do so without formal education in contract law. Nonetheless, people do not, on the whole, create new forms of promissory obligations or novel formalities. Indeed, most people have a general sense of what it means to make a contract—signing a document—and similarly, a general sense that the law of contracts is all about policing assent to be bound rather than the content of the agreement.[23] If we think that individuals learn from their environments,

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[20] *See, e.g.*, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55, 63 (1963) (describing evidence that repeat players in commercial transactions preferred to ignore or overlook contract terms in favor of renegotiation in order to preserve an ongoing relationship).

[21] *See, e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (arguing that although specific assent may be absent, there is blanket assent to boilerplate terms that are not "unreasonable or indecent").

[22] *See, e.g.*, Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1754 (2013) (citing examples of sympathetic yet easy cases in which readership is assumed).

[23] *See* David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 418-27 (2013) (exploring the moral intuition behind lay people's understanding of what it means to be in a contractual relationship). *See generally* Tess Wilkinson-Ryan & Jonathan Baron, *The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The*

this is not surprising. Most contracts are contracts of adhesion, written to cover every possible base and requiring not just assent, but documented assent (by signing or clicking "I agree").[24] Indeed, when contracts have particularly high stakes, as with the purchase of a home, a notary is often required to verify the manifestation of assent.[25] The popular conception of a court's role in enforcing contracts is that the judge assesses the evidence of a contract's existence, and, if such proof exists, makes the breaching party perform. Yet evidence from experimental psychology and economics suggests that legal enforcement is often beside the point, because people take their promissory obligations so seriously that they essentially self-enforce.[26] In this Part, I first consider moral psychology as a component of realist challenges to contract doctrine and then offer a counterpoint in the form of evidence that parties are often surprisingly formalist.

A. *Social Science as Legal Realism*

Behavioral decision research has been accused of being "the new legal realism."[27] Karl Llewellyn's dark observation that "our government is not a government of laws, but one of laws through men"[28] was a critique of judicial decisionmaking that had potentially devastating implications for the rule of law. Llewellyn's view that law is often so open or indeterminate that a judge could often choose his or her favorite among different legally plausible outcomes led to increasing interest in the features of the judge rather than the dispute itself. The judge's "personality"—presumably some combination of his or her preferences, beliefs, and group affiliations—was posited as the true source of judicial behavior.[29] The original formulations

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Case of No-Fault Divorce, 37 J. LEGAL STUD. 315 (2008) (studying moral intuitions in the context of divorce).

[24] *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1186-87 n.50 (1983) (discussing the meaning of "assent").

[25] *See, e.g.*, Eason v. Bynon, 781 So. 2d 238, 240-41 (Ala. Civ. App. 2000) (holding that "[i]f a notary public does not witness the signatures of the mortgagors, is not in the place where the mortgagors sign the mortgage, does not see or speak to the mortgagors when they sign the mortgage, and the mortgagors do not acknowledge to the notary that they executed the mortgage, the mortgage is invalid").

[26] *See, e.g.*, Tess Wilkinson-Ryan, *Incentives to Breach*, 17 AM. L. ECON. REV. 290, 306 (2015) (finding a reluctance to break a contract in both laboratory and vignette studies, even when breach was the profitable choice).

[27] *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) ("We believe that much of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism.").

[28] Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1243 (1931).

[29] *Id.* at 1242-43.

of Legal Realism suggested that judicial behavior was either impossible to predict (insofar as decisions relied not on the law but on the unobservable internal state of the judge) or entirely predictable once the judge's politics were known.[30]

More recently, the "new Legal Realism" depends on the systematic use of empirical research methods to test the constituent hypotheses of the theory of "laws through men."[31] In contract law, while we might critique judicial decisionmaking as a function of judicial politics or preferences, perhaps the more interesting set of inquiries has been how these laws through men operate within private legal decisionmaking. There is growing recognition in contracts scholarship that private individuals often make and enforce their own legal regimes, from Robert Ellickson's study of rural landowners in Shasta County[32] to Lisa Bernstein's report on extracontractual agreements in the diamond trade[33] and Stewart Macaulay's descriptions of dealmaking by handshake among Wisconsin businessmen in the 1960s.[34] But these examples are really just the most explicit and visible. In fact, the overwhelming majority of contracts are only nominally subject to contract law, because the stakes are almost always much too small to make the expected value of litigation positive and, to some extent, because existing informal enforcement makes legal enforcement redundant.

Perhaps because behavioral law and economics has positioned itself as a challenge to rational actor theory, many of its best known and most studied phenomena focus on the central importance of informal social and community norms and internalized moral commitments and preferences in legal decisionmaking.[35] Psychologists working in this area are often just

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30 *Id.*

31 *See, e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 976-80, 991-93 (2006) (discussing results of the Implicit Association Test, which finds that most people have an implicit and unconscious bias against members of traditionally disadvantaged groups, and their implications for antidiscrimination laws). *See generally* Miles & Sunstein, *supra* note 27 (defining the "New Legal Realism" as an effort to identify empirically the sources of judicial decisions, and discussing some of the results).

32 *See generally* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (investigating how rural landowners in Shasta County, California, resolve disputes arising from trespass by livestock).

33 *See generally* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (detailing how "the diamond industry has systematically rejected state-created law," and instead "the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules").

34 *See* Macaulay, *supra* note 20, at 58 (discussing how "[b]usinessmen often prefer to rely on 'a man's word' in a brief letter, a handshake, or 'common honesty and decency'—even when the transaction involves exposure to serious risks").

35 *See, e.g.*, Ernst Fehr & Simon Gachter, *Fairness and Retaliation: The Economics of Reciprocity*, J. ECON. PERSP., Summer 2000, at 159, 167 (reporting, in the context of economics games

trying to document that people have preferences for more than material wealth or, indeed, preferences for outcomes that do not even appear to have any concrete effects on the decisionmaker at all—that is, preferences for other people's outcomes.[36] In particular, three strands of findings have emerged: (1) social enforcement (reputation effects), (2) reciprocity and fairness, and (3) the internalized moral rule of promise-keeping.

1. Social Enforcement

Stewart Macaulay brought sociological insights to bear on commercial contracting, interviewing a large number of businessmen about their contracting practices.[37] His findings sparked fifty years of research developing a relational theory of contracts. Relational contract theory posits that humans engage in exchanges in a social context and that this social context encourages, or even requires, particular "categories of behavior"—namely, reciprocity and solidarity.[38] Enormous practical implications follow from this rather abstract premise. If individuals care about their relationships with their counterparties—especially counterparties with whom they expect to interact repeatedly over time either in commercial or social settings—it is the norms and rhythms of their relationships, and not the law of contracts, that will guide the parties' choices. As one Macaulay interviewee remarked, "You don't read legalistic contract clauses at each other if you want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently."[39] The social enforcement theory therefore suggests a very strong role for reputation effects and what we might think of as social costs in deterring breach.

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demonstrating altruistic preferences, the prevalence of norm-driven behavior in the workplace, in property disputes, in tax evasion, in political attitudes, in voting behavior, and in criminal activity).

36 *See, e.g.*, Jonathan Baron, *Value Analysis of Political Behavior—Self-interested : Moralistic :: Altruistic : Moral*, 151 U. PA. L. REV. 1135, 1155 (2003) (describing "moralistic goals" as goals we have for others and showing experimental evidence that, for example, "some people are willing to impose their allocation judgments on others, even when it is clear that the consequences for others are worse and that the others do not favor the allocations in question").

37 Macaulay, *supra* note 20, at 55 ("The primary research technique involved interviewing 68 businessmen and lawyers representing 43 companies and six law firms.").

38 Ian R. Macneil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, 143 J. INST. & THEOR. ECON. 272, 274 (1987).

39 *See* Macaulay, *supra* note 20, at 61.

2. Reciprocity and Fairness

Even without external sanctions, however informal, many people will choose to perform their contracts out of a sense of generosity or, at least, a preference for reciprocal generosity when one's counterparty has shown generosity first.[40] This is the finding of the classic "Trust Game," an experiment in which a player in Room A is given money and offered the chance to send some of it to a partner in Room B.[41] The player in Room B receives triple the amount sent and is then given an opportunity to send some back to the original "investor" in Room A.[42] Defying the equilibrium prediction, most of the investors in Room A send money,[43] and most of their partners send back enough to make a positive return on investment.[44] In the contracts context, this has clear implications: some would-be breachers will perform, at a cost to themselves, because they feel obligated to reciprocate the trusting or generous behavior of the other party. The promisee may have already actually performed, but it may also be that performing is a way of reciprocating the original promisor's generous behavior.

3. Promise-keeping

Finally, there appears to be a strong moral norm of promise-keeping. In study after study, subjects show preferences for performing tasks that they have manifested assent to do—and for punishing violators of that norm. Macaulay was the first to document this strong commitment to keeping one's word, citing the frequent admonition that a man's handshake is his bond.[45] In early public goods games, Robyn Dawes and Richard Thaler observed that the form of "cheap talk" most likely to predict pro-social

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[40] *See generally* Ernst Fehr et al., *Reciprocity as a Contract Enforcement Device: Experimental Evidence*, 65 ECONOMETRICA 833 (1997) (exploring reciprocal motivations as they relate to the enforcement of contracts).

[41] *See* Joyce Berg et al., *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAV. 122, 123 (1995) (explaining the rules of the "Trust Game").

[42] *See id.* (further describing the game scenario).

[43] *Id.* at 123 ("The unique Nash equilibrium prediction for this game, with perfect information, is to send zero money. This prediction is rejected in our first . . . treatment where 30 of 32 room A subjects sent money . . . .").

[44] *Id.* at 131, 135 (noting that in the no history treatment, "11 of the same 28 subjects returned more than their counterpart sent, resulting in positive net returns . . . . [In the social history treatment,] 13 of the same 24 subjects returned more than their counterpart[] sent[,] resulting in positive net returns").

[45] Macaulay, *supra* note 20, at 58.

behavior was the exchange of promises.[46] In recent work, I have found that subjects are willing to give up substantial payoffs in a lab game in order to avoid breaking a deal.[47] Similarly, Zev Eigen has found that subjects confronted with a clearly unfair deal after they have promised to see it through will go to surprising lengths to perform.[48] Some contracts scholars, most famously Oliver Wendell Holmes, have argued that contracts are only a promise to perform or pay.[49] In such a world, all contracts are option contracts. More recently, Steve Shavell has made a similar argument based on data from original surveys, finding that the moral promise within the contract is one to perform only as long as performance is efficient.[50] But there is evidence from a variety of questionnaire studies that many people view the promise to perform as a promise to do a particular thing. While there may be informal mitigating conditions (e.g., the cost of performance becoming unreasonable), subjects rarely view the fear of missing a profitable opportunity as a morally valid reason to pay money damages rather than perform.[51]

B. *Doctrinalism and Realism in the Age of Boilerplate*

Given the body of evidence showing greater-than-expected levels of performance even when deals are extra-contractual, informal, or just unprofitable, we may be tempted to think that the role of contract doctrine

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[46] A public goods game is an experimental economics game in which players are each allocated small sums and then offered the possibility of increasing their payoffs by cooperating with other players. *See* Robyn M. Dawes & Richard H. Thaler, *Anomalies: Cooperation*, J. ECON. PERSP., Summer 1988, at 187, 195 ("In such groups with universal promising, the rate of cooperation was substantially higher than in other groups.").

[47] *See* Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 663-64 (2010) (discussing subjects' differing attitudes towards breach, depending on whether a liquidated damages clause was present in the contract).

[48] Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 87 (2012) ("When subjects saw and actively selected the term obligating them to perform the undesirable task, they were significantly more likely to perform that task than when they had no such choice and when there was no consent at all.").

[49] O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.").

[50] Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 460 (2006) ("[C]ontracts are to an important extent incomplete promises and . . . the morality of promise keeping does not imply that performance should always occur.").

[51] *See generally* Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569 (2009) (acknowledging the widely held belief that breach of contract is immoral, but arguing that may not always be the case given that contracts are incomplete and cannot cover every contingency).

in small-stakes transactions is minimal. However, the fact that most contracting in America consists of consumer contracts that are uniformly contracts of adhesion casts doubt on such a conclusion. This has a number of implications for the psychology of promissory obligations. Perhaps most obviously, it means that only one party is a natural person to whom it is reasonable to attribute psychological phenomena of any description. Furthermore, even if we focus entirely on the consumer, we may still doubt that the kinds of preferences and norms that inhere when one's counterparty is, say, a local business, would play an important role in a contract with a remote, faceless entity—indeed, possibly an entity that has already engendered some ill will (e.g., Comcast or Countrywide). In fact, in some relatively high-stakes contexts, survey evidence suggests that this kind of negative reciprocity has behavioral effects.[52] So we might want to question the role of informal norms in consumer contracting at least in part because it is not always clear how the morality of promissory obligations applies in consumer–firm contexts.

The focus of this Article, though, is not the nature of the parties, but rather the nature of the contracting process. If we think that people will perform their promissory obligations for reasons entirely apart from legal enforceability, it is easy to underestimate the central psychological place of a formal contract. In fact, there is a growing body of literature showing a rather formal, even rigid, interpretation of contract law.

1. Contracting is Signing on the Dotted Line

In a previous study, David Hoffman and I surveyed the general population for their views on how contracts are formed, with attention to some of the more controversial or esoteric rules.[53] We found, not surprisingly, that people do not intuit their way to the Mailbox Rule and that paying for a good is often identified as the moment of formation.[54] We predicted, and found, that subjects would find the signing of a document particularly salient. What was less expected was that subjects adhered to a sort of signature rule well beyond its utility as a heuristic.[55] In a scenario

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[52] *See* Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547, 1569 (2011) (presenting survey data that shows that "moral imperatives of promise keeping or debt repayment diminish when citizens perceive that banks are getting away with selfish behavior while ordinary people are being held to their promises").

[53] Wilkinson-Ryan & Hoffman, *supra* note 7.

[54] *Id.* at 17.

[55] *Id.* at 26 (presenting a tentative conclusion that people view thir legal obligations as heavily dependent on formal manifestation of assent via signature).

describing a home renovation contract, subjects learned that the contractor instructed the homeowner to "call me at my office to accept."[56] Nonetheless, when subjects learned that the homeowner, after the initial meeting but before calling the contractor, signed the contract while alone in his home, they identified the signature as the moment of formation.[57] In a test of the Mailbox Rule, for which the doctrinal debate is typically over whether formation should be at the moment of dispatch or receipt, more than half of the subjects chose neither—they chose the moment that the offeree signed the contract, before mailing it to the offeror.[58] There was such resistance to the idea that contracts could be formed without a contract document that only eighteen percent of subjects thought a contract had been formed when the buyer emailed "I'll buy [your car]! Can I drop the check off tomorrow and pick up the car? $2,000 is fine by me," and only twenty-four percent when the seller replied, "Yes! I'll see you tomorrow."[59] Instead, they overwhelmingly thought there was no contract until the payment had been made—after the manifestations of assent.[60]

Indeed, the formal fact of being in a contract affects parties' behavior to an extent not easily explained by a rational cost–benefit calculation. Oliver Hart and John Moore argued that contracts act as reference points, meaning that parties evaluate outcomes with reference to their expectations under the contract, rather than the actual status quo.[61] This theory draws on the concepts of loss aversion and status quo bias, arguing that the moment of contract is the "kink" in the utility function. We followed up on this prediction with an even more fine-grained hypothesis: that the pure, formal fact of contract formation affects behavior irrespective of the contract's practical implications for the parties.[62] That is, it is not just that contracts reset parties' expectations (something that any informal deal or promise could do), but that the legal contract has a sort of framing effect, informing how parties understand their rights and obligations, as well as the costs and

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[56] *Id.* at 15.

[57] *Id.*

[58] *Id.* at 17.

[59] *Id.* at 13-14.

[60] *Id.* (showing that fifty-one percent of those surveyed believed a contract was formed at the time of payment).

[61] Oliver Hart & John Moore, *Contracts as Reference Points*, 123 Q.J. ECON. 1, 2 (2008) ("We argue that a contract provides a reference point for the parties' trading relationship: more precisely for their feelings of entitlement.").

[62] David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 397 (2013) ("We hypothesize that one of the most important determinants of self-protective behavior is whether the promisee considers herself to be in negotiations or already in an ongoing contractual relationship.").

benefits of performance and breach.[63] We tested this by asking subjects to consider whether or not they would be willing to "cancel" an arrangement (either a car lease or automobile insurance). Subjects were randomly assigned to read that the contract had a trial period before the contract kicked in, or that the contract period had begun but that there was a refund policy that permitted hassle-free cancellation within a certain period after the contract was made. The subjects were more willing to cancel if the trial period was before, rather than after, contract formation, even though the difference was only the difference between commitment to a revocable contract and a revocable non-contractual deal.[64] This result suggests that there is something about the fact of a legally binding contract—even one that explicitly permits breach without consequences for the breaching party—that changes how individuals perceive their obligations.

2. Contract Enforcement is Specific Enforcement of All the Terms

This intuitive formalism also pervades the commonsense understanding of contract enforcement. People think that contracts are enforceable as written—and, indeed, they often believe that specific enforcement is available and appropriate. One study of enforcement behavior showed participants a contract between a health club and a consumer.[65] Half of the participants were assigned to read a version of the contract with a clause relieving the drafter of liability for customers' personal injury claims, including those arising from the health club's own negligence.[66] The other half read the same contract but without the exculpatory clause.[67] Subjects were asked to imagine themselves in the position of a party who had suffered an injury, and asked to indicate their likelihood of seeking legal advice and approaching the club for compensation.[68] Those subjects whose contracts included exculpatory clause were less likely to report that they would seek redress, even though they did not report finding the contract any less fair.[69]

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[63] *Id.* at 408 ("The reference point was the contract, meaning the value of performance was judged with reference not to the overall outcome but with reference to the expected outcome under the contract.").

[64] *Id.* at 418.

[65] Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83 (1997).

[66] *Id.* at 86-87.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 91.

Perhaps this literal belief in the promise of the contract helps explain a similarly rigid concept of contract in the performance and enforcement context. It might not be surprising that many people think that their moral obligation under a contract is to perform, not simply to pay damages in the amount that would put the non-breaching party in a position as good as performance would have done. But what might be more surprising is that many people think that performance is legally required—that is, that a judge will actually order specific performance, whether on a delivery of goods or a routine service contract.

Indeed, high-salience stories of contractual unfairness abound. The subprime mortgage crisis, for example, involved in part a narrative of millions of Americans being talked into not only disadvantageous contracts, but contracts that were clearly, unequivocally enforceable.[70] Whether the victims in these narratives are deserving of sympathy or scorn may be contested, but there is a clear lesson about the facts of American contract law: burdensome, unread terms are enforceable. In this way, certain contract law doctrines make their way into the psychology of contract.

III. VIGNETTE STUDY: EFFECTS OF FORMALITY ON WILLINGNESS TO BREACH

Given our understanding of both moral preferences around contract performance and of formalist understandings of legal obligation, it is worth asking how the two sets of preferences or intuitions interact. We have ample information that there are real social and moral norms that bear on contract performance—for example, altruistic preferences, reciprocity norms, or personal commitments to promise-keeping. In most discussions of moral norms, there is an underlying assumption about the positive normative status of altruism and personal integrity. Indeed, these kinds of norms, and the related fear of informal sanctions for violating them, might actually be the primary enforcement mechanisms for the kinds of small-stakes contracts most of us make every day. But at least some research suggests that increased formality yields an increased likelihood of performance, whether because people internalize the solemnity of the commitment or because they believe that legal enforceability has practical

[70] *See, e.g.*, Oren Bar-Gill, *The Law, Economics, and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1138-39 (2009) ("A recent study found that black borrowers paid an additional $415 in fees and Latino borrowers paid an additional $365 in fees. . . . Borrowers with less income and education are less likely to know their mortgage terms, implying greater underestimation of deferred or hidden costs and a diminished ability to effectively shop for better terms.").

consequences to their choices. Oddly, the formality of our contracts is not necessarily associated with the attendant stakes. A homeowner might reasonably prefer an oral contract for a $20,000 home renovation if she has reason to trust her contractor and to worry that formalization will make their interactions more stilted. By contrast, the contract that accompanies an iTunes purchase covers every possible base in writing. Indeed, it is fairly obvious that contract formality is about the parties, and not the stakes involved. When a firm is involved in a deal, even a very small deal, there are standard terms and a record of the parties' assent to those terms. Given the thread of formalism we see across contracts contexts, it also seems reasonable to suspect that formalities up the moral ante—that is, that formalities have behavioral effects.

An original study reported below tested the idea that the formalist tendency affects how parties feel about their contracts. In this scenario, subjects were asked to imagine that they were party to either a verbal or a written contract. They were then asked what financial incentive they would require to back out of the contract. The prediction was that subjects who were part of a more formal contract would feel more bound and would therefore require a greater financial incentive to back out, even though the degree of formality had no practical bearing on the consequences of cancellation.

Each of these scenarios, in both conditions, included language explaining that the contract was not binding until a waiting period had passed. This approach allowed subjects' behavioral and/or moral intuitions to be evaluated *without* implicating their (mis)understandings of actual contract penalties and remedies.

In this study, subjects read a short vignette under one of two conditions, Signature or No Signature, and answered follow-up questions. The subjects read the following scenario:

> Please imagine that you have a motor boat that you would like to sell. It is parked in your driveway with a For Sale sign, but you've had very little interest. You decide to try to sell it on Craigslist.
>
> On Craigslist, you list the asking price as "$12,500 or best offer." After a few days of listing the boat, you have an interested buyer. He comes and looks at the boat and offers you $12,000. You agree.
>
> Signature Condition only: the two of you sign an agreement of sale.
>
> For sales of large vehicles like cars and boats, there is then a state mandated three-day "waiting period." Once the parties have negotiated a deal and signed an agreement of sale [reached a verbal agreement] they must wait three days before completing the transaction. During the waiting

period, either party may cancel the transaction with no penalty. After the waiting period, if neither party has backed out, [the parties sign the sales contract, and] the buyer pays in full and picks up the vehicle.

Subjects then answered three questions:

1. While you are waiting out the three-day waiting period, someone rides by your yard and sees the boat with its For Sale sign still in the window, and makes an offer of $12,500 for the boat. The three-day waiting period has not expired. Would you cancel the deal with the Craigslist buyer?

2. What is the lowest offer that you would accept to cancel with the Craigslist buyer and go with the new buyer? For example, would you go with a new buyer if they were offering $15,000? What about $12,100? What is the lowest price that the new buyer could offer such that you would prefer to go with them instead of the Craigslist buyer?

3. To what extent do you think it would be morally wrong to cancel with the Craigslist buyer?

Table 1: Summary of Results, Study 3, Effect of Signing on Willingness to Accept Alternate Offer

	Signed Contract	Verbal Contract
Median WTA	$13,500	$13,000
Mean WTA	$14,168.58	$13,467.27
Wrongness (7-point scale, 1=not immoral at all; 7=very morally wrong)	4.1	3.9

In the Signed Contract condition, 30.3% of the subjects said that they would cancel the deal with the Craigslist buyer. Where the formal contract was not yet signed, 44.0% of subjects would cancel for the higher offer. This difference is significant (t=1.997, df=185.57, p=.0473).[71]

On the free response question, all responses over $25,000 were omitted as outliers. The mean and median responses were significantly higher in the Signed Contract condition than in the Verbal Contract condition (W=3497,

[71] Under the Uniform Commercial Code's statute of frauds, the seller's signature would be required to enforce the deal. U.C.C. § 2-201 (2014). However, under both conditions it was stipulated that the parties were allowed to back out, so this contingency should not have affected subjects' behavior, even if they knew of the rule.

p=.0139). There was no difference in the perceived wrongness of cancellation by condition.

IV. DISCUSSION AND IMPLICATIONS

The results show that signing a formal contract made subjects less willing to exit the deal in favor of another more lucrative partnership, even though the signature had no legal force or meaning. For psychologists, explaining why formalities make people feel more bound is the most pressing among the open questions in intuitive formalism. It could be an essentially other-regarding heuristic—the ritual of the formalities communicates to the other party an increased likelihood of performance, prompting more reliance and, in the event of breach, greater disappointment. Or, it could be that the rituals have internalized meaning, and that signing documents is understood to be an almost sacred act. The mechanism remains unclear and deserves further experimental attention.

For law and policy scholars, though, the behavioral result alone might raise concerns. In particular, increased formalization may have disadvantageous behavioral implications for consumers. Because many people take formal contracts seriously, firms may be able to leverage formalization in order to minimize the likelihood that consumers will exit bad deals or complain about bad terms—that is, they will fail to punish firms for their bad contracting behavior. Terms that stand on shaky legal ground—forbidding class actions or imposing penalties for termination, for example—may go unchallenged as a practical matter because the dominant view of contract doctrine is that it is all about the formalization of deals, not the substance of those deals. The persistence of contract doctrine in the face of strong, empirically based policy objections is arguably at its starkest in the context of contracts of adhesion. This happens at two levels: the level of courts and the level of consumers. As Ben-Shahar and Schneider observed, the popularity of disclosure regimes has been essentially unsullied by the reality that disclosures serve virtually no informational purpose.[72] But this does not mean that disclosures have no effect; in fact, disclosures are very effective in protecting firms from litigation.[73] Behavior that would otherwise give rise to liability can effectively be disinfected by way of a disclosure.

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[72] *See generally* Ben-Shahar & Schneider, *supra* note 15 (exploring "the spectacular prevalence, and failure, of . . . mandated disclosure").

[73] *See id.* at 739 ("[A]n empty but formally correct disclosure can keep the contract from being unconscionable, however problematic its terms.").

Finally, the formalist tendency can work against consumers in a less obvious way, namely that consumers themselves tend to take a surprisingly strong strict-liability stance when it comes to unread terms. In a previous study, subjects were asked to consider an unfortunate (or hapless, depending on your attitude) consumer who agreed to a credit card contract and later learned that the terms included a fee for online payments.[74] The consumer was unhappy and regretted the deal.[75] Subjects were randomly assigned to read one of two variations of the fact pattern, either that the contract was two pages long or that it was fifteen pages long.[76] Participants were then asked, among other things, the extent to which readership was a reasonable expectation and the extent to which the consumer was to blame for his own misfortune.[77] Subjects in the long contract condition overwhelmingly thought it was unreasonable to expect anyone to read the contract, while subjects in the short contract condition thought it was moderately reasonable.[78] The two groups did not differ at all, however, on the blame measure.[79] In both groups, the large majority (over eighty percent) agreed that the consumer was to blame for his situation.[80] This is very much in line with Stolle and Slain's finding that subjects did not differentiate between the fairness of a contract that was highly disadvantageous to the consumer and one that was reasonably equitable.[81] The fact of assent seems, for the average consumer, to cleanse the transaction—to press the reset button, morally as well as legally.

These misconceptions about contract doctrine may actually be a part of the story of the New Doctrinalism. There is an argument to be made that the lay understanding of contracts as enforceable as written provides a fairly accurate approximation of what individuals can expect from the legal system if they want to enforce a contract after breach. They may imagine that the likelihood of a successful claim in contract is very low if there is a dispute about whether a contract ever existed or over its content—in other words, they may correctly surmise that they would fare better in court with proof of the deal. Indeed, they may be intuiting their way to the Statute of

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[74] *See* Wilkinson-Ryan, *supra* note 22, at 1763 (explaining the experiment).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 1764.

[79] *Id.* at 1764-65.

[80] *Id.*

[81] *See* Stolle & Slain, *supra* note 65, at 91 (finding that "the presence of an exculpatory clause" deterring consumers from pursuing their legal rights "did not impact [study] participants' perceptions of fairness of the contracts").

Frauds. However, evidence from previous studies shows that subjects view even email assent as insufficient to form a contract, even though email communications are surely capable of being brought into court as evidence. Furthermore, it appears that subjects focused on form often insist on the wrong formalities. Anecdotal evidence suggests that the requirement of consideration—which certainly affects legal enforceability—sometimes comes as a surprise.[82] Option contracts, for example, require ritualized consideration (nominal consideration, a recital of consideration, or a recital of nominal consideration),[83] but this particular formality is not an obvious one to most consumers.

Consumers' other formalist tendency is to understand contract law as being about how to make and perform deals rather than which deals to make. There exists evidence in various contexts that consumers believe they are bound to terms that would clearly be unenforceable. Take *Carnival Cruise Lines v. Shute*, for example, a case in which cruise ship passengers paid for tickets before the terms and conditions arrived.[84] When the terms arrived, they included the particular forum selection clause at issue in the case, as well as a no-refund provision.[85] The Supreme Court suggested dismissively that the no-refund clause was not enforceable and that it therefore had no bearing on the forum selection question.[86] But the dissent was somewhat more realistic about consumer psychology, arguing that the average consumer would believe the refund clause applied and would therefore fail to return the tickets even if the terms were unacceptable.[87]

When examining research gathered under the heading of intuitive formalism, two dominant themes emerge. First, the popular conception of contract formation is largely concerned with highly ritualized documentation of assent (i.e., signing papers).[88] Second, there appears to be a view that the primary purpose of contract law is policing the form, rather

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[82] This phenomenon may be observed in the highly formalized documents featured in a first-year contracts course's section on promissory estoppel. *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898), for example, features a written and signed promissory note but no pretense of consideration.

[83] *See* RESTATEMENT (SECOND) OF CONTRACTS § 87 (1981) ("An offer is binding as an option contract if it is in writing and signed by the offeror, [and] recites a purported consideration for the making of the offer . . . .").

[84] 499 U.S. 585, 587 (1991).

[85] *Id.* at 597 (Stevens, J., dissenting).

[86] *Id.* at 595 ("[R]espondents have conceded that they were given notices of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity.").

[87] *Id.* at 597 (Stevens, J., dissenting).

[88] Wilkinson-Ryan & Hoffman, *supra* note 7 (finding that participants in questionnaire studies largely identified the moment of contract formation as the time of signing a written document).

than the content, of agreements.[89] In other words, that the role of courts in contract disputes is to determine whether the parties took the right steps to bind themselves and, if they did, to enforce the obligations to which the parties assented.

CONCLUSION

New doctrinalism is essentially a broad and possibly unfalsifiable hypothesis: that legal realism did not defeat legal doctrine, but rather that modern courts accommodate at least some of the most compelling forms of realist methods. Lay misconceptions about contract doctrine may actually be a part of the story of this new doctrinalism. It is possible that the lay understanding of contracts as enforceable forms is in fact a good distillation of what individuals can expect from the legal system if they want to enforce a contract after breach.

Ending the analysis here would be perfunctory, though, because in many cases, people get the formalities quite wrong. Consideration, for example, is of paramount importance in common law courts—in option contracts, for instance, consideration matters more than the formality of documentation—but common sense may rank them in the reverse order. In the meantime, there is growing recognition that both law and legal practice contribute to legal intuitions, and those intuitions, in turn, affect a whole range of behaviors that exist outside the legal system.

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[89] *See, e.g.*, *id.*; Stolle & Slain, *supra* note 65.